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YOUR FACULTY

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RECENT SIGNIFICANT CASES

- Court System and Case Law 101
- ADA/504
- Negligence
- First Amendment
- Student Conduct
- Title IX

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LEGAL TERMINOLOGY

- Motion
- Subpoena
- Deposition
- Discovery
- Injunction
- Summary Judgment
- Dismissal
- Writ
- Opinion
- *De Novo*
- *En Banc*
- *Nolo Contendere*
- Affidavit
- Mistrial
- Continuance
- Others?

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THE LEGAL PROCESS (CIVIL)

- Filing/Petition
- Response
- Motions
- Motion to Dismiss
  - 12(b)6
  - Grant or Deny
  - In whole or in part
- Discovery
- Motion for Summary Judgment
  - Grant or Deny
  - In whole or in part
- More Discovery
- More Motions
- Trial and Verdict
- Appeal

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THE 5 SOURCES OF LAW

- Constitutions
- Codes
- Contracts
- Contact with Entities (Torts)
- Courts/Case Law

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OVERVIEW OF THE CIVIL LITIGATION PROCESS

- **Pleadings**
  - Filing of a Complaint by Plaintiff with the District Court
  - Defendants files an "Answer" in Response, etc.
- **Motion to Dismiss (filed by defendants)**
  - "Failure to state a claim" (even if true, no legal recourse available)
  - Typically no additional evidence provided or reviewed
- **Discovery**
  - Interrogatories; Depositions; Requests for Production; Experts
- **Motion for Summary Judgment (filed by either party)**
  - Typically filed at the conclusion of Discovery
  - Granted only if there is no genuine issue of material fact
- **Settlement (if possible…if not, then…)**
- **Trial**

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KEY U.S. CONSTITUTIONAL PROVISIONS

- Ratified in 1791:
  - Amendment I - Freedom of Religion, Press, Expression.
  - Amendment IV - Search and Seizure.
  - Amendment V - Trial and Punishment, Compensation for Takings.
  - Amendment X - Powers of the States and People.
- Ratified in 1868:
  - Amendment XIV - Citizenship Rights.

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CODES

- The United States Code (U.S.C.) contains all statutes passed by Congress and signed into law by the president.
  - Title 20 of the U.S.C. addresses education.
- The Code of Federal Regulations (C.F.R.) provides additional detail about how statutes are to be implemented.
  - Title 34 of the C.F.R. addresses education.

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CIVIL RIGHTS ENFORCEMENT 42 U.S.C. § 1983

Sec. 1983. - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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CONTRACTS

- Binding agreement between and among parties.
- Some of your institution's documents may represent a binding contract between the institution and student. However, the courts have often given colleges great latitude in changing the provisions of that contract.
- Contracts are particularly important for private colleges as most of the definition of the relationship between a private institution and its students is in the form of a contract.

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POSSIBLE CONTRACTS

- Syllabus
- Graduate Catalog
- Student Handbook
  - Student Code of Conduct
- Housing Agreement
- Course Schedule
- University Website
- Faculty Manual
- Human Resources Manual
- Policy Statement

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ARE THESE CONTRACTS?

- Institutional Practices
- "Academic Customs"
- Things you do a lot, but never write down…
  - "We've always done it this way."

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TORTS

- Civil wrong, other than a breach of contract, for which the court will offer a remedy.
- In higher education, negligence and defamation are the two most common types.
- Four elements of a negligence claim:
  - Duty
  - Breach
  - Injury
  - Causation (Was the breach the proximate cause of the injury?)

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COURT SYSTEM IN A NUTSHELL

- Federal Court
  - **U.S. District Court**
    - Trial Court; Single judge or magistrate judge; Decisions binding only on single District
  - **U.S. Courts of Appeals ("Circuit Courts")**
    - 12 Geographic Circuits: 11 + DC Circuit
    - Panel of three judges (also *en banc* option)
    - Decisions binding on entire Circuit
  - **U.S. Supreme Court**
    - Final appellate court (both federal and state)
    - Nine justices

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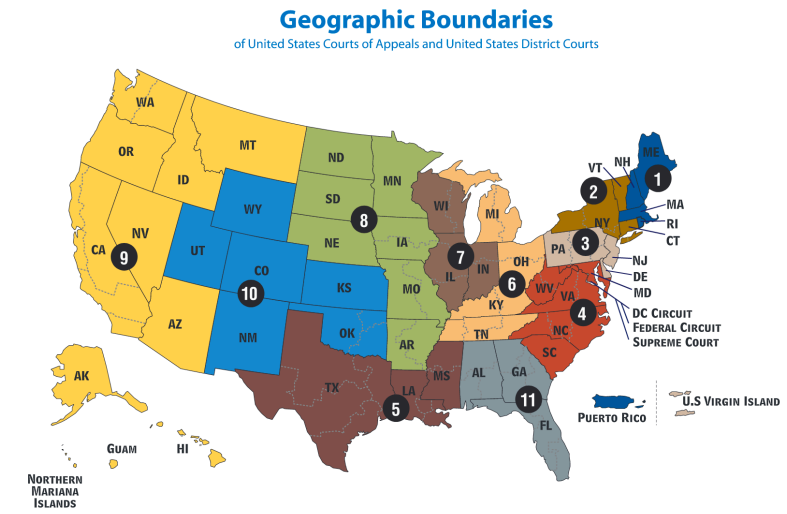
U.S. COURTS OF APPEALS MAP



Source: https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf

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KEY JUDICIAL CONCEPTS

- ***Precedent*:**
  - Relying upon a previous opinion, either as binding or persuasive authority, to determine a current case.
- ***Stare Decisis:***
  - "Let the decision stand"
  - Courts are loathe to overturn prior decisions, except in very unusual circumstances.
  - Courts look to precedent and if the facts closely match the current lawsuit, the courts will typically apply precedent to the current case.

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READING OPINIONS

- *Concurring Opinions:*
  - In appellate decisions, judges on the panel who agree, but for different legal reasons or who apply the facts differently.
- *Dissenting Opinions:*
  - In appellate cases, judges on the panel who disagree with the majority will write dissenting opinions.
- *Dicta:*
  - Extraneous comments in an opinion that are not directly related to decision.
  - Dicta may not be relied upon as precedent in future cases.

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STATE ACTION: "UNDER COLOR OF STATE LAW"

- Private institutions are only mandated to provide individuals with constitutionally-protected rights IF the institution is engaged in "state action" or so promised in a contract.

- State action can be determined:
  - "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance."
    - *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

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HOW TO DETERMINE STATE ACTION

- The Nexus Approach
  - Is the action _____ by the State?
    - Compelled?
    - Directed?
    - Fostered?
    - Encouraged?
  - How much so?
  - *Jackson v. Metro. Edison Co.,* 419 U.S. 345 (1974).
- Symbiotic Relationship
  - Look at the state's involvement with the institution
    - Overall and In the matter at hand
  - Is it enough to make them "partners?"
    - Typically financial resources
  - *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

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HOW TO DETERMINE STATE ACTION

- Public Function
  - What is the function…
    - At hand?
    - Of the entity?
  - Is it "traditionally the *exclusive* prerogative of the State?"
  - *Jackson v. Metro. Edison Co.,* 419 U.S. 345, 352-53 (1974).
- Pervasive Entwinement
  - Entwinement Up?
    - Public School Members of Private Assoc.
  - or Down?
    - State Gov't relationship with (read: regulation of) the Private Assoc.
    - Public Officers on Private Boards
  - *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assoc.*, 531 U.S. 288 (2001).

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KEY HIGHER EDUCATION CASE LAW

Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

- Facts: Six African American students at Alabama State College were expelled by the College President for participating in a civil rights demonstration at the lunch counter in the lower level of the Montgomery courthouse.
- Issue: Does an institution have the ability to simply remove a student(s) at the discretion of administration without meeting with the student(s) in question?
- Analysis: Students have the right to due process before being removed from the institution. At the most basic level due process includes some sort of notice and an opportunity to be heard.

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KEY HIGHER EDUCATION CASE LAW

Esteban v. Cent. Missouri State Coll., 415 F.2d 1077 (8th Cir. 1969).

- Facts: Two students were suspended after a faculty member alleged they participated in a student demonstration. The students were provided verbal notice and were allowed to state their side of the story to the Dean of Men. The students were allowed to appeal to the College President.
- Issue: Is written notice required?
- Analysis: Verbal notice of the allegations led to confusion as to the specific grounds for the college's disciplinary action. Notice of the allegation(s) should be in writing and contain a specific description of the behavior in question and cite to applicable college policies.

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KEY HIGHER EDUCATION CASE LAW

Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503 (1969).

- Facts: High school students wore black armbands at school in protest of the Vietnam War. Parents of the students also participated in the demonstration. The high school expelled the participating students for a violation of school policy related to acceptable forms of dress. The students and their parents, many of whom participated, brought suit.
- Issue: Do students have a right to free expression of ideas?
- Analysis: Students cannot be denied their freedom to express themselves as long as doing so does not cause a substantial disruption in the educational function of the school.

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KEY HIGHER EDUCATION CASE LAW

Healy v. James, 408 U.S. 169 (1972).

- Facts: College President refused to grant recognition to a proposed student group, *Students for a Democratic Society (SDS)*. The refusal was related to known instances where the National SDS was known to disrupt university functions.
- Issue: Do students have a right to freely associate under the First Amendment?
- Analysis: Students cannot be denied their right to associate as long as the student organization adheres to established college policies.

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KEY HIGHER EDUCATION CASE LAW

Goss v. Lopez, 419 U.S. 565 (1975).

- Facts: Nine students were issued school suspensions for 10 days for destroying school property and disrupting the learning environment (i.e. food fight). Ohio state law permitted school administration to suspend students for misconduct. The students were not afforded a hearing and did not have an option to appeal the suspension. Students and parents filed suit.
- Issue: Can a school deny a state-established right to education as a result of misconduct without a hearing?
- Analysis: In a 5-4 majority decision, the Supreme Court held that students have a right to education under state law, the right under the 14th Amendment to due process, and should be afforded minimum standards of due process before being removed from school.

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KEY HIGHER EDUCATION CASE LAW

Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979).

- Facts: Bradshaw was a passenger in a classmate's car. The students attended an off-campus picnic, advertised on campus including that alcohol would be served. Class funds were used to purchase beer. Bradshaw was injured in a car accident while returning to campus; his injuries rendered him a quadriplegic.
- Issue: Can the be held negligent for the harm of a student? Did the university have a duty to protect students from harm?
- Analysis: The court ruled that the University did not have a duty to protect its students from harm and could not have reasonably prevented the harm from occurring. The court acknowledged the close nexus of the University to the event in question.

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KEY HIGHER EDUCATION CASE LAW

Furek v. Univ. of Delaware, 594 A.2d 506 (Del. 1991).

- Facts: The University became aware of potential student organization-related injuries via the Student Health Center. The University instituted an anti-hazing policy and began education on the topic of hazing. Furek pledged Sigma Phi Epsilon (SigEp) and during "hell night" was blindfolded and had oven cleaner poured over him among other things. Furek received chemical burns and was severely scarred.
- Issue: Can a University be held accountable for not taking sufficient action to address a known problem?
- Analysis: The court held that the University had a "unique relationship" with its students as evident by the anti-hazing policy and knowledge of problematic hazing practices. Therefore, a duty of care existed.

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KEY HIGHER EDUCATION CASE LAW

Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).

- Facts: The parent of a fifth-grade student, LaShonda Davis, sued the school for its response to peer-based sexual harassment. A classmate continually harassed Davis over a six-month period, and the harassment negatively impacted Ms. Davis's ability to receive an education.
- Issue: Can a school be held responsible under Title IX for student-on-student sexual harassment?
- Analysis: In a 5-4 decision, the Supreme Court found in favor of Davis. When the school has actual knowledge of the harassment, and fails to properly take corrective action, the school is deliberately indifferent. The conduct was sufficiently severe, pervasive, and objectionably offensive.

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RECENT MAJOR CASES

ADA
Negligence
First Amendment
Student Conduct
Title IX

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ADA

Shank v. Carleton College

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SHANK v. CARLETON COLL., NO. 16-CV-01154, 2019 WL 3974091 (D. MINN. AUG. 22, 2019).

Facts

- Shank alleged that she was raped twice by fellow Carlton students. One incident occurred freshman year; the second occurred when she was a sophomore.
- After the first assault, Shank sought support and services from the campus Health and Counseling Center, but was initially reluctant to file a report with the Title IX office.
- Another Carlton student filed a community concern form about Shank, who was cutting her wrists. Months later, Shank was briefly hospitalized for suicidal statements made under the influence of alcohol and marijuana. The hospital's discharge summary included information about Shank's first alleged assault.
- Coincidentally, another member of the community filed a concern form regarding the alleged assault. Shank's parents also learned of the assault at this time and reported it to Carlton. Carlton honored Shank's request not to investigate, but provided interim measures.

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SHANK v. CARLETON COLL., NO. 16-CV-01154, 2019 WL 3974091 (D. MINN. AUG. 22, 2019).

Facts

- Carlton eventually learned the name of the alleged responding party and determined that it needed to move forward with an investigation. The responding party was held responsible, but was not expelled or suspended.
- In her sophomore year, Shank was assaulted by a second student. She believed she had been drugged and reported the second assault immediately.
- At some point much later in her senior year, Shank sought disability accommodations relating to her PTSD diagnosis.
- She was granted a notetaker and alternative testing space, but was denied video access to her courses. Instead, Carlton offered to relocate all of her classes to classrooms. Carlton did not grant or deny her requests for additional time on assignments, alternative assignments, verbal versus written testing, or reduced attendance requirements, but rather offered to work with her and her faculty on a case-by-case basis.
- Shank brought suit under Title IX, the ADA, and Section 504.

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SHANK v. CARLETON COLL., NO. 16-CV-01154, 2019 WL 3974091 (D. MINN. AUG. 22, 2019).

Holding

- The parties did not dispute Shank would be considered "disabled" under ADA/504 based upon her PTSD.
- Her medical provider's documentation did not clearly identify how her requested accommodations directly related to her PTSD diagnosis.
- Carlton's Coordinator of Disability Services engaged in the interactive process regarding her accommodations requests, granting some, substituting one, and taking an instance-by-instance approach to the remaining ones.
- Because Carlton did not deny any of Shank's requests, she cannot establish a necessary element of her ADA/504 claims.
- Carlton's response to Shank's assaults was not "deliberately indifferent;" Carlton was granted summary judgment on her Title IX claims also.

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SHANK v. CARLETON COLL., NO. 16-CV-01154, 2019 WL 3974091 (D. MINN. AUG. 22, 2019).

Takeaways

- Take care, as Carlton did, to separate disability accommodations issues from Title IX interim measures, even though there may be overlap in the necessary "accommodation" (such as classroom assignment).
- The Disability Services Coordinator had thoroughly considered and responded to her accommodations request.
- Carlton could demonstrate that it had gone through the interactive process to discern whether the requests were "reasonable," and tailored to properly accommodate the effects of her disability.

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NEGLIGENCE

Nguyen v. MIT

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NGUYEN v. MIT, 96 N.E.3D 128 (MASS. 2018).

Facts

- A 25-year old graduate student with a history of mental illness received care from on-campus and off-campus providers while enrolled.
- He also received various interventions from faculty and staff as academic challenges emerged.
- He rebuffed most interventions, insisting that he wanted to keep his mental health issues separate from his academic challenges.
- Faculty in his program knew he was obtaining unspecified treatment off-campus and continued to work with him on his academic and social challenges.
- He sent an inappropriate and aggressive email to a senior researcher, which prompted the faculty department chair to "read him the riot act." Immediately after this phone call, Nguyen jumped to his death.
- Nguyen's father sued MIT, claiming that his son's death was foreseeable and MIT did not do enough to prevent it.

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NGUYEN v. MIT, 96 N.E.3D 128 (MASS. 2018).

Holding

- The Massachusetts Supreme Court began by examining the scope of an institution's duty to a student in Nguyen's circumstances.
- In certain limited circumstances, the "special relationship" between a college and student creates a duty to take reasonable measures to prevent suicide.
- "Where a university has actual knowledge of a student's suicide attempt that occurred while enrolled at the university or recently before matriculation, or of a student's stated plans or intentions to commit suicide, the university has a duty to take reasonable measures . . . to protect the student from self-harm."
- "Reasonable measures" could include invoking a suicide protocol or contacting the appropriate individuals at the institution (such as in a Dean of Students' office) to initiate and coordinate appropriate clinical care. When a student refuses care, an institution should notify the emergency contact, or in crisis situations, emergency services personnel.
- Under these facts, MIT did not owe a duty to Nguyen because there was no "actual knowledge" of suicidality.

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NGUYEN v. MIT, 96 N.E.3D 128 (MASS. 2018).

Takeaways

- Although *Nguyen* is a state court decision that technically only applies to Massachusetts, we expect that it will be influential with other state courts.
- Your campus and BIT should have a suicide prevention protocol. *Nguyen* suggests that having and following a protocol creates a "safe harbor" of sorts, and can address safety issues and planning, crisis intervention, and emergency notification practices.
- Ensure that you are training key campus stakeholders about their duty to notify your BIT when they have knowledge that a student is at risk for self-harm.
- The *Nguyen* court looked carefully at the records and correspondence among various MIT officials about what they knew about Nguyen's well-being. Be sure to keep accurate records of all communications and efforts to provide interventions and support, including outreach to off-campus health providers and emergency contacts.

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NEGLIGENCE

Miller v. University of Maryland

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MILLER v. UNIV. OF MARYLAND, NO. 1:19-CV-105, 2019 WL 6716455 (N.D.N.Y. DEC. 10, 2019).

Facts

- Miller, a hockey player enrolled at UMBC, fell from the third story of an off-campus house where he lived along with several other UMBC hockey players.
- Because Miller enrolled in January, he was unable to secure a spot in UMBC's dormitories. The hockey coach arranged for him to move into the team's off-campus house.
- The team threw several parties at the house where marijuana and alcohol were present. Miller claims his teammates and housemates pressured him to drink and smoke.
- Miller was uncomfortable in the house and made inquiries about room in the UMBC dorms. He was offered a spot, but failed to move in because of a snowstorm. UMBC rescinded the offer.
- Miller acquiesced and smoked at a house party; he experienced hallucinations and was "running around yelling about Jesus." Plaintiff fell from the window in his room, suffering a punctured lung, broken vertebrae, and a severed spinal court. He was paralyzed.

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MILLER v. UNIV. OF MARYLAND, NO. 1:19-CV-105, 2019 WL 6716455 (N.D.N.Y. DEC. 10, 2019).

Holding

- Miller sued UMBC alleging that the university was negligent in exposing him to the house's environment, allowing the hockey players to engage in behavior contrary to school rules, and failing to move him from the house.
- The Eleventh Amendment provides UMBC with tort claims immunity, which Maryland has not waived.
- The court agreed that no other federal law cited by Miller establish jurisdiction to sue UMBC for his injuries, including the ADA, 504, or the Drug Free Schools and Communities Act (DFSCA).
- No aspect of the ADA or 504 allows an individual to recover for an accident that causes a disability.

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MILLER v. UNIV. OF MARYLAND, NO. 1:19-CV-105, 2019 WL 6716455 (N.D.N.Y. DEC. 10, 2019).

Takeaways

- Public institutions typically are shielded fairly broadly from liability as state actors under the Eleventh Amendment, and can typically only waive their immunity through clear legislative intent through the passage of a state statute, such as the Maryland Tort Claims Act.
- Congress must indicate a clear or implied right for an individual to bring a "private right of action" under a federal statute.
- Though UMBC might not bear liability for Miller's injuries, the court suggested that other defendants might exist, such as the property owner, the other hockey players/roommates, or the coach.

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FIRST AMENDMENT

Business Leaders in Christ v. University of Iowa

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BUSINESS LEADERS IN CHRIST v. U. OF IOWA ET AL., 360 F. SUPP. 3D 885 (S.D. IOWA 2019).

Facts

- Business Leaders in Christ (BLIC) was a religious student organization. All Registered Student Organizations (RSOs) must comply with Iowa's policies and procedures, including the Human Rights (HR) Policy, which prohibits discrimination.
- BLIC was a "Bible-based group that believes the Bible is the unerring Word of God," believed that "homosexual relationships are outside of God's design" and that "every person should embrace, not reject, their God-given sex." BLIC required student leaders sign a statement of faith denouncing homosexuality.
- A BLIC member reported that he was denied a leadership position when BLIC leaders learned that he is gay.
- Iowa deregistered BLIC because the statement of faith violated the HR Policy.
- Plaintiffs sued based on First Amendment rights to free speech, free association, and religious exercise.

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BUSINESS LEADERS IN CHRIST v. U. OF IOWA ET AL., 360 F. SUPP. 3D 885 (S.D. IOWA 2019).

Holding

On cross motions for summary judgment, the District Court held:

- The HR Policy was not neutrally applied to all RSOs / was selectively enforced against religious student groups.
- Iowa violated Plaintiff's First Amendment rights; summary judgment granted.
- Iowa's actions failed "strict scrutiny," in that revoking BLIC's RSO status was not narrowly tailored to achieve a compelling government interest.
- Injunction awarded; Iowa required to reinstate BLIC.
- School officials entitled to qualified immunity.
- BLIC awarded nominal damages in the amount of $1.

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BUSINESS LEADERS IN CHRIST v. U. OF IOWA ET AL., 360 F. SUPP. 3D 885 (S.D. IOWA 2019).

Takeaways

- Allowing some secular groups exemptions from a neutral nondiscrimination policy, while not allowing exemptions for religious groups, violates the First Amendment.
- Institutions should ensure that neutral nondiscrimination policies are applied consistently.

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FIRST AMENDMENT

InterVarsity Christian Fellowship v. University of Iowa

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INTERVARSITY CHRISTIAN FELLOWSHIP v. UNIV. OF IOWA, 3:18-CV-00080-SMR-SBJ (S.D. IOWA, SEPT. 27, 2019).

Facts

- Following the BLIC suit, Iowa reviewed all 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 different religious national organization with a 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."

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INTERVARSITY CHRISTIAN FELLOWSHIP v. UNIV. OF IOWA, 3:18-CV-00080-SMR-SBJ (S.D. IOWA, SEPT. 27, 2019).

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.

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INTERVARSITY CHRISTIAN FELLOWSHIP v. UNIV. OF IOWA, 3:18-CV-00080-SMR-SBJ (S.D. IOWA, SEPT. 27, 2019).

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.

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INTERVARSITY CHRISTIAN FELLOWSHIP v. UNIV. OF IOWA, 3:18-CV-00080-SMR-SBJ (S.D. IOWA, SEPT. 27, 2019).

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.

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INTERVARSITY CHRISTIAN FELLOWSHIP v. UNIV. OF IOWA, 3:18-CV-00080-SMR-SBJ (S.D. IOWA, SEPT. 27, 2019).

Takeaways

- Iowa had been admonished by the same court in the *BLIC* suit 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."

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INTERVARSITY CHRISTIAN FELLOWSHIP v. UNIV. OF IOWA, 3:18-CV-00080-SMR-SBJ (S.D. IOWA, SEPT. 27, 2019).

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."

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STUDENT CONDUCT

Endres v. Northeast Ohio Medical University

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ENDRES v. N.E. OHIO MEDICAL UNIV.,
938 F.3D 281 (6TH CIR. 2019).

Facts

- Endres was a first-year medical student who used Ritalin to manage his ADHD. He began to experience new side effects and stopped taking the medication. He subsequently failed a class.
- Under school policy, NEOMED required him to retake his entire first-year curriculum. In his second year, he started taking a substitute medication, which left him with ADHD-related fidgeting.
- During a proctored exam, test proctors noticed that Endres repeatedly looked towards the adjacent test-taker's computer screen. His behavior was reported by the proctor to the Chief Student Affairs Officer, Sandra Emerick, in an "irregularity report." Emerick reviewed the video of the test-takers and his exam responses relative to his neighbors and concluded that it was quite possible Endres had cheated. She referred the matter to the appropriate committee to address allegations of academic and professional misconduct.

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ENDRES v. N.E. OHIO MEDICAL UNIV.,
938 F.3D 281 (6TH CIR. 2019).

Facts

- Endres was shocked and stunned by the allegations against him, including how much he was fidgeting on the video. He explained his ADHD and issues with his medication, and provided documentation of his efforts to adjust medication with his clinician.
- In his defense, Endres also argued, and requested field testing, to prove that it was impossible due to the position and tinting of the laptops for one student to read another's answers.
- During his hearing, Endres explained his medication management issues and explained that the zoom feature of the testing software, used frequently by his neighbor, caused light flashes that caused him to glance involuntarily. He presented results of his own field-testing.
- Emerick was present during Endres's presentation; however, he was not permitted to be present during her presentation. Emerick remained for deliberations.

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ENDRES v. N.E. OHIO MEDICAL UNIV.,
938 F.3D 281 (6TH CIR. 2019).

Facts

- The committee found him responsible for academic misconduct.
- He appealed on a number of bases, including that Emerick had provided a statistical analysis by a faculty member, which had not been provided to Endres, citing a 0.000036 percent chance that two students would answer the same six questions incorrectly.
- Endres had also reviewed his student file and discovered a memo that he argued misrepresented information provided by his clinicians.
- Endres sued NEOMED arguing that the institution violated his constitutional rights by expelling him without providing sufficient due process. The district court dismissed his suit and he appealed to the Sixth Circuit.

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ENDRES v. N.E. OHIO MEDICAL UNIV.,
938 F.3D 281 (6TH CIR. 2019).

Holding

- The Sixth Circuit held that NEOMED did violate Endres's due process rights in the manner it conducted his disciplinary hearing.
- Looking to Supreme Court precedent, "due process" requirements depended in large part on the characterization of Endres's dismissal.
- Was he dismissed due to disciplinary misconduct or for academic underperformance?
- There are two loose categories of student conduct cases: some require heavy emphasis on fact-finding to determine whether a policy has been violated. In contrast, other cases rely on the faculty's expert judgment about whether a student's performance (or conduct) satisfies some predetermined measure of academic competence.

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ENDRES v. N.E. OHIO MEDICAL UNIV.,
938 F.3D 281 (6TH CIR. 2019).

Holding

- "Fact-finding" processes warrant more rigorous due process protections.
- "Academic performance" cases require less "due process."
- Because this case required formal fact-finding, due in part to the process used by NEOMED to address the allegations against Endres, the process used did not satisfy due process requirements.
- There were several due process infirmities in NEOMED's process, including that Endres did not have access to review and respond to all of the evidence presented to the decision-makers, as well as to hear and respond to Emerick's testimony.

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ENDRES v. N.E. OHIO MEDICAL UNIV.,
938 F.3D 281 (6TH CIR. 2019).

Takeaways

- Courts generally have not undertaken such a nuanced analysis of the nature of the fact-finding inquiry in drawing lines between academic and behavioral misconduct. Generally, courts exhibit great deference to academic decision-making, including academic integrity cases.
- The Sixth Circuit acknowledged that some disciplinary action could appropriately be recharacterized as "academic" conduct through professionalism standards or other character-based analyses. However, the central question is how the institution determines whether the policy has been violated.
- All evidence contributing to a determination of responsibility should be made available for review, comment, and response by the responding party prior to the determination. No surprises before or after the hearing.

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TITLE IX

Haidak v. University of Massachusetts Amherst

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HAIDAK v. UNIVERSITY OF MASS.-AMHERST, 933 F.3D 56 (1ST CIR. 2019).

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 Board; an administrator pared it down to sixteen prior to 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.

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HAIDAK v. UNIVERSITY OF MASS.-AMHERST, 933 F.3D 56 (1ST CIR. 2019).

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.

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HAIDAK v. UNIVERSITY OF MASS.-AMHERST, 933 F.3D 56 (1ST CIR. 2019).

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.

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HAIDAK v. UNIVERSITY OF MASS.-AMHERST, 933 F.3D 56 (1ST CIR. 2019).

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.

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HAIDAK v. UNIVERSITY OF MASS.-AMHERST, 933 F.3D 56 (1ST CIR. 2019).

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.

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QUESTIONS?

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RESOLUTION AGREEMENTS

Department of Justice
Department of Education

3

RESOLUTION AGREEMENTS - ADA

Northern Michigan University Department of Justice Settlement Agreement

4

NORTHERN MICHIGAN UNIVERSITY,
DEPARTMENT OF JUSTICE SETTLEMENT AGREEMENT, OCTOBER 18, 2018.

Facts

- Katerina Klawes was a student at Northern Michigan University when she shared with a friend that she was having suicidal thoughts.
- When her friend reported it, NMU had campus and local police locate her. Local police determined she was not a threat to herself.
- Even though a psychological evaluation also determined she was not a threat to herself, NMU required her to sign a behavioral agreement or threatened to disenroll her.

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NORTHERN MICHIGAN UNIVERSITY,
DEPARTMENT OF JUSTICE SETTLEMENT AGREEMENT, OCTOBER 18, 2018.

Facts

- The behavior agreement required she refrain from sharing suicidal thoughts or ideation with friends.
- Klawes filed a complaint with DOJ for violation of Title II of the ADA.
- NMU settled and agreed to amend its disability and leave policies.

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NORTHERN MICHIGAN UNIVERSITY,
DEPARTMENT OF JUSTICE SETTLEMENT AGREEMENT, OCTOBER 18, 2018.

Takeaways

- Use an evidence-based risk rubric to ensure each case is reviewed based on objective criteria to assess severity of behavior and imminency of risk, and to assure that interventions applied line up with the gravity of the concern.
- Use a collaborative, case-management centered process.
- Avoid threatening a student with separation or conduct code action for suicidal thoughts. (Don't use BIT as conduct.)

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NORTHERN MICHIGAN UNIVERSITY,
DEPARTMENT OF JUSTICE SETTLEMENT AGREEMENT, OCTOBER 18, 2018.

Takeaways

- Work along with the student to create a plan that is based on a good-faith desire for the student to be successful at the institution.
- Collaborate with disability services, or the school's ADA Coordinator as a middle circle member of the BIT who is invited to meetings as needed and consults on specific cases.

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NORTHERN MICHIGAN UNIVERSITY,
DEPARTMENT OF JUSTICE SETTLEMENT AGREEMENT, OCTOBER 18, 2018.

BIT Standards

- BITs should use an objective risk rubric to assess risk and not make assumptions. Interventions must match the risk.
  - **Standard 5. Team Membership:** Teams are comprised of at least 5, but no more than 10 members and should at a minimum include: dean of students and/or vice president of student affairs (principal or assistant principal in K-12), a mental health care employee (adjustment counselor or school psychologist in K-12), a student conduct staff member, police/law enforcement officer (school resource officer in K-12).
  - **Standard 11. Objective Risk Rubric:** Teams have an evidence-based, objective risk rubric that is used for each case that comes to the attention of the team.
  - **Standard 12. Interventions:** A team clearly defines its actions and interventions for each risk level associated with the objective risk rubric they have in place for their team.

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RESOLUTION AGREEMENTS - TITLE IX

Michigan State University Department of Education Settlement Agreement

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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' 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.

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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.

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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.

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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

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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.

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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.

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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

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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

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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 at 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

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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"

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CASE LAW IMMERSION

Title VII
Transgender Students
Retaliation
ADA
First Amendment

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TITLE VII

Menaker v. Hofstra University

22

MENAKER v. HOFSTRA UNIVERSITY,
935 F.3d 20 (2ND CIR. 2019).

Facts

- Menaker was head coach of the women's and men's teams at Hofstra.
- Menaker informed a student-athlete that she would not receive a full scholarship, despite the fact that a previous coach had promised one.
- The student made a Title IX report alleging that after she did not respond to Menaker's advances, he threatened to remove her partial scholarship and position on the team, among other things.
- Menaker was summoned to meet with Deputy Counsel and the Athletic Director. He was not given notice; he was questioned at the meeting and then told an investigation would be conducted.
- Hofstra's investigation was not conducted pursuant to school policy, which would have required interviewing witnesses, a written response from the respondent, and written findings.

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MENAKER v. HOFSTRA UNIVERSITY,
935 F.3d 20 (2ND CIR. 2019).

Facts

- Several months later, Menaker was summoned to another meeting that included the Director of HR. Administrators recited the allegations and added concerns that Menaker allegedly made comments to students about his divorce. Menaker was told he was being fired for "unprofessional conduct" and the "totality of the circumstances."
- Menaker sued in District Court alleging a violation of Title VII, among other claims.
- Hofstra's motion to dismiss was granted; the District Court found that Menaker failed to allege sufficient facts to support an inference that his sex was a motivating factor in his termination.
- Menaker appealed to the Second Circuit.

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MENAKER v. HOFSTRA UNIVERSITY,
935 F.3d 20 (2ND CIR. 2019).

McDonnell Douglas Burden Shifting Analysis

1. Employee must demonstrate membership in a protected class and an adverse action.
2. Employer must show a legitimate, nondiscriminatory reason for the adverse action.
3. Employee must show that the proffered reason is pretext for discrimination.

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MENAKER v. HOFSTRA UNIVERSITY,
935 F.3d 20 (2ND CIR. 2019).

Holding

The Second Circuit found that Hofstra's motion to dismiss was granted prematurely, based on a 2016 Title IX case:

- In *Doe v. Columbia*, the court found that procedural infirmities in the investigation and adjudication process that raised an inference of sex-based bias placed alongside substantial public criticism about the university's handling of sexual assault allegations could constitute impermissible bias based on sex.
- *Doe v. Columbia* established a lenient pleading standard in the Second Circuit.
- The court in *Menaker* found this rationale could be extended to include Title VII employment discrimination claims.

> "Even minimal evidence of pressure on the university to act based on invidious stereotypes will permit a plausible inference of sex discrimination."

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MENAKER v. HOFSTRA UNIVERSITY,
935 F.3d 20 (2ND CIR. 2019).

Holding

- Hofstra's argument that Menaker was fired for "unprofessional conduct," and was not entitled to procedural protections he would have received otherwise, was not persuasive:

  > "Hofstra's abandonment of its written Harassment Policy here would *still* be irregular. After all, Hofstra's conclusion that Menaker had engaged in 'unprofessional conduct' derives from – and simply recharacterizes – [the sexual harassment allegations]."

- The Second Circuit also found that any discriminatory intent on the part of the student-athlete reporting party could be imputed to Hofstra under a "cat's paw" theory.

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MENAKER v. HOFSTRA UNIVERSITY,
935 F.3d 20 (2ND CIR. 2019).

Takeaways

- The lenient pleading standard will mean more plaintiffs survive the motion to dismiss stage in the Second Circuit. The adoption of this standard sets up a circuit spilt with the Sixth and Ninth Circuits.
- Recharacterizing serious harassment allegations as unprofessional conduct, and skirting procedural protections, is fairly common. Schools in the Second Circuit should proceed with caution.
- Uniform policies/procedures are best practice.
- Follow your process!

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TRANSGENDER STUDENTS

Grimm v. Gloucester County School Board

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GRIMM v. GLOUCESTER CTY. SCH. BD.,
400 F.SUPP.3D 44 (E.D. VA. 2019).

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.

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GRIMM v. GLOUCESTER CTY. SCH. BD.,
400 F.SUPP.3D 44 (E.D. VA. 2019).

Facts

- 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.

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GRIMM v. GLOUCESTER CTY. SCH. BD.,
400 F.SUPP.3D 44 (E.D. VA. 2019).

Facts

- 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.

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GRIMM v. GLOUCESTER CTY. SCH. BD.,
400 F.SUPP.3D 44 (E.D. VA. 2019).

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 guidance on transgender students 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.

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GRIMM v. GLOUCESTER CTY. SCH. BD.,
400 F.SUPP.3D 44 (E.D. VA. 2019).

Decision

- 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.

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GRIMM v. GLOUCESTER CTY. SCH. BD.,
400 F.SUPP.3D 44 (E.D. VA. 2019).

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 under 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.

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RETALIATION

Aslin v. University of Rochester

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ASLIN v. UNIVERSITY OF ROCHESTER,
NO. 6:17-CV-06847, 2019 WL 4112130, (W.D.N.Y. AUG. 28, 2019).

Facts

- Plaintiffs comprised 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.

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ASLIN v. UNIVERSITY OF ROCHESTER,
NO. 6:17-CV-06847, 2019 WL 4112130, (W.D.N.Y. AUG. 28, 2019).

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."

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ASLIN v. UNIVERSITY OF ROCHESTER, NO. 6:17-CV-06847, 2019 WL 4112130, (W.D.N.Y. AUG. 28, 2019).

Facts

- Plaintiffs alleged that conditions at the University worsened substantially after the second investigation, including exclusion, 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.

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ASLIN v. UNIVERSITY OF ROCHESTER, NO. 6:17-CV-06847, 2019 WL 4112130, (W.D.N.Y. AUG. 28, 2019).

Analysis

Under Title VII, the elements of a retaliation claim include:

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

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ASLIN v. UNIVERSITY OF ROCHESTER,
NO. 6:17-CV-06847, 2019 WL 4112130, (W.D.N.Y. AUG. 28, 2019).

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 Plaintiff's planned move to a neighboring university
  - Exclusion from meetings

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ASLIN v. UNIVERSITY OF ROCHESTER,
NO. 6:17-CV-06847, 2019 WL 4112130, (W.D.N.Y. AUG. 28, 2019).

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.

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ASLIN v. UNIVERSITY OF ROCHESTER, NO. 6:17-CV-06847, 2019 WL 4112130, (W.D.N.Y. AUG. 28, 2019).

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.

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PREGNANCY AND CONSTRUCTIVE DISCHARGE

Skelton v. Arizona State University

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SKELTON v. ARIZONA STATE UNIVERSITY,
CV-17-01013-PHX-GMS (D. ARIZ. MARCH 6, 2019).

Facts

- Skelton was a student in ASU's Physical Activity, Nutrition, and Wellness (PANW) program and worked as a Research Associate and Teaching Associate.
- In January 2015, Skelton told her program mentor that she was pregnant with her second child.
  - Skelton alleged her mentor was "shocked and taken aback" about the pregnancy, told Skelton that "she would have to rethink [her] RA position and study coordinator position" for the upcoming fall semester, and made a reference to having to "problem solve" around Skelton's pregnancy.

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SKELTON v. ARIZONA STATE UNIVERSITY,
CV-17-01013-PHX-GMS (D. ARIZ. MARCH 6, 2019).

Facts

- Later that month, the mentor expressed disappointment with how Skelton conducted herself at a conference and noted that she believed that Skelton was having issues with her productivity.
  - Skelton responded by saying she felt she needed to apologize for her pregnancy, but her mentor assured her she did not need to apologize. Skelton then thanked her mentor for her "willingness to support me at what is a difficult time in the program and my personal life."
- In February, Skelton filed a complaint with the Office of Equity and Inclusion (OEI) alleging her mentor treated her differently after she disclosed her pregnancy.

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SKELTON v. ARIZONA STATE UNIVERSITY,
CV-17-01013-PHX-GMS (D. ARIZ. MARCH 6, 2019).

Facts

- Later in February, Skelton told her mentor she was considering withdrawing from a class.
  - Her mentor noted this may impact Skelton's ability to pass the required progressive exams and instead suggested Skelton take a paid three-week break from her RA position to catch up on her schoolwork.
  - Skelton had also contacted the program director who subsequently allowed her to drop the course.

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SKELTON v. ARIZONA STATE UNIVERSITY,
CV-17-01013-PHX-GMS (D. ARIZ. MARCH 6, 2019).

Facts

- The program director and Skelton's mentor met with her to discuss the OEI complaint.
  - Her mentor apologized for her comment about "problem solving," noted that she did not take away any actual benefits or opportunities because of Skelton's pregnancy, and she then discussed plans for handling work during Skelton's upcoming maternity leave.
  - The mentor also reminded Skelton that she was behind on some of her course work.

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SKELTON v. ARIZONA STATE UNIVERSITY,
CV-17-01013-PHX-GMS (D. ARIZ. MARCH 6, 2019).

Facts

- In March, the mentor informed Skelton and another student that they needed to complete work in the lab over Spring Break.
  - Skelton noted she could not work in the lab due to childcare issues. The mentor said that was unacceptable as the work could not be completed at home.
  - After meeting with the mentor and program director, Skelton was allowed to work from home.
- In April, Skelton chose a new mentor.
- The program director notified Skelton's professors that she was likely going to fail a class and would not be able to take her progressive exams.

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SKELTON v. ARIZONA STATE UNIVERSITY,
CV-17-01013-PHX-GMS (D. ARIZ. MARCH 6, 2019).

Facts

- In May, Skelton withdrew from her remaining classes, which resulted in her being disqualified from taking her progressive exams.
  - Skelton subsequently transferred to another university.
  - The program director wrote her a letter of recommendation.
- Skelton sued in federal district court under a constructive discharge theory and Title IX.
- The Court granted ASU's motion for summary judgement.

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SKELTON v. ARIZONA STATE UNIVERSITY,
CV-17-01013-PHX-GMS (D. ARIZ. MARCH 6, 2019).

Decision

- The district court found there were insufficient facts to show that Skelton was constructively discharged.
- Constructive discharge occurs when:
  - "[T]he working conditions deteriorate, as a result of discrimination, to the point that they become sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer."
- Skelton failed to provide sufficient facts to meet this high standard.

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SKELTON v. ARIZONA STATE UNIVERSITY,
CV-17-01013-PHX-GMS (D. ARIZ. MARCH 6, 2019).

Decision

- The court found that although Skelton alleged her mentor deprived her from submitting an article abstract, decided not to place her in a study coordinator position, and admonished her for not attending the second day of a conference, these facts were not sufficient to establish the extraordinary and egregious conditions required for constructive discharge.
- The Court pointed to several actions by ASU to support that Skelton's working conditions were not intolerable and thus did not support a constructive discharge claim.

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SKELTON v. ARIZONA STATE UNIVERSITY,
CV-17-01013-PHX-GMS (D. ARIZ. MARCH 6, 2019).

Decision

- The actions included:
  - Providing a three-week paid break to catch up on school work.
  - Allowing her to drop a class.
  - Allowing her to complete the lab work at home.
  - Skelton's mentor apologized for any confusion and noted she would accommodate her pregnancy and maternity leave.
  - Skelton expressing appreciation for her mentor's support.
  - The program director mediated the situation between Skelton and her mentor and allowed Skelton to select a different mentor.
  - The program director wrote Skelton a recommendation letter to transfer to another school.

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SKELTON v. ARIZONA STATE UNIVERSITY,
CV-17-01013-PHX-GMS (D. ARIZ. MARCH 6, 2019).

Decision

- Under Title IX, the Court found there was not evidence to show ASU was deliberately indifferent because its response was not "clearly unreasonable in light of the known circumstances."
- The Court relied upon the same facts to note:
  - The program director and mentor met with Skelton in an effort to mediate her OEI complaint.
  - Her mentor apologized for any confusion and noted she would accommodate Skelton's pregnancy.
  - Allowed her to work from home during Spring Break.
  - Accommodated her request for a new mentor.

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SKELTON v. ARIZONA STATE UNIVERSITY,
CV-17-01013-PHX-GMS (D. ARIZ. MARCH 6, 2019).

Takeaways

- Discriminatory constructive discharge requires "working conditions to deteriorate to the point that they become sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job…"
- Pregnant students may claim discrimination under a Title IX theory of deliberate indifference.
- However, where an institution responds to complaints and provides support and resources, they will not be found to have acted with deliberate indifference.

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ADA – "BUT FOR"

Natofsky v. City of New York

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NATOFSKY v. CITY OF NEW YORK,
NO. 17-2757 (2D CIR. APRIL 18, 2019).

Facts

- Natofsky served as the Director of Budget and Human Resources at the New York City Department of Investigations.
- As an infant, Natofsky experienced nerve damage that significantly impacted his hearing.
- Even with hearing aids, his disability requires intense focus and lip reading to fully understand the speaker.
- His hearing disability also affects his speech, which is less clear and slower than the average person.

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NATOFSKY v. CITY OF NEW YORK,
NO. 17-2757 (2D CIR. APRIL 18, 2019).

Facts

- A mayoral transition led to many changes within Natofsky's city department.
- Although he received praise on past performance reviews, after the mayoral transition, Natofsky's supervisor provided feedback that he needed to respond more quickly to emails.
- Natofsky claimed his hearing disability required his focus during meetings therefore he was unable to check email or multi-task in meetings.

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NATOFSKY v. CITY OF NEW YORK,
NO. 17-2757 (2D CIR. APRIL 18, 2019).

Facts

- His supervisor also requested that he arrive to work later in the morning and submit fewer leave requests.
  - She withdrew this request after Natofsky protested.
- Natofsky's supervisor's position was eliminated.
- On her last day, she gave Natofsky a negative performance review.
  - She also shared with the Chief of Staff that Natofsky had performance deficiencies.

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NATOFSKY v. CITY OF NEW YORK,
NO. 17-2757 (2D CIR. APRIL 18, 2019).

Facts

- The Chief of Staff and City Commissioner had concerns for Natofsky's performance after he exhibited a lack of critical knowledge required for his position.
- Natofsky was demoted and received a 50% pay decrease. He was also relocated to a cubicle where his secretary used to sit.
  - After an appeal, Natofsky's salary was adjusted to the highest possible amount allowed for his new title.

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NATOFSKY v. CITY OF NEW YORK,
NO. 17-2757 (2D CIR. APRIL 18, 2019).

Facts

- Natofsky sued for violation of Section 504 of the Rehabilitation Act alleging discrimination based on his hearing disability.
- The federal district court dismissed the lawsuit in the City's favor.

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NATOFSKY v. CITY OF NEW YORK,
NO. 17-2757 (2D CIR. APRIL 18, 2019).

Decision

- The Second Circuit affirmed holding that the Rehabilitation Act incorporates the ADA's "but for" standard for employment discrimination claims.
- The Court referred to the plain language of the ADA statute which prohibits employers from "discriminating against a qualified individual ***on the basis of disability."***
- "On the basis of" should be interpreted to mean that the disability was the "but-for" cause of the adverse employment action.
  - The adverse action occurred only because of/by reason of/on account of, the disability.

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NATOFSKY v. CITY OF NEW YORK,
NO. 17-2757 (2D CIR. APRIL 18, 2019).

Decision

- The court applied this causation standard over the "mixed motive" standard which allows a claimant to succeed where disability was a motivating factor for adverse employment action.
- Natofsky failed to demonstrate that disability discrimination was the but-for cause of his adverse employment actions.
- Sufficient evidence existed that indicated Natofsky's poor performance caused his demotion and salary decrease.

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NATOFSKY v. CITY OF NEW YORK,
NO. 17-2757 (2D CIR. APRIL 18, 2019).

Decision

- Additionally, he failed to show his prior supervisor's request that he respond faster to email, shift his work hours, and decrease his leave requests were "materially adverse" employment actions.
  - "Materially adverse" means more than just a mere inconvenience or an alteration of job responsibilities.

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NATOFSKY v. CITY OF NEW YORK,
NO. 17-2757 (2D CIR. APRIL 18, 2019).

Takeaways

- Institutions should be aware of the causation standard utilized in their jurisdiction because the Federal Circuit courts are divided on which causation standard applies in employment discrimination claims under the ADA and Section 504 of the Rehabilitation Act.
- When taking any action against an individual with a disability, intuitions should be prepared to articulate a legitimate, non-discriminatory reason for the action and be prepared to show that the disability did not play any role in the decision to act.

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FIRST AMENDMENT

Speech First, Inc. v. Schlissel

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SPEECH FIRST, INC. v. SCHLISSEL,
939 F.3D 756 (6TH CIR. 2019).

Facts

- University of Michigan policy prohibits "[h]arassing or bullying another person – physical, verbally, or through other means." Harassing and bullying are not defined in the University's policy but there were definitions on the school's website.
- The university also has a Bias Response Team (BRT).
- The university defines a "bias incident" as "conduct that discriminates, stereotypes, excludes, harasses or harms anyone in our community based on their identity (such as race, color, ethnicity . . .)"

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SPEECH FIRST, INC. v. SCHLISSEL,
939 F.3D 756 (6TH CIR. 2019).

Facts

- Under university policy, a bias incident is not itself punishable unless the behavior violates some provision of the conduct code. The BRT does not determine whether conduct is a bias incident, but has a procedure to follow for each report.
- If a reporting party desires, the BRT invites the person alleged to have committed the incident to meet with a member of the BRT. This meeting is not compulsory.
- Speech First alleges the definitions of "harassing" and "bullying" are overbroad, vague, and "sweep in" protected speech.
- Speech First also alleges that the term "bias incident" is overbroad and that the BRT's practices intimidate students and quash free speech.
- Speech First filed suit on behalf of its members (associational standing) to challenge the policy definitions and BRT.

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SPEECH FIRST, INC. v. SCHLISSEL,
939 F.3D 756 (6TH CIR. 2019).

Decision

- The Court agreed with Speech First that students speech is chilled by the BRT. Even though the BRT lacks disciplinary authority, the Court agrees that the invitation to meet with team member carries an implicit threat of punishment and intimidation such to quell speech.
- The Court supported Speech First's associational standing because it is challenging the definitions and BRT "on its face" as opposed to alleging the University applied the definitions in a manner that violated students' free speech rights.
- Even though the University voluntarily removed the definitions from its website after Speech First sued, its actions were akin to ad hoc regulatory action and can be easily and/or discretionarily reversed. Thus, the issue is still subject to a court's review.

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SPEECH FIRST, INC. v. SCHLISSEL,
939 F.3D 756 (6TH CIR. 2019).

Takeaways

- Policies and practices like those of the BRT carry implied threats of discipline – even when the policy states otherwise.
- Institutions should clearly define prohibited behavior, particularly in policies that otherwise impact speech and expression.
- National organizations that have campus chapters may have associational standing to sue when challenging a policy or practice, even without a showing of injury.

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FIRST AMENDMENT

Wozniak v. Adesida

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WOZNIAK v. ADESIDA,
932 F.3D 1008 (7TH CIR. 2019).

Facts

- The University of Illinois fired Wozniak, who had been a tenured professor in the College of Engineering.
- Wozniak was one of several professors who were eligible for an award, which was to be decided upon by a committee that included students.
- When Wozniak did not win the award, he engaged in an extended campaign against the students on the committee.
- The University directed Wozniak to follow established institutional norms and rules including respecting students.

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WOZNIAK v. ADESIDA,
932 F.3D 1008 (7TH CIR. 2019).

Facts

- Wozniak sued. This lawsuit was the second time Wozniak sued the University for insisting that he follow its policies. Wozniak lost the first lawsuit.
- The Dean of the College initiated tenure-revocation proceedings against Wozniak. The University's Committee on Academic Freedom followed its procedures by investigating, accepting submissions from the Interim Chancellor and Wozniak, and conducting the hearing.
- Wozniak wanted to interrogate the students on the committee and when they refused to speak to him, he filed suit seeking damages from the students. He filed the suit in an effort to depose the students and gather information from them.
- The Committee found that Wozniak was responsible for several kinds of misconduct.

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WOZNIAK v. ADESIDA,
932 F.3D 1008 (7TH CIR. 2019).

Facts

- The Committee concluded that revoking tenure was an excessive response. Wozniak posted the entire document to his website and revealed the identity of the students involved. He also included a link to the report in his email signature.
- The University's president presented the matter to the Board of Trustees (which had ultimate authority to decide). The Board disagreed with the Committee and considered Wozniak's conduct worthy of termination.
- Wozniak filed another lawsuit against the University alleging a violation of his constitutional rights.

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WOZNIAK v. ADESIDA,
932 F.3D 1008 (7TH CIR. 2019).

Decision

- The Court ruled that Wozniak's constitutional rights had not been violated.
- The Court noted that Wozniak acted in his capacity as a teacher regarding the teaching award and that he used his position to cause the circumstances that resulted in his termination.
- According to the Court, speech that concerns personal job-related matters is outside the scope of the First Amendment.

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WOZNIAK v. ADESIDA,
932 F.3D 1008 (7TH CIR. 2019).

Decision

- Tenured professors at public universities have property interests in their jobs and are entitled to due process.
- Wozniak was provided with notice and two hearings. He was allowed to present arguments at both hearings satisfying due process requirements.
- The Board went above and beyond the constitutional minimum; Wozniak was not deprived of any constitutional rights.

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WOZNIAK v. ADESIDA,
932 F.3D 1008 (7TH CIR. 2019).

Takeaways

- Public universities are well within their rights to have behavioral policies that govern the conduct of all employees, including tenured professors.
- In a situation where you have a robust tenure revocation process, you will likely find that you have more than met due process requirements.
- Personal discussion of work-related matters is not speech protected by the First Amendment.

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FIRST AMENDMENT

Robinson v. Hunt County, Texas

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ROBINSON v. HUNT COUNTY, TEXAS,
921 F.3D 440 (5TH CIR. 2019).

Facts

- The Hunt County Sheriff's Office, which is led by an elected sheriff, maintains a Facebook page. The "About" section read:
  - "Welcome to the official Hunt County Sheriff's Office Facebook page. We welcome your input and POSITIVE comments regarding the Hunt County Sheriff's Office. . . The purpose of this site is to present matters of public interest within Hunt County. We encourage you to submit your comments, but please note that this is NOT a public forum."
- In January 2017, following the murder of a North Texas Police Officer, the account administrator posted a notice to the page concerning anti-police calls in the office and degrading/insulting comments about police officers being posted to the Facebook page.
- The notice stated that posts filled with foul language, any kind of hate speech, or inappropriate comments would be removed.

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ROBINSON v. HUNT COUNTY, TEXAS,
921 F.3D 440 (5TH CIR. 2019).

Facts

- Deanna Robinson filed a complaint alleging the Facebook page is a public forum and that the post "reflects a deliberately overbroad and vague stated procedure and/or policy intended to chill critical, unpopular, or unfavorable speech from the public on the HCSO Facebook page."
- Robinson and other users criticized the January post for expressing a policy to censor protected speech. Robinson also made highly offensive remarks about HCSO and the dead police officer referenced in the January post.
- Shortly after, the page administrators banned the Robinson and removed other comments that were critical of the HCSO policy.
- In February 2017, Robinson sued Hunt County, Sheriff Meeks, and several other unnamed officials. She later amended her complaint and named the individuals.

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ROBINSON v. HUNT COUNTY, TEXAS,
921 F.3D 440 (5TH CIR. 2019).

Facts

- In her lawsuit, Robinson alleged the defendants violated her First and Fourteenth Amendment rights by engaging in viewpoint discrimination, retaliating against her, placing an impermissible prior restraint on her exercise of free speech, and banning her from the HCSO Facebook page without due process.
- Robinson's suit also alleged:
  - Hunt County has a policy or longstanding practice of censoring unfavorable speech on the HSCO Facebook page.
  - The policy was developed, ratified and enforced by Sheriff Meeks or another County defendant with final policymaking authority.

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ROBINSON v. HUNT COUNTY, TEXAS,
921 F.3D 440 (5TH CIR. 2019).

Decision

- The Court dismissed the official capacity claims against the individual defendants because those claims duplicated Robinson's claims against Hunt County.
- Because Robinson did not seek relief against the defendants in their individual capacities, the Court upheld the district court's dismissal of the individual capacity claims.
- The Court agreed with Robinson that the defendants' actions were viewpoint discrimination regardless of motivation.

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ROBINSON v. HUNT COUNTY, TEXAS,
921 F.3D 440 (5TH CIR. 2019).

Decision

- For purposes of this case, the Court assumed HCSO's Facebook page was a public forum subject to First Amendment protection.
- The Court further attributed the Sheriff's actions to Hunt County because the Facebook page was within the Sheriff's power to define objectives and choose the means of achieving them without county supervision.
- Finally, the Court vacated the district court's denial of Robinson's request for a preliminary injunction because Robinson is not required to show a violation of clearly established law to obtain a preliminary injunction.

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ROBINSON v. HUNT COUNTY, TEXAS,
921 F.3D 440 (5TH CIR. 2019).

Takeaways

- A Facebook page maintained by a public institution is likely to be considered a public forum. As such, the Facebook page is subject to First Amendment protections.
- Any regulation of the page must be viewpoint neutral. So, even if a member of the public posts something offensive or that you dislike, you may not censor their viewpoint by deleting posts and/or banning them from the page.
- A public employee's actions can be imputed to the public entity when that person has the authority to determine the objectives of the entity and guide the achievement of those objectives.
- Isolated unconstitutional actions by a public employee will almost never trigger liability.

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QUESTIONS?

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TITLE IX – SINGLE GENDER GROUPS

Kappa Alpha Theta Fraternity, Inc. v. Harvard University

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KAPPA ALPHA THETA FRATERNITY, INC. v. HARVARD UNIV., 297 F.SUPP.3D 97 (D. MASS. 2019).

Facts

- Plaintiffs are national fraternities with Harvard chapters. Others are students in "finals clubs," which are private single-sex clubs.
- Organizations operate off-campus and were not officially recognized by Harvard. There was considerable campus debate about the clubs, including whether they contributed to a heightened risk of sexual assaults and a misogynistic culture.
- In May 2016, Harvard announced a new policy:
  - Students who become members of unrecognized single-gender social organizations will not be eligible to hold leadership positions in recognized student organizations or athletic teams and will be ineligible to receive fellowships that require Harvard's endorsement.
- Policy applied to new students.

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KAPPA ALPHA THETA FRATERNITY, INC. v. HARVARD UNIV., 297 F.SUPP.3D 97 (D. MASS. 2019).

Facts

- Harvard's policy goal was to improve inclusivity, promote culture change at Harvard, and encourage clubs to open membership.
- Plaintiffs brought suit under Title IX, alleging that Harvard is singling-out students who join single-sex social organizations, and that the policy is part of a broader campaign of intimidation and coercion against organization members. Theories:
  - Disparate treatment on the basis of sex
  - Associational discrimination on the basis of sex
  - Gender-stereotyping
  - Discrimination on the basis of anti-male bias
  - Violation of equal protection under state law

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KAPPA ALPHA THETA FRATERNITY, INC. v. HARVARD UNIV., 297 F.SUPP.3D 97 (D. MASS. 2019).

Holding

- Harvard moved to dismiss the lawsuit, arguing that Title IX should not apply here because its policy was applied equally to both men and women students.
- The District Court declined to dismiss the suit, noting that:
  - "[I]t is impossible for Harvard to apply its Policy without considering both the sex of the particular student and the sex of the other students with whom he or she seeks to associate."
  - Facts also could plausibly suggest gender-stereotyping and anti-male bias, because Harvard's policy may have been motivated in part by a view that the clubs promote sexual assault.

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KAPPA ALPHA THETA FRATERNITY, INC. v. HARVARD UNIV., 297 F.SUPP.3D 97 (D. MASS. 2019).

Takeaways

- Even though private institutions may enjoy more flexibility to set student conduct rules, college policies must not discriminate on the basis of sex or gender.
- A policy such as Harvard's would be unlikely to survive First Amendment "freedom of association" scrutiny in any public institution.
- State civil rights laws may apply equally to both public and private institutions.

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TITLE IX - HAZING

Gruver v. Louisiana State University

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GRUVER v. LOUISIANA STATE UNIV.,
401 F.SUPP.3D 742 (M.D. LA. 2019).

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.

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GRUVER v. LOUISIANA STATE UNIV.,
401 F.SUPP.3D 742 (M.D. LA. 2019).

Facts

- 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.

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GRUVER v. LOUISIANA STATE UNIV.,
401 F.SUPP.3D 742 (M.D. LA. 2019).

Facts

- 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 that 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.

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GRUVER v. LOUISIANA STATE UNIV.,
401 F.SUPP.3D 742 (M.D. LA. 2019).

Facts

- They also alleged that LSU took a "boys will be boys" approach to fraternity oversight that relied on gender stereotypes about male fraternity members and masculine rights of passage.
- LSU filed a motion to dismiss the case.

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GRUVER v. LOUISIANA STATE UNIV.,
401 F.SUPP.3D 742 (M.D. LA. 2019).

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.

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GRUVER v. LOUISIANA STATE UNIV.,
401 F.SUPP.3D 742 (M.D. LA. 2019).

Decision

- The court looked to the *Baylor* case because it was conceptually analogous and the reasoning 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.

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GRUVER v. LOUISIANA STATE UNIV.,
401 F.SUPP.3D 742 (M.D. LA. 2019).

Takeaways

- 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 schools 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.

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GRUVER v. LOUISIANA STATE UNIV.,
401 F.SUPP.3D 742 (M.D. LA. 2019).

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).

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AFFIRMATIVE ACTION

Students for Fair Admissions, Inc. v. Harvard University

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STUDENTS FOR FAIR ADMISSIONS, INC. v. HARVARD, 397 F.SUPP.3D 126 (D. MASS. 2019).

Facts

- Harvard is a private institution that receives federal funding and is therefore subject to Title VI, which prohibits discrimination on the basis of race in education.
- Undergraduates are admitted to Harvard College through a highly-selective process. Applicants may choose to disclose their racial identities.
- The Admissions Committee uses a holistic review process that factors academic aptitude and achievement, extracurricular distinction, and personal qualities. Character is highly valued, including a class that represents a diversity of backgrounds, which "affects the quality of education as much as a great faculty or vast material resources."

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STUDENTS FOR FAIR ADMISSIONS, INC. v. HARVARD, 397 F.SUPP.3D 126 (D. MASS. 2019).

Facts

- Students for Fair Admissions (SFFA) alleges that Harvard violates Title VI by intentionally discriminating against Asian American applicants by using race as a factor in the admissions process.
- SFFA argues that Harvard's admission methodology violates the Supreme Court's *Fisher v. Univ. of Texas* decision allowing the use of race as a "plus factor" in admissions decisions, and that Harvard's method is more akin to impermissible racial quotas. The case went to a bench trial in 2018.
  - "Bench trial" is decided by a judge rather than a jury.

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STUDENTS FOR FAIR ADMISSIONS, INC. v. HARVARD, 397 F.SUPP.3D 126 (D. MASS. 2019).

Holding

- The court upheld Harvard's admissions system.
  - Even though it's "not perfect," the court declined to "dismantle a very fine admissions program that passes constitutional muster, solely because it could do better."
  - Race was "never viewed as a negative," but rather only a "plus" factor when admissions officers assigned an overall personal rating, and that rating did not happen until the end of the process.
  - No discernable pattern of stereotyping Asian-Americans.
  - "Race-neutral alternatives," which are required under constitutional equal protection analysis, were not a workable solution for Harvard.

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STUDENTS FOR FAIR ADMISSIONS, INC. v. HARVARD, 397 F.SUPP.3D 126 (D. MASS. 2019).

Holding

- Recommended improvements for Harvard:
  - Training to reduce implicit biases of admissions officers or high school guidance counselors/teachers who write recommendations.
- SFFA is appealing the decision to the First Circuit.

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STUDENTS FOR FAIR ADMISSIONS, INC. v. HARVARD, 397 F.SUPP.3D 126 (D. MASS. 2019).

Takeaways

- Institutions retain a compelling interest in having a diverse student body.
- The court's review of Harvard's admission system was exhaustive, including a highly detailed review of all the touchpoints at which interviewers, admissions file reviewers, and decision-makers evaluated prospective applicants.
- Supreme Court precedent requires that institutions consider race-neutral alternatives before considering race as a factor.
- Race should only be considered as a "plus factor" as part of a holistic review of a prospective student's potential contribution to the educational community.

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NEGLIGENCE – SPECIAL RELATIONSHIP

Regents of the University of California v. Superior Court of Los Angeles County, Katherine Rosen, Real Party In Interest

23

REGENTS OF UNIV. OF CALIFORNIA v. SUPERIOR COURT OF L.A. COUNTY, KATHERINE ROSEN, REAL PARTY IN INTEREST, 413 P.3D 656 (CAL. 2018).

Facts

- UCLA Student Damon Thompson had previously been transported to a hospital for a psychiatric evaluation after he claimed to have heard other students plotting to shoot him.
- Thompson was receiving mental health treatment through the university and several university personnel were monitoring Thompson.
- Katherine Rosen received life-threatening injuries when Thompson, a classmate, attacked her with a kitchen knife during chemistry lab.

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REGENTS OF UNIV. OF CALIFORNIA v. SUPERIOR COURT OF L.A. COUNTY, KATHERINE ROSEN, REAL PARTY IN INTEREST, 413 P.3D 656 (CAL. 2018).

Facts

- Rosen filed a negligence suit against UCLA and several UCLA employees.
- UCLA sought summary judgment at the trial court and petitioned the Court of Appeal for a writ of mandate when they were denied summary judgment.
- The California Supreme Court granted review of the Court of Appeals decision that UCLA owed no duty to Rosen.

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REGENTS OF UNIV. OF CALIFORNIA v. SUPERIOR COURT OF L.A. COUNTY, KATHERINE ROSEN, REAL PARTY IN INTEREST, 413 P.3D 656 (CAL. 2018).

Holding

- In a landmark ruling, the Supreme Court of California applied Section 40 of the Third Restatement of Torts to determine for the first time that colleges and universities have a "special relationship" with their students.
- This decision removes the fact question of duty from litigation. Schools in CA now have a duty to use reasonable care to protect students from foreseeable acts of violence in the classroom or during curricular activities.

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REGENTS OF UNIV. OF CALIFORNIA v. SUPERIOR COURT OF L.A. COUNTY, KATHERINE ROSEN, REAL PARTY IN INTEREST, 413 P.3D 656 (CAL. 2018).

Holding

- The appropriate standard is the level of care that a reasonable person of ordinarily prudent behavior could be expected to exercise under the circumstances.
- The court noted that many institutions already have sophisticated strategies for mitigating potential threats.

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REGENTS OF UNIV. OF CALIFORNIA v. SUPERIOR COURT OF L.A. COUNTY, KATHERINE ROSEN, REAL PARTY IN INTEREST, 413 P.3D 656 (CAL. 2018).

Takeaways

- Institutions should have a BIT to assess and manage behaviors associated with students with severe mental illness.
- Institutions should anticipate a duty of care for students who may be at foreseeable risk as the result of another student's mental health challenges.
- Where a student has been complying with mental health treatment, yet behavior is escalating, it is imperative to create a safety plan and evaluate duties to warn/make safe.
- Section 40, as part of a Restatement, can be adopted by legislatures or courts. Now that CA has taken the lead other courts are likely to follow.

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REGENTS OF UNIV. OF CALIFORNIA v. SUPERIOR COURT OF L.A. COUNTY, KATHERINE ROSEN, REAL PARTY IN INTEREST, 413 P.3D 656 (CAL. 2018).

BIT Standards

- Institutions should have BITs to collect and assess information about at-risk students.
  - **Standard 1. Define BIT:** Behavioral Intervention Teams are small groups of school officials who meet regularly to collect and review concerning information about at-risk community members and develop intervention plans to assist them.
  - **Standard 2. Prevention vs. Threat Assessment:** Schools have an integrated team that addresses early intervention cases as well as threat assessment cases.

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REGENTS OF UNIV. OF CALIFORNIA v. SUPERIOR COURT OF L.A. COUNTY, KATHERINE ROSEN, REAL PARTY IN INTEREST, 413 P.3D 656 (CAL. 2018).

BIT Standards

- Where students are seeking care but their behavior is continuing or escalating, BITs should conduct a threat and violence assessment. Case management should be employed in low risk cases.
  - **Standard 12. Interventions:** A team clearly defines its actions and interventions for each risk level associated with the objective risk rubric they have in place for their team.
  - **Standard 13. Case Management:** Teams invest in case management as a process, and often a position, that provides flexible, need-based support for students to overcome challenges.
  - **Standard 17. Psychological, Threat and Violence Risk Assessments:** BITs conduct threat and violence risk assessment as part of their overall approach to prevention and intervention.

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TITLE IX – OFF-CAMPUS JURISDICTION

Farmer v. Kansas State University

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FARMER v. KANSAS STATE UNIVERSITY,

918 F.3D 1094 (10TH CIR. 2019).

Facts

- Two female students sued KSU alleging that the institution was deliberately indifferent 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.

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FARMER v. KANSAS STATE UNIVERSITY,
918 F.3D 1094 (10TH CIR. 2019).

Facts

- KSU would not investigate off-campus conduct.
- 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.

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FARMER v. KANSAS STATE UNIVERSITY,
918 F.3D 1094 (10TH CIR. 2019).

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.

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FARMER v. KANSAS STATE UNIVERSITY,
918 F.3D 1094 (10TH CIR. 2019).

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 from the assaults.
- Even if an institution cannot address off-campus conduct under its polices, 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."

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TITLE IX – "VULNERABLE TO FURTHER HARASSMENT"

Kollaritsch v. Michigan State University

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KOLLARITSCH v. MICHIGAN STATE UNIVERSITY, 944 F.3D 613 (6TH CIR. 2019).

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.

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KOLLARITSCH v. MICHIGAN STATE UNIVERSITY, 944 F.3D 613 (6TH CIR. 2019).

Facts

- 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.

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KOLLARITSCH v. MICHIGAN STATE UNIVERSITY, 944 F.3D 613 (6TH CIR. 2019).

Facts

- 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.

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KOLLARITSCH v. MICHIGAN STATE UNIVERSITY, 944 F.3D 613 (6TH CIR. 2019).

Decision

- The Sixth Circuit analogized 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.

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KOLLARITSCH v. MICHIGAN STATE UNIVERSITY, 944 F.3D 613 (6TH CIR. 2019).

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 school's 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.

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KOLLARITSCH v. MICHIGAN STATE UNIVERSITY, 944 F.3D 613 (6TH CIR. 2019).

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.

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KOLLARITSCH v. MICHIGAN STATE UNIVERSITY, 944 F.3D 613 (6TH CIR. 2019).

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.

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TITLE IX – "PRE-ASSAULT" CLAIM

Karasek v. University of California

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KARASEK v. UNIV. OF CALIFORNIA,

NO. 18-15841, 2020 WL 486786 (9TH CIR. JAN. 30, 2020).

Facts

- Three women alleged that they were sexually assaulted while students at UC-Berkeley in 2012.
- Two of the women reported that another student was their assailant; the third woman reported that she was assaulted by a male who was an occasional guest lecturer on campus.
- Each student reported to the University; the responses by the University varied, but included:
  - Lack of communication with reporting parties.
  - Delays.
  - Lengthy processes.

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KARASEK v. UNIV. OF CALIFORNIA,

NO. 18-15841, 2020 WL 486786 (9TH CIR. JAN. 30, 2020).

Facts

- The women filed suit under Title IX for the handling of their individual claims under two theories:
  - The response to their reports was deliberately indifferent.
  - The University's *policy of indifference* to reports of sexual misconduct created a sexually hostile environment and heighted the risk that they would be sexually assaulted (a "pre-assault" claim).
- The District Court dismissed and granted summary judgment on the majority of the claims.
- The women appealed to the Ninth Circuit.

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KARASEK v. UNIV. OF CALIFORNIA,

NO. 18-15841, 2020 WL 486786 (9TH CIR. JAN. 30, 2020).

Holding

The Ninth Circuit:

- Affirmed the District Court's ruing as to the University's response to the individual women's claims, finding that although the University's actions were problematic, the University was not deliberately indifferent in its response.

- Vacated the District Court's ruling as to the "pre-assault" claim.
  - Referred to a 2014 CA State Auditor report of UC-Berkeley's TIX processes.
  - Relied on the Tenth Circuit's 2007 ruling in *Simpson v. University of Colorado-Boulder.*

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KARASEK v. UNIV. OF CALIFORNIA,

NO. 18-15841, 2020 WL 486786 (9TH CIR. JAN. 30, 2020).

Holding

- A pre-assault claim survives a motion to dismiss if the plaintiff plausibly alleges that:
  - A school maintained a policy of deliberate indifference to reports of sexual misconduct
  - which created a heightened risk of sexual harassment
  - in a context subject to the school's control, and
  - the plaintiff was harassed as a result.

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KARASEK v. UNIV. OF CALIFORNIA,

NO. 18-15841, 2020 WL 486786 (9TH CIR. JAN. 30, 2020).

Takeaways

- The court was deferential regarding the reasonableness of the University's action taken in response to the individual claims.
- The court was more critical regarding the widespread use of an Early Resolution Process for reports and lack of prevention education, as was noted in the State Auditor's report.
- This ruling marks a significant expansion of *Simpson* "pre-assault" liability.
- Higher educational institutions in the Ninth Circuit may be open to legal challenge regarding the effectiveness of their policies.
- Implications for "special admits."

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DUE PROCESS

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TITLE IX

Doe v. Allee

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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 hands 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.

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

Facts

- USC began an investigation into Roe's original allegations and added the additional encounter Doe reported in his interview.
- Doe suggested that Roe fabricated the allegations so she wouldn't be fired as an athletic trainer. The investigator did not pursue this theory 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.

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

Holding

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

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

Takeaways

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

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TITLE IX – JURISDICTION & DUE PROCESS

Doe v. University of Virginia

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DOE v. UNIV. OF VIRGINIA,
NO. 3:19CV00038, 2019 WL 2718496 (W.D. VA. JUNE 28, 2019).

Facts
- In April 2017, John Doe met Jane Roe at a private, off-campus commercial establishment in Charlottesville.
- Roe later went with Doe to his off-campus apartment where they had sex. Roe was not a student or employee at UVA and was not involved in any of UVA's programs or activities.
- Roe later reported to local law enforcement that she did not consent to sex with Doe and that he sexually assaulted her.
- In August 2018, a local law enforcement officer contacted UVA's Title IX Coordinator to report that a criminal investigation had been ongoing for more than a year. Until this time, UVA had no knowledge of the alleged sexual assault.
- UVA took this information and initiated an investigation into whether or not Doe violated UVA's Sexual Misconduct Policy.

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DOE v. UNIV. OF VIRGINIA,
NO. 3:19CV00038, 2019 WL 2718496 (W.D. VA. JUNE 28, 2019).

Facts
- Between August and October, the investigator interviewed four people including Roe. In December, the investigator issued a report that summarized the information the investigator gathered during the investigation.
- By this time, Doe was in his final year at UVA and scheduled to complete his degree requirements and graduate in May. Doe filed a response to the report and submitted additional evidence.
- In May, more than four months after the draft investigation report was issued, the Title IX Coordinator informed Doe the university would be holding his degree "pending final resolution of the current Title IX matter".
- Doe could participate in all ceremonies – including commencement – but was not provided an opportunity to be heard before UVA decided to hold his degree.

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DOE v. UNIV. OF VIRGINIA,
NO. 3:19CV00038, 2019 WL 2718496 (W.D. VA. JUNE 28, 2019).

Facts

- By this time, Doe had accepted a job and planned to start work shortly after graduation.
- In late May, the investigator issued a final report. Because it was confirmed that Roe was not affiliated with UVA and was not seeking to participate in any UVA program or activity, "the investigation focused solely on whether Doe was responsible for sexual assault in violation of the Title IX Policy." A university hearing panel was scheduled for July.
- Doe submitted a response to the final report and objected to UVA's jurisdiction over the matter.
- Doe sued alleging procedural and substantive due process violations. Doe also filed for a Temporary Restraining Order (TRO) and preliminary injunction to prevent the July hearing and force UVA to confer his degree.

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DOE v. UNIV. OF VIRGINIA,
NO. 3:19CV00038, 2019 WL 2718496 (W.D. VA. JUNE 28, 2019).

Decision

- For a preliminary injunction, Doe must show he is likely to succeed on at least one claim.
- The Court said Doe demonstrated that he was likely to succeed on his due process claim. Based on UVA's policies and procedures, Doe raised a valid argument that UVA does not have authority to discipline him for the alleged incident with Roe.
- The "balance of factors relevant to the inquiry" also weighed in Doe's favor. Doe had a substantial private interest at stake because of the long-term impact on his personal life, education, and employment opportunities.
- Because the procedures did not allow Doe a hearing on the jurisdiction issue, the risk of "erroneous deprivation" of his reputation, employment, and education was significant.

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DOE v. UNIV. OF VIRGINIA,
NO. 3:19CV00038, 2019 WL 2718496 (W.D. VA. JUNE 28, 2019).

Decision

- The Court also concluded that Doe was likely to suffer irreparable harm without injunctive relief (noting that when constitutional rights are at stake, irreparable harm is presumed).
- The Court decided the "balance of equities" favors Doe and protecting his due process rights is in the public interest.
- Finally, the Court noted that any prejudice or inconvenience to Roe is outweighed by the implications for Doe.

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DOE v. UNIV. OF VIRGINIA,
NO. 3:19CV00038, 2019 WL 2718496 (W.D. VA. JUNE 28, 2019).

Takeaways

- When considering due process protection, institutions should have procedures in place at each stage where a student may suffer a substantial deprivation (i.e. holding a degree, removal from campus, etc.).
- When dealing with potential policy violations suffered by a third party, there should be some connection between the conduct and campus (i.e. Adverse effects on campus, a third party who may be seeking to participate in a campus activity or program, etc.).
- Timeliness of investigations is key.

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DUE PROCESS

Doe v. University of Dayton

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DOE v. UNIV. OF DAYTON,
766 FED.APPX. 275 (6TH CIR. 2019).

Facts

- Roe reported to University Police that Doe sexually assaulted her.
- 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.

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DOE v. UNIV. OF DAYTON,
766 FED.APPX. 275 (6TH CIR. 2019).

Facts

- Doe was found responsible for 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.

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DOE v. UNIV. OF DAYTON,
766 FED.APPX. 275 (6TH CIR. 2019).

Facts

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

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DOE v. UNIV. OF DAYTON,
766 FED.APPX. 275 (6TH CIR. 2019).

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 is **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.

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DOE v. UNIV. OF DAYTON,
766 FED.APPX. 275 (6TH CIR. 2019).

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.

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DECEPTION BEHAVIOR POLICY PRE-EMPTION CLAUSE

Doe v. Belmont University

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DOE v. BELMONT UNIVERSITY,
367 F.SUPP.3D 732 (M.D. TENN. 2019).

Facts

- Student S. reported that John Doe engaged in unwelcome sexual contact with her; both were Belmont students.
- During the Title IX investigation, John Doe lied to investigators about the extent of physical contact he and Student S. had, aside from the allegations of sexual misconduct. Student S. presented text messages that corroborated her statements on this issue.
- The Title IX Coordinator consulted with chief IT officers regarding the texts.
- Doe was found not responsible for sexual misconduct.
- Belmont had a Deceptive Behavior Policy that prohibited students from making false or misleading statements to university officials, and a "preemption clause" that empowered the Title IX process to subsume all other alleged violations including those that might be committed in the investigation process.

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DOE v. BELMONT UNIVERSITY,
367 F.SUPP.3D 732 (M.D. TENN. 2019).

Facts

- The Title IX Coordinator determined that Doe was purposefully untruthful during the investigation in violation of the Deceptive Behavior Policy.
- Doe was suspended for one semester for violating the Deceptive Behavior Policy and for a related violation of the residence hall visitation policy.
- Doe appealed the sanctions, which were upheld.
- Doe brought suit alleging that Belmont retaliated against him, in violation of Title IX.

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DOE v. BELMONT UNIVERSITY,
367 F.SUPP. 3D 732 (M.D. TENN. 2019).

Holding

On Defendant's motion for summary judgment, the District Court:

- Awarded summary judgment to the Defendants on Doe's Title IX retaliation claim, finding that Doe did not engage in protected activity when he participated as a respondent in a Title IX investigation:

> "[I]n stark contrast to merely defending oneself against charges as a participant in a sexual misconduct investigation, the 'protected activity' that forms the basis of a Title IX retaliation claim is actively complaining of or opposing alleged discrimination on the basis of sex under Title IX . . . [otherwise] every respondent in a Title IX investigation would have a baked-in retaliation claim simply because they resisted an allegation of sexual misconduct. Indeed, merely defending an allegation of misconduct is as different from actively opposing or complaining of unlawful discrimination as day is to night; the former involves affirming that one has not committed wrongdoing, while the latter rests on the notion, real or perceived, that one has been on the receiving end of or has opposed wrongdoing in the form of illegal discrimination."

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DOE v. BELMONT UNIVERSITY,
367 F.SUPP.3D 732 (M.D. TENN. 2019).

Takeaways

- Institutions are wise to include a written policy akin to the Deceptive Behavior Policy in place at Belmont University, and ensure that students are aware of this policy.
- Consulting with colleagues in IT can be an important step in verifying submitted evidence.
- A preemption clause like the one in place here is key.

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DUE PROCESS PRIVATE COLLEGE

Doe v. Rhodes College

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DOE v. RHODES COLLEGE,
NO. 2:19-CV-02336-JTF-TMP (W.D. TENN. JUNE 14, 2019) .

Facts

- C.S. attended a 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 where she had a forensic exam and gave a 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.

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DOE v. RHODES COLLEGE,
NO. 2:19-CV-02336-JTF-TMP (W.D. TENN. JUNE 14, 2019).

Facts

- Rhodes held a hearing to determine responsibility.
- Doe and Z.W. attended the hearing but C.S. did not.
- Without advanced notice, the 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 sought a temporary restraining order sought to prevent Rhodes from enforcing expulsion.

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DOE v. RHODES COLLEGE,
NO. 2:19-CV-02336-JTF-TMP (W.D. TENN. JUNE 14, 2019) .

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.

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DOE v. RHODES COLLEGE,
NO. 2:19-CV-02336-JTF-TMP (W.D. TENN. JUNE 14, 2019).

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.

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TITLE IX: NOTICE

Hall v. Millersville University

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HALL v. MILLERSVILLE UNIVERSITY,

400 F.SUPP.3D 252 (E.D. PA. 2019).

Facts

- In October 2014, her RA, campus police, and friends responded to an apparent act of domestic violence in first-year student Karlie Hall's room by her non-student boyfriend.
- Next, a friend's mother alerted campus authorities about domestic violence concerns, but no investigation ensued due to Hall's lack of participation.
- In February 2015, Hall and the boyfriend return from fraternity party. There were sounds of furniture moving, a "loud bump" that shook walls, and screams for help.
- The RA knocked on her door, the sound ceased, and RA did not investigate further.
- Hall was murdered by strangulation, multiple traumatic injuries, and possibly sexually assaulted.

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HALL v. MILLERSVILLE UNIVERSITY,
400 F.SUPP.3D 252 (E.D. PA. 2019).

Key Issues

- The fraternity provided alcohol to partygoers in direct contravention of a reinstatement agreement after the fraternity had been suspended
  - Foreseeability and proximate cause
- A fraternity brother witnessed Hall's boyfriend yelling at Hall, pointing his finger in her face, and potentially shoving her
  - Foreseeability and duty to protect
- Millersville was on notice to potential harassment, triggering a duty under Title IX
  - October 2014 incident
  - Mother's phone call to authorities

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HALL v. MILLERSVILLE UNIVERSITY,
400 F.SUPP.3D 252 (E.D. PA. 2019).

Key Issues

- Millersville was granted summary judgment.
- The court rejected proximate cause argument – contributing to intoxication not reasonable predictor of murder
- The court rejected duty to protect argument – may have covered Hall while at party, but does not extend to residence hall
- The court determined the boyfriend was not covered under Millersville's policy for nonstudents
  - Control of harasser under *Davis* jurisdiction nexus includes a visiting athlete or speaker, or a third party somehow analogous to those groups
- The court noted Millersville WAS on notice and would be deliberately indifferent if the boyfriend was covered by policy

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HALL v. MILLERSVILLE UNIVERSITY,
400 F.SUPP.3D 252 (2019).

Takeaways

- Millersville technically absolved but issues highlighted
- Representatives should report notice relating to *all* persons – even student guests not falling under institutional policy
- Institutions can bridge gap in law enforcement – no complainant needed when there is a perceivable threat
- "Millersville's indifference" – MUPD, counseling did not inform Title IX Coordinator or other administrators
- Persons not covered by policy deserve no process – trespass orders can be unilateral with very few exceptions
- No surprises at the hearing – provide all evidence and opportunity to prepare *before* the hearing

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QUESTIONS?

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CAMPUSES AND THE COURTS: CAMPUS HEARINGS AND CROSS EXAMINATION

February 2020 | Clearwater Beach, Florida

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DUE PROCESS – LIBERTY INTEREST

Doe v. Purdue University

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DOE v. PURDUE UNIVERSITY,

928 F.3D 652 (7TH CIR. 2019).

Facts

- Doe and Roe were Navy ROTC students and dating each other.
- 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 which Doe was excluded from ROTC as an interim measure.
- Investigators submitted a report to a three-person panel, who 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.

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DOE v. PURDUE UNIVERSITY,
928 F.3D 652 (7TH CIR. 2019).

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.

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DOE v. PURDUE UNIVERSITY,
928 F.3D 652 (7TH CIR. 2019).

Facts

- 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.
- 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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DOE v. PURDUE UNIVERSITY,
928 F.3D 652 (7TH CIR. 2019).

Holding

The Seventh Circuit reversed and remanded, finding that:

- Doe adequately alleged violations of §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:
  - inflicted reputational damage and
  - 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.

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DOE v. PURDUE UNIVERSITY,
928 F.3D 652 (7TH CIR. 2019).

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

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DOE v. PURDUE UNIVERSITY,
928 F.3D 652 (7TH CIR. 2019).

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.

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DOE v. PURDUE UNIVERSITY,
928 F.3D 652 (7TH CIR. 2019).

Holding

- 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.
- 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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DOE v. PURDUE UNIVERSITY,
928 F.3D 652 (7TH CIR. 2019).

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 should be assessed by the decision-makers hearing directly from the parties with a clear rationale provided.

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DOE v. PURDUE UNIVERSITY,
928 F.3D 652 (7TH CIR. 2019).

Takeaways

- 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.

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DUE PROCESS – CROSS EXAMINATION

Doe v. Baum

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DOE v. BAUM,
903 F.3D 575 (6TH CIR. 2018).

Facts

- Jane Roe accused John Doe of sexual misconduct, claiming she was incapacitated during the interaction.
- The University of Michigan investigated over the course of 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."

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DOE v. BAUM,
903 F.3D 575 (6TH CIR. 2018).

Facts

- The administration followed the investigator's recommendation, found for Doe, and closed the case.
- Roe appealed.
- 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.

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DOE v. BAUM,
903 F.3D 575 (6TH CIR. 2018).

Facts

- 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 Title IX erroneous outcome claims survived.

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DOE v. BAUM,
903 F.3D 575 (6TH CIR. 2018).

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."

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DOE v. BAUM,
903 F.3D 575 (6TH CIR. 2018).

Decision

- Due Process
  - "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."

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DOE v. BAUM,
903 F.3D 575 (6TH CIR. 2018).

Decision

- Title IX erroneous outcome
  - The due process issues informed their finding.
  - The court cited significant public scrutiny and fear of losing federal funding due to an OCR investigation in assessing whether U. of Michigan's policy and procedure discriminated against female reporting parties.

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DOE v. BAUM,
903 F.3D 575 (6TH CIR. 2018).

Decision

- Although the court recognized that external pressure alone is not enough to show bias, it could be possible here when:
  - Appellate Board dismissed all the evidence provided by male witnesses.
  - Male witnesses were all on Doe's side, and 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.

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DOE v. BAUM,
903 F.3D 575 (6TH CIR. 2018).

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.

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CONTRACTUAL OBLIGATIONS - BASIC FAIRNESS

Doe v. Trustees of Boston College

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

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.

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

Facts

- 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.
- The board served as both investigator and adjudicator.
- Hughes informed JK he was required to appear at Doe's hearing as a witness and told him he was not being charged to put him at ease.

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

Facts

- 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.

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

Facts

- 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.

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

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 as stated in its Code of Conduct.
  - The informal communications among the Deans and the hearing board supported the court's decision.

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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, have a process that is thorough, adequate, reliable and impartial.

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

Takeaways

- 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 to sue an institution for Title IX related matters in addition to a private cause of action under Title IX (ex: contract, defamation, negligence, etc.).

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DUE PROCESS – GENDER BIAS

Doe v. Syracuse University

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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.

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

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

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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.

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

- Doe's Allegations Regarding the Investigation
  - 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.

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

- 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.

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

- Doe's Allegations Regarding the Investigation
  - 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.

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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 school 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.

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

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

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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, seemed to be influenced by "trauma-informed investigation and adjudication processes."

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

- 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.

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DIFFERENTIAL TREATMENT

Doe v. Princeton University

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DOE v. PRINCETON UNIVERSITY,
NO. 18-1477, 2019 WL 5491561 (3D. CIR. 2019).

Facts

- John Doe was a graduate student at Princeton. He met an undergraduate student during spring term and alleges that the undergraduate student sexually assaulted him over the summer and again when both returned to school in the fall.
- After the second sexual assault, Doe alleges the undergraduate's friends harassed him by calling him a gay slur and a liar.
- Doe filed a complaint against the undergraduate student and the undergraduate student filed a cross-complaint.

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DOE v. PRINCETON UNIVERSITY,
NO. 18-1477, 2019 WL 5491561 (3D. CIR. 2019).

Facts

- In accordance with its policy, Princeton assembled a panel to investigate Doe's complaint and the undergraduate student's cross-complaint. The panel found both Doe and the undergraduate student "not responsible" for violating university policy.
- Doe's appeal to a new panel was denied. Doe also alleges that the panel gathered information about Doe's sexual history, failed to interview all of Doe's witnesses, and let the undergraduate student present new evidence during deliberations.

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DOE v. PRINCETON UNIVERSITY,
NO. 18-1477, 2019 WL 5491561 (3D. CIR. 2019).

Facts

- During the investigation, the panel banned Doe from the religious community center that both Doe and the undergraduate student attended. The panel also denied Doe's request for a no-contact directive against the undergraduate student's friends.
- Doe alleges the trauma associated with the assault and aftermath had a negative impact on his grades.
- Doe also alleges that he felt depressed and attempted suicide. Doe says he contacted clergy and other Princeton administrators about his suicide attempt, and no one took any action.

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DOE v. PRINCETON UNIVERSITY,
NO. 18-1477, 2019 WL 5491561 (3D. CIR. 2019).

Facts

- During his last semester, Doe withdrew because he could not complete his coursework. He was allowed to reenroll the following semester subject to his maintaining at least a B average.
- Doe could not maintain the GPA and was permanently withdrawn from Princeton. Doe claims another male student was allowed to graduate without completing all degree requirements.
- Doe sued Princeton for violating his Title IX rights among other claims. Doe's lawsuit was dismissed by the district court and Doe appealed to the Third Circuit.

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DOE v. PRINCETON UNIVERSITY,
NO. 18-1477, 2019 WL 5491561 (3D. CIR. 2019).

Decision

- Doe was unsuccessful on appeal. Doe did not show Princeton treated him differently because of his sex. The Third Circuit characterized Doe's assertions as generalized and conclusory. The Court also noted that Doe did not allege that the disciplinary process is applied differently as to female students.
- Although Doe alleges Princeton has a history of mishandling sexual assault complaints, he did not allege that the mishandling of those complaints involved anti-male bias.
- The Court noted Doe's allegation that Princeton was deliberately indifferent fails because Princeton investigated and adjudicated his claims.

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DOE v. PRINCETON UNIVERSITY,
NO. 18-1477, 2019 WL 5491561 (3D. CIR. 2019).

Decision

- According to the Third Circuit, Princeton's response was not "clearly unreasonable based on the known circumstances."
- Doe claimed that Princeton retaliated against him because he filed a complaint against the undergraduate student. Doe's claim failed, however, because Doe did not show that he suffered adverse action because he participated in protected activity (filing the complaint).

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DOE v. PRINCETON UNIVERSITY,
NO. 18-1477, 2019 WL 5491561 (3D. CIR. 2019).

Takeaways

- It is important to remember interim measures that are not identically applied to both parties can still be considered to be "reasonable." However, always document those measures as well as the rationale undergirding them.
- There may be times when academic policies and faculty-imposed rules and requirements may impede resolution of a sexual misconduct case. This presents an opportunity to engage faculty to work collaboratively on student issues.

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DUE PROCESS – OPPORTUNITY TO REVIEW

Doe v. University of Arkansas-Fayetteville

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DOE v. UNIV. OF ARKANSAS-FAYETTEVILLE, NO. 5:18-CV-05182, 2019 WL 1493701 (W.D. ARK. APR. 3, 2019).

Facts

- John Doe and Jane Roe were students at the University of Arkansas ("UA"). During the fall semester, Doe and Roe exchanged messages over social media.
- In October 2017, Roe attended a Halloween party where she began a text conversation with Doe. They decided to "hang out." Doe took an Uber back to his apartment and told Roe he would be home by 12:15 a.m.
- Roe asked Doe for his address so she could request an Uber. At 12:16 a.m., Roe took an Uber to Doe's apartment.

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DOE v. UNIV. OF ARKANSAS-FAYETTEVILLE, NO. 5:18-CV-05182, 2019 WL 1493701 (W.D. ARK. APR. 3, 2019).

Facts

- When Roe arrived at Doe's apartment, she suggested they go into his room and talk. Doe alleges Roe turned off the lights and began kissing him.
- Doe and Roe then had sex. Doe claims that Roe confirmed for him several times that she wanted to have sex. Doe also maintains that Roe confirmed (during the investigation) that she was not drunk when she texted him and Roe did not drink at Doe's apartment.
- Doe drove Roe home and she gave him directions to her apartment on the drive.

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DOE v. UNIV. OF ARKANSAS-FAYETTEVILLE, NO. 5:18-CV-05182, 2019 WL 1493701 (W.D. ARK. APR. 3, 2019).

Facts

- A few hours later, Roe's roommate's boyfriend found Roe bleeding from self inflicted wounds. Roe told a 911 operator that she was not intoxicated and was cutting because of a bad breakup.
- The following week, Roe filed a sexual misconduct complaint against Doe. After an investigation, UA's Title IX coordinator found Doe not responsible for sexually assaulting Roe.
- Roe appealed challenging the investigative finding that she was not intoxicated. The case went to a UA hearing panel, which found Doe responsible for sexual misconduct.

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DOE v. UNIV. OF ARKANSAS-FAYETTEVILLE, NO. 5:18-CV-05182, 2019 WL 1493701 (W.D. ARK. APR. 3, 2019).

Facts

- Doe filed a lawsuit against UA, which filed a motion to dismiss.
- Doe accused UA of violating his procedural due process rights and the requirements of Title IX because of an "erroneous outcome" and deliberate indifference to the inequitable resolution of Doe's case.

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DOE v. UNIV. OF ARKANSAS-FAYETTEVILLE, NO. 5:18-CV-05182, 2019 WL 1493701 (W.D. ARK. APR. 3, 2019).

Decision

- The Court ruled that Doe received sufficient process and denied his due process claim. From initial allegation through Roe's appeal hearing, the case featured the same incident, the same parties and the same UA policy. The Court noted UA provided Doe adequate notice throughout the proceedings.
- The Court ruled that allowing a second opportunity to present evidence to a neutral fact finder satisfies procedural due process. Both Doe and Roe had the same opportunity to present new evidence during the appeal. This, according to the Court, increases the possibility of a correct determination and protects the parties' right to a meaningful opportunity to be heard.

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DOE v. UNIV. OF ARKANSAS-FAYETTEVILLE, NO. 5:18-CV-05182, 2019 WL 1493701 (W.D. ARK. APR. 3, 2019).

Decision

- Doe took issue with UA's single investigator model because he could have more fully developed the record with a live hearing and cross-examination.
- The Court noted that Doe was given multiple opportunities to review the evidence collected and submit statements. He was able to tell his story and build his defense before the record was given to the panel. This satisfied due process.
- Doe's Title IX claim failed because, according to the court, Doe's allegations about the hearing panel's outcome did not sufficiently allege doubt as to the accuracy of the outcome. The Court noted Doe failed to raise a plausible claim for erroneous outcome.
- This decision has been appealed to the Eighth Circuit.

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DOE v. UNIV. OF ARKANSAS-FAYETTEVILLE, NO. 5:18-CV-05182, 2019 WL 1493701 (W.D. ARK. APR. 3, 2019).

Takeaways

- The common elements involved in the single-investigator model can be sufficient to satisfy due process; however, they may be contrary to some state court decisions as well as the proposed Title IX regulations.
- This includes the practice of letting the parties review and comment on the evidence and information gathered by the investigator. In this court's view, this serves the same purpose as live cross-examination.
- In this case, the investigator and the hearing panel reached opposing decisions that turned on the same facts. The hearing panel was provided with new evidence; however, the facts, parties, and policy violations remained the same.

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DOE v. UNIV. OF ARKANSAS-FAYETTEVILLE, NO. 5:18-CV-05182, 2019 WL 1493701 (W.D. ARK. APR. 3, 2019).

Takeaways

- Hearing panel credibility determinations are upheld when the process is supported by a robust investigation that provides opportunities for the parties to review and question the evidence that will be used. For this court, live cross examination is not necessary to make a valid credibility determination.
- Preponderance of the evidence remains a viable standard of proof for campus proceedings. If a case involving similar facts was filed in civil court, it would be decided by a preponderance. This further supports the notion that a preponderance is the appropriate standard in campus proceedings.

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CROSS EXAMINATION

Messeri v. University of Colorado, Boulder

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MESSERI v. UNIV. OF COLORADO, BOULDER, NO. 18-CV-2658-WJM-SKC, 2019 WL 4597875 (D. COLO. SEPT. 23, 2019).

Facts

- In 2016, during his freshman year at CU, Messeri and his roommate W2 met Jane Doe and her friend W1 on campus. Doe and W1 were not students at CU. Doe and W1 agreed to go to Messeri and W2's dorm room.
- Messeri says he asked Doe to perform oral sex on him in a bathroom. Doe agreed and began performing oral sex. After about a minute, Doe stopped and told Messeri she did not feel well. Doe then rejoined W1 and they continued to hang out in the building for an hour or so, including socializing with Messeri and W2.

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MESSERI v. UNIV. OF COLORADO, BOULDER, NO. 18-CV-2658-WJM-SKC, 2019 WL 4597875 (D. COLO. SEPT. 23, 2019).

Facts

- Two days later, Doe alleged to campus police (CUPD) that Messeri had forced her to perform oral sex on him.
- That day, Messeri was banned from the residence halls and relocated.
- Two CU investigators were appointed to determine if Messeri violated CU's sexual misconduct policy. The investigators interviewed W1 and W2 but did not interview Doe or Messeri.

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MESSERI v. UNIV. OF COLORADO, BOULDER, NO. 18-CV-2658-WJM-SKC, 2019 WL 4597875 (D. COLO. SEPT. 23, 2019).

Facts

- The investigators found that the information Doe provided to CUPD during three law enforcement interviews was consistent.
- The investigators found W1 more credible than W2, despite some seemingly inconsistent statements by W1.
- Based on the investigation, Messeri was found responsible for non-consensual sexual intercourse. The finding was reviewed and approved by a review committee, but there was no hearing, no opportunity for Messeri to submit questions before the finding, and no opportunity for Messeri to review statements until the investigation was completed.

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MESSERI v. UNIV. OF COLORADO, BOULDER, NO. 18-CV-2658-WJM-SKC, 2019 WL 4597875 (D. COLO. SEPT. 23, 2019).

Facts

- The process allowed the TIXC to reopen cases in limited circumstances, but that did not occur here.
- The TIXC was solely responsible for sanctioning Messeri. Messeri alleges the TIXC pressured him to admit wrongdoing even though a parallel criminal investigation was active.
- Messeri continued to deny wrongdoing; he was ultimately expelled and a notation was added to his transcript. There was no opportunity to appeal the finding or sanction.

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MESSERI v. UNIV. OF COLORADO, BOULDER, NO. 18-CV-2658-WJM-SKC, 2019 WL 4597875 (D. COLO. SEPT. 23, 2019).

Facts

- Messeri filed a lawsuit against CU and eight CU officials, alleging procedural and substantive due process violations and Title IX violations. Among other things, Messeri alleged that CU treated him more harshly than it would have treated a female accused of sexual assault, that CU "coordinated" with CUPD and the local DA's office, and that he was denied due process.

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MESSERI v. UNIV. OF COLORADO, BOULDER, NO. 18-CV-2658-WJM-SKC, 2019 WL 4597875 (D. COLO. SEPT. 23, 2019).

Decision

- CU and the named officials filed a motion to dismiss. The Court partially granted the motion and dismissed the claims against the named individuals.
- The Court analyzed Messeri's procedural and substantive due process claims in depth, distinguishing procedural due process from substantive due process.
- The Court noted that Messeri received clear notice of CU's resolution process and procedures upon his acceptance.
- Ultimately the Court concluded that Messeri failed to state to a claim that supported due process violations.

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MESSERI v. UNIV. OF COLORADO, BOULDER, NO. 18-CV-2658-WJM-SKC, 2019 WL 4597875 (D. COLO. SEPT. 23, 2019).

Decision

- The Court found that Messeri's claims that CU found more men responsible for sexual misconduct than women, used trauma-informed investigation practices, and operated in a climate of heightened criticism of handling of sexual assault reports were not enough to support a claim that CU violated Messeri's Title IX rights.

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MESSERI v. UNIV. OF COLORADO, BOULDER, NO. 18-CV-2658-WJM-SKC, 2019 WL 4597875 (D. COLO. SEPT. 23, 2019).

Decision

- The Court dismissed Messeri's claims against the individuals named in the suit for reasons substantially similar to those used when addressing the allegations against CU. The Court also supported the named individuals assertions regarding qualified immunity because Messeri did not show the individuals violated a clearly established constitutional right.
- Although the Court upheld CU's process in this case, it noted that "the opportunity for at least some form of cross-examination of the complainant and supporting witnesses" is increasingly recognized as an essential right of procedural due process, particularly where credibility is at issue.

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MESSERI v. UNIV. OF COLORADO, BOULDER, NO. 18-CV-2658-WJM-SKC, 2019 WL 4597875 (D. COLO. SEPT. 23, 2019).

Takeaways

- Colleges and universities should adhere to their published policies and procedures when resolving sexual misconduct allegations.
- Take note of the importance of reviewing polices and procedures annually, and when required due to regulatory changes.
- When a court signals that your process needs revision, take heed.

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QUESTIONS?

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CONTACT INFORMATION

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LEGISLATIVE UPDATE

John Wesley Lowery, Ph.D.

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YOUR FACULTY

John Wesley Lowery, Ph.D.

Professor & Department Chair
Student Affairs in Higher Education
Indiana University of Pennsylvania

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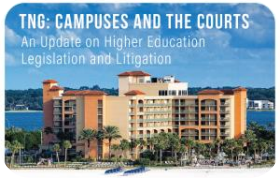

AGENDA

1. Sexual Assault & Title IX
2. First Amendment Issues
3. Clery Act
4. Hazing
5. Beyond the Box

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SEXUAL ASSAULT & TITLE IX

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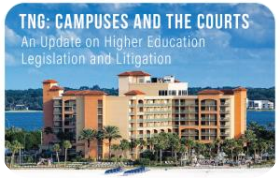

TITLE IX, AND OCR IN THE U.S. DEPARTMENT OF EDUCATION

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GUIDANCE FROM THE OBAMA ADMINISTRATION

Dear Colleague Letter on Sexual Violence

The Dear Colleague Letter builds upon and clarifies the 2001 *Revised Sexual Harassment Guidance* "by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence" (p. 2).

Issued April 4, 2011

Questions and Answers on Title IX and Sexual Violence

A School's Obligation to Respond to Sexual Violence

Students Protected by Title IX

Title IX Procedures Requirements

Responsible Employees

Confidential Reporting

Investigations & Hearings

Released April 29, 2014

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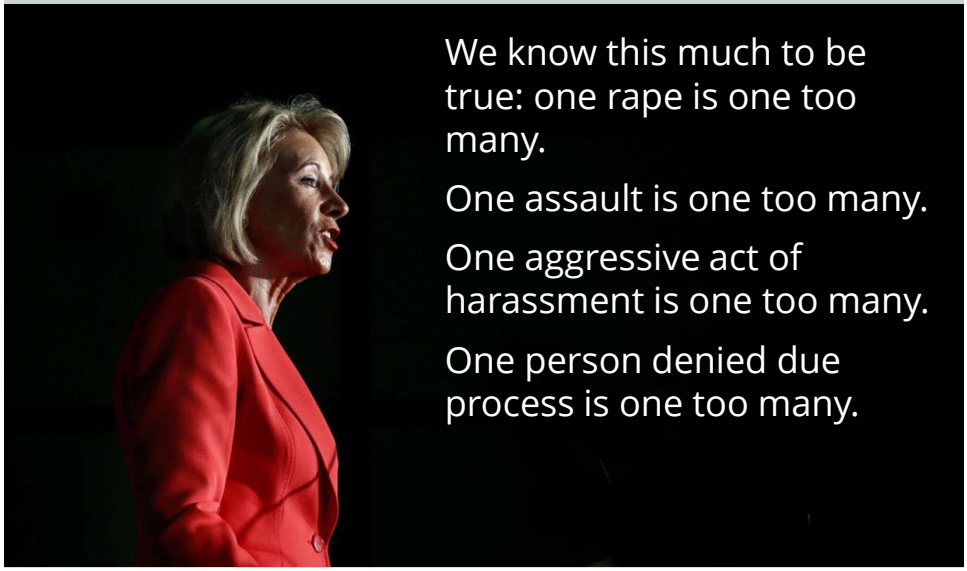
SEC. BETSY DEVOS (SEPT. 7, 2017)



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GUIDANCE FROM THE OBAMA ADMINISTRATION

Dear Colleague Letter on Sexual Violence

- The Dear Colleague Letter builds upon and clarifies the 2001 *Revised Sexual Harassment Guidance* "by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence" (p. 2).
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Questions and Answers on Title IX and Sexual Violence

- A School's Obligation to Respond to Sexual Violence
- Students Protected by Title IX
- Title IX Procedures Requirements
- Responsible Employees
- Confidential Reporting
- Investigations & Hearings
- Released April 29, 2014

WITHDRAWN

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OCR WITHDRAWS GUIDANCE ON SEXUAL VIOLENCE AND ISSUES Q&A ON CAMPUS SEXUAL MISCONDUCT

- "Legal commentators have criticized the 2011 Letter and the 2014 Questions and Answers for placing 'improper pressure upon universities to adopt procedures that do not afford fundamental fairness.'"
- "The 2011 and 2014 guidance documents may have been well-intentioned, but those documents have led to the deprivation of rights for many students—both accused students denied fair process and victims denied an adequate resolution of their complaints."
- "Dear Colleague" letter issued September 22, 2017

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GUIDANCE FROM THE TRUMP ADMINISTRATION

- "Dear Colleague" letter issued September 22, 2017
- Q&A on Campus Sexual Misconduct issued September 2017
- Notice of Proposed Rule Making published on November 29, 2018

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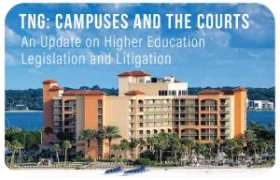

RESOLUTION AGREEMENTS

In light of the rescission of OCR's 2011 Dear Colleague Letter and 2014 Questions & Answers guidance, are existing resolution agreements between OCR and schools still binding?

- **Yes.** Schools enter into voluntary resolution agreements with OCR to address the deficiencies and violations identified during an OCR investigation based on Title IX and its implementing regulations. Existing resolution agreements remain binding upon the schools that voluntarily entered into them. Such agreements are fact specific and do not bind other schools. If a school has questions about an existing resolution agreement, the school may contact the appropriate OCR regional office responsible for the monitoring of its agreement.

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TITLE IX & SEXUAL MISCONDUCT

Under the Obama Administration

Under the Trump Administration

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TITLE IX UNDER BETSY DEVOS

B.B.E.

A.B.E.

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DEFINING SEXUAL HARASSMENT

Sexual harassment means:

(i) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(ii) 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; or

(iii) Sexual assault, as defined in 34 CFR 668.46(a). (NPRM)

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ACTUAL KNOWLEDGE

- A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. (NPRM)
- Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient.... The mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures. (NPRM)

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EDUCATION PROGRAM OR ACTIVITY

- The alleged harassment must involve conduct that occurred within the school's own program or activity because Title IX by its own text applies to discrimination occurring "under any education program or activity" receiving federal funds. **It is important to note that this does not create an artificial bright-line between harassment occurring "on campus" versus "off campus."** Geography does not necessarily determine whether the harassment is under the school's program or activity; rather, situations are fact-specific and schools should look to factors such as whether the harassment occurred at a location or under circumstances where the school owned the premises, exercised oversight, supervision or discipline over the location or
- Background & Summary of the Education Department's Proposed Title IX Regulation participants, or funded, sponsored, promoted or endorsed the event or circumstance where the harassment occurred. •
- Third, the alleged harassment must have been perpetrated against a person "in the United States" (affecting, for example, study abroad programs); this is a necessary condition because the text of the Title IX statute limits protections to "person[s] in the United States."

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INVESTIGATING A FORMAL COMPLAINT

The recipient must investigate the allegations in a formal complaint. If the conduct alleged by the complainant would not constitute sexual harassment as defined in section 106.44(e) even if proved or did not occur within the recipient's program or activity, **the recipient must dismiss the formal complaint with regard to that conduct**. When investigating a formal complaint, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties;

(ii) Provide equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence;

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, and not limit the choice of advisor or presence for either the complainant or respondent in any meeting or grievance proceeding. (NPRM)

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INTERIM ACTIONS: THEN AND NOW

Under the Obama Administration

- Title IX requires a school to protect the complainant and ensure his or her safety as necessary, including taking interim steps before the final outcome of any investigation. The school should take these steps promptly once it has notice of a sexual violence allegation and should provide the complainant with periodic updates on the status of the investigation. If the school determines that the sexual violence occurred, the school must continue to take these steps to protect the complainant and ensure his or her safety, as necessary.

Under the Trump Administration

- It may be appropriate for a school to take interim measures during the investigation of a complaint. In fairly assessing the need for a party to receive interim measures, a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party.

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PROMPT: THEN AND NOW

Under the Obama Administration

- The 60-calendar day timeframe refers to the entire investigation process, which includes conducting the fact-finding investigation, holding a hearing or engaging in another decision-making process to determine whether the alleged sexual violence occurred and created a hostile environment, and determining what actions the school will take to eliminate the hostile environment and prevent its recurrence, including imposing sanctions against the perpetrator and providing remedies for the complainant and school community, as appropriate.

Under the Trump Administration

- Include reasonably prompt timeframes for conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals if the recipient offers an appeal, and a process that allows for the temporary delay of the grievance process or the limited extension of timeframes for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities. (NPRM)

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"EQUITABLE" INVESTIGATIONS: THEN AND NOW

Under the Obama Administration

- Furthermore, neither Title IX nor the DCL specifies who should conduct the investigation. It could be the Title IX coordinator, provided there are no conflicts of interest, but it does not have to be.

Under the Trump Administration

- Require that any individual designated by a recipient as a coordinator, investigator, or decision-maker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. (NPRM)

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"EQUITABLE" INVESTIGATIONS: THEN AND NOW

Under the Obama Administration

- The training should include information on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence; the proper standard of review for sexual violence complaints (preponderance of the evidence); information on consent and the role drugs or alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual violence; the need for remedial actions for the perpetrator, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; how to conduct investigations; confidentiality; the effects of trauma, including neurobiological change; and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.

Under the Trump Administration

- A recipient ensure that coordinators, investigators, and decision-makers receive training on the definition of sexual harassment and how to conduct an investigation and grievance process – including hearings, if applicable – that protect the safety of students, ensure due process protections for all parties, and promote accountability; and that any materials used to train coordinators, investigators, or decision-makers not rely on sex stereotypes and instead promote impartial investigations and adjudications of sexual harassment. (NPRM)

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"EQUITABLE" INVESTIGATIONS: THEN AND NOW

Under the Obama Administration

- The training should include information on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence; the proper standard of review for sexual violence complaints (preponderance of the evidence); information on consent and the role drugs or alcohol can play in the ability to consent; the importance of accountability for individuals found to have committed sexual violence; the need for remedial actions for the perpetrator, complainant, and school community; how to determine credibility; how to evaluate evidence and weigh it in an impartial manner; how to conduct investigations; confidentiality; the effects of trauma, including neurobiological change; and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.

Under the Trump Administration

- Any materials used to train coordinators, investigators, or decision-makers may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment (NPRM).

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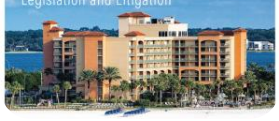

"EQUITABLE" INVESTIGATIONS: THEN AND NOW

(i) Treat complainants and respondents equitably. An equitable resolution for a complainant must include remedies where a finding of responsibility for sexual harassment has been made against the respondent; such remedies must be designed to restore or preserve access to the recipient's education program or activity. An equitable resolution for a respondent must include due process protections before any disciplinary sanctions are imposed;

(ii) Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness (NPRM).

NOW

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"EQUITABLE" INVESTIGATIONS: NOW

- Require an investigation of the allegations and an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness (NPRM)
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process (NPRM)

NOW

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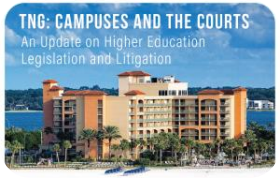

"EQUITABLE" INVESTIGATIONS: NOW

- Notice of the allegations constituting a potential violation of the recipient's code of conduct, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the specific section of the recipient's code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient's policy, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must also inform the parties that they may request to inspect and review evidence under. (NPRM)

NOW

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"EQUITABLE" INVESTIGATIONS: NOW

- Each party should receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation. The investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence. The reporting and responding parties and appropriate officials must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.

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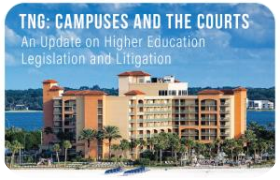

"EQUITABLE" INVESTIGATIONS: NOW

- Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms. Restricting the ability of either party to discuss the investigation (e.g., through "gag orders") is likely to deprive the parties of the ability to obtain and present evidence or otherwise to defend their interests and therefore is likely inequitable.

NOW

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"EQUITABLE" INVESTIGATIONS: NOW

- Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school's sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident.

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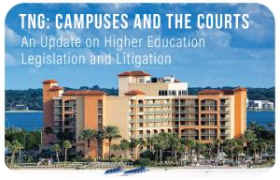

"EQUITABLE" INVESTIGATIONS: NOW

- Each party should receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation. The investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence. The reporting and responding parties and appropriate officials must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.

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LIVE HEARINGS

- For institutions of higher education, the recipient's grievance procedure must provide for a live hearing. (NPRM)

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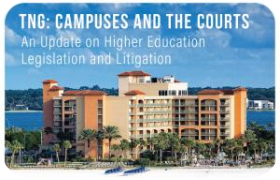

CROSS-EXAMINATION

- At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at a hearing must be conducted by the party's advisor of choice, notwithstanding the discretion of the recipient under subsection 106.45(b)(3)(iv) to otherwise restrict the extent to which advisors may participate in the proceedings. If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party for to conduct cross-examination. All cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. (NPRM)

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CROSS-EXAMINATION

- At the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions. The decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant. If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility (NPRM)

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STANDARD OF EVIDENCE: THEN AND NOW

Under the Obama Administration

- The evidentiary standard that must be used (preponderance of the evidence) (i.e., more likely than not that sexual violence occurred) in resolving a complaint;

Under the Trump Administration

- The findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.
- The standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases.

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DETERMINATION REGARDING RESPONSIBILITY

- The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty. (NPRM)

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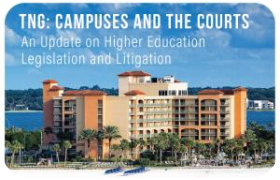

INFORMAL RESOLUTION: THEN AND NOW

Under the 2001 Guidance

- Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so… In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.

Under the Trump Administration

- At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication (NPRM)

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SANCTIONS: NOW

- The decision-maker as to any disciplinary sanction imposed after a finding of responsibility may be the same or different from the decision-maker who made the finding of responsibility. Disciplinary sanction decisions must be made for the purpose of deciding how best to enforce the school's code of student conduct while considering the impact of separating a student from her or his education. Any disciplinary decision must be made as a proportionate response to the violation.

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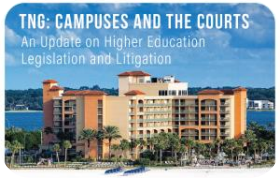

APPEALS: THEN AND NOW

Under the Obama Administration

- While Title IX does not require that a school provide an appeals process, OCR does recommend that the school do so where procedural error or previously unavailable relevant evidence could significantly impact the outcome of a case or where a sanction is substantially disproportionate to the findings. If a school chooses to provide for an appeal of the findings or remedy or both, it must do so equally for both parties.

Under the Trump Administration

- A recipient may choose to offer an appeal. If a recipient offers an appeal, it must allow both parties to appeal. (NPRM)

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APPEALS

- In cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity, a complainant is not entitled to a particular sanction against the respondent. As to all appeals, the recipient must: (i) notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties; (ii) ensure that the appeal decision-maker is not the same person as any investigator(s) or decision-maker(s) that reached the determination of responsibility; (iii) ensure that the appeal decision-maker complies with the standards set forth in section 106.45(b)(1)(iii); (iv) give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome; (v) issue a written decision describing the result of the appeal and the rationale for the result; and (vi) provide the written decision simultaneously to both parties. (NPRM)

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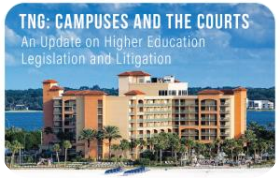

ACE RESPONDS

- A number of our specific concerns, such as the requirement for a live hearing with cross-examination or the mandate giving both parties the absolute right to inspect "all evidence . . . directly related" to the allegations, vividly illustrate our overarching concern that the NPRM imposes highly legalistic, court-like processes that conflict with the fundamental educational missions of our institutions.
- We repeat: Colleges and universities are not law enforcement agencies or courts. Unfortunately, the NPRM consistently relies on formal legal procedures and concepts, and imports courtroom terminology and procedures, to impose an approach that all schools—large and small, public and private—must follow, even if these procedures, concepts, and terms are wildly inappropriate and infeasible in an educational setting. The proposed rule assumes that institutions are a reasonable substitute for our criminal and civil legal system. They are not.

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RELIGIOUS EXEMPTIONS

- An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. **An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption.** In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of the exemption from the Assistant Secretary. (NPRM)

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KENNETH MARCUS
ASSISTANT SECRETARY FOR CIVIL RIGHTS

- Lillie and Nathan Ackerman Chair in Equality and Justice in America at Baruch College of the City University of New York.
- Founding President of the Louis D. Brandeis Center for Human Rights under Law.
- Previously served in OCR (2002-2004) under President George W. Bush (including Acting Director).
- Worked as staff director with U.S. Commission on Civil Rights

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KENNETH L. MARCUS
ASSISTANT SECRETARY FOR CIVIL RIGHTS

- Nominated by President Trump on Thursday, October 26, 2017.
- Confirmation hearing on Tuesday, December 5, 2017.
- The Senate voted 50 to 46 to confirm Marcus to run the Office for Civil Rights on June 7, 2018.

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WHAT'S NEXT?

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WHAT'S NEXT?

- The Office of Information and Regulatory Affairs in the Office of Management and Budget has stakeholder meetings scheduled through February 24, 2020.
- The U.S. Department of Education will publish the final rule in Federal Register in the spring with stated implementation timeline (30 or 60 days).
- There will likely be multiple lawsuits challenging provisions of the Final Rule including by victims advocacy groups and private institutions of higher education.

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THE 116TH CONGRESS

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PROPOSED LEGISLATION: SEXUAL ASSAULT

- Accountability of Leaders in Education to Report Title IX Investigations Act (H.R. 2421 & S. 808)
- Campus Accountability and Safety Act (S. 976)
- Hold Accountable and Lend Transparency on Campus Sexual Violence Act (H.R. 3381)
- Prohibition on Regulations That Weaken the Enforcement of the Prohibition of Sex Discrimination (H.R. 5388)
- Survivor Outreach and Support Campus Act (S. 1483)

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ALERT ACT

Accountability of Leaders in Education to Report Title IX Investigations Act (H.R. 2421 & S. 808) would require:

- The president and at least one member of an institution's board of trustees complete a "comprehensive review" of every complaint involving a "covered employee" and its resolution filed with the Title IX Coordinator.
- Primary sponsors are Representative Elissa Slotkin (D-MI) and Senator Gary C. Peters (D-MI).

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CAMPUS ACCOUNTABILITY AND SAFETY ACT

Campus Accountability and Safety Act (S. 976) would:

- Designate all "responsible employees" under Title IX as "campus security authorities" under the Clery Act.
- Require the Secretary of Education and the Attorney General to develop a national climate survey which institutions would be required to administer every two years.
- Increase the fines for Clery Act violations to $150,000.
- Require new statistics about the cases processed through the Title IX office.

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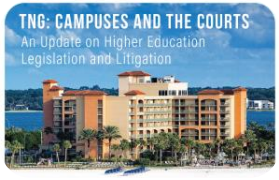

CAMPUS ACCOUNTABILITY AND SAFETY ACT

New Statistics

Number of incidents reported the Title IX coordinator or other responsible employees.

Of those incidents, the number of victims who sought campus disciplinary action.

Of those incidents, the number of cases processed through the student disciplinary process.

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CAMPUS ACCOUNTABILITY AND SAFETY ACT

Of those incidents where victims sought campus disciplinary action, the number of cases processed through the student disciplinary process.

Of those cases, the number of accused individuals who were found responsible through the student disciplinary process of the institution.

Of those cases, the number of accused individuals who were found not responsible through the student disciplinary process.

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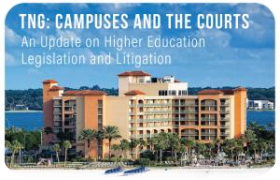

CAMPUS ACCOUNTABILITY AND SAFETY ACT

Campus Accountability and Safety Act (S. 976) requires that both the accused and accuser be notified of:

- The results of a disciplinary proceeding **within 5 days of such determination**.
- A change in the outcome of disciplinary proceeding **within 5 days of such change**.
- When the results become final **within 5 days of such determination after results become final**.

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CAMPUS ACCOUNTABILITY AND SAFETY ACT

Campus Accountability and Safety Act (S. 976) would:

- Require institutions to enter into memorandum of understanding with local law enforcement to clearly outline responsibilities for the investigations of cases of domestic violence, dating violence, sexual assault, and stalking.
- Require institutions to establish Sexual Assault Response Coordinator position(s) to assist victims of sexual assault.

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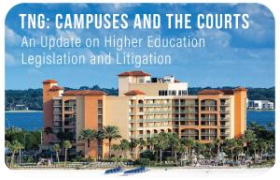

CAMPUS ACCOUNTABILITY AND SAFETY ACT

Amnesty Policy:

- Institutions must provide an amnesty policy "for any student who reports, in good faith, domestic violence, dating violence, sexual assault, or stalking to an institution official, such that the reporting student will not be sanctioned by the institution for a student conduct violation related to alcohol use or drug use that is revealed in the course of such a report and that occurred at or near the time of the commission of the domestic violence, dating violence, sexual assault, or stalking."

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CAMPUS ACCOUNTABILITY AND SAFETY ACT

Uniform Campus-wide Process for Student Disciplinary Proceeding for Domestic Violence, Dating Violence, Sexual Assault, and Stalking:

- Must establish and carry out a uniform process for student disciplinary proceedings against a student who attends the institution; and
- Must not carry out a different disciplinary process, or alter the uniform process, based on the status or characteristics of a student who will be involved in that disciplinary proceeding, including characteristics such as a student's membership on an athletic team, academic major, or any other characteristic or status of a student.

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CAMPUS ACCOUNTABILITY AND SAFETY ACT

Campus Accountability and Safety Act (S. 976) would:

- Require institutions to provide the name and contact information for the Title IX Coordinator including:
  - Brief description of the coordinator's role, and
  - Documentation of training received by the Title IX Coordinator.
- Require the Secretary of Education to create a public website which includes the following information:
  - The names and contact information for all Title IX Coordinators,
  - Information about all of the current and completed Title IX investigations by OCR,
  - A campus safety and security data tool, and
  - Information on how to file Title IX Complaints with OCR.

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CAMPUS ACCOUNTABILITY AND SAFETY ACT

Campus Accountability and Safety Act is sponsored by Senator Kirsten E. Gillibrand (D-NY) and has 15 cosponsors.

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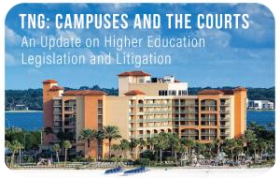

HALT CAMPUS SEXUAL VIOLENCE ACT

Hold Accountable and Lend Transparency on Campus Sexual Violence Act (H.R. 3381) would:

- Require the U.S. Department of Education to publicly disclose information about open Title IX investigations of institutions and the resolution of those investigations.
- Require the U.S. Department of Education to publicly identify religious institutions of higher education which has requested exemptions to Title IX.
- Authorize the Office for Civil Rights to impose fines against institutions of higher education.
- Require biannual campus climate surveys.

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HALT CAMPUS SEXUAL VIOLENCE ACT

Hold Accountable and Lend Transparency on Campus Sexual Violence Act (H.R. 3381) would:

- Establish a private right of action under the Clery Act.
- Increase Clery Act fines for $100,000.
- Require institutions to develop a statement of policies aimed at the prevention of sexual violence which is posted on-line, prominently on campus, and sent to all recognized student groups.

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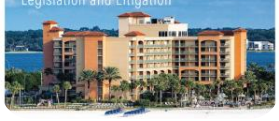

HALT CAMPUS SEXUAL VIOLENCE ACT

Hold Accountable and Lend Transparency on Campus Sexual Violence Act (H.R. 3381) would:

- Require the Secretary of Education, the Secretary of Health and Human Services, and the Attorney General shall establish a joint interagency task force to be known as the "Campus Sexual Violence Task Force"
- Primary sponsor is Representative Jackie Speier (D-CA) with 60 cosponsors.

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H.R. 5388

Prohibition on Regulations That Weaken the Enforcement of the Prohibition of Sex Discrimination (H.R. 5388) would:

- Prohibit the U.S. Department of Education from implementing adopting the proposed Title IX regulations or from issue new guidance.
- Primary sponsor is Representative Elissa Slotkin (D-MI).

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SOS CAMPUS ACT

Survivor Outreach and Support Campus Act (S. 1483) would:

- Require all institutions to appoint an independent advocate for campus sexual assault prevention and response.
  - In carrying out the responsibilities described in this section, the Advocate shall represent the interests of the student victim even when in conflict with the interests of the institution.
  - The Advocate may not be disciplined, penalized, or otherwise retaliated against by the institution for representing the interest of the victim, in the event of a conflict of interest with the institution.

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SOS CAMPUS ACT

Survivor Outreach and Support Campus Act (S. 1483) is sponsored by Senator Tim Kaine (D-VA) and has 3 cosponsors.

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PROPOSED LEGISLATION: OTHER TITLE IX LEGISLATION

- H.R. 3513: Patsy T. Mink and Louise M. Slaughter Gender Equity in Education Act of 2019
- H.R. 3555: Exposing Discrimination in Higher Education Act

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GENDER EQUITY IN EDUCATION ACT OF 2019

Patsy T. Mink and Louise M. Slaughter Gender Equity in Education Act of 2019 (H.R. 3513) would:

- Require the Secretary of Education to create an Office for Gender Equity which would provide coordination, training, technical assistance, and support for Title IX coordinators.
- Representative Doris O. Matsui (D-CA) is the primary sponsor of the legislation.

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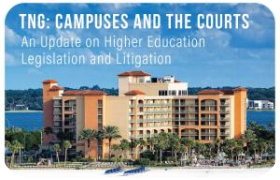

EXPOSING DISCRIMINATION IN HIGHER EDUCATION ACT

Exposing Discrimination in Higher Education Act (H.R. 3555) would:

- Require religious institutions of higher education to request in writing from the highest ranking campus official exceptions under Title IX.
- Require the U.S. Department of Education to publish a list of all institutions and the nature of the exceptions granted.

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EXPOSING DISCRIMINATION IN HIGHER EDUCATION ACT

Exposing Discrimination in Higher Education Act (H.R. 3555) would:

- Require religious institutions receiving exceptions under Title IX to publish on its website:
  - The institution's request(s) for exemptions under Title IX,
  - The U.S. Department of Education's response(s) granting or rejecting the request(s), and
  - The specific characteristics and programs covered by the exemption.

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EXPOSING DISCRIMINATION IN HIGHER EDUCATION ACT

- Representative Katherine M. Clark (D-MA) is the primary sponsor of Exposing Discrimination in Higher Education Act (H.R. 3555) and the bill has 50 cosponsors.

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FREE SPEECH AND ASSOCIATION RIGHTS

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EXECUTIVE ORDER 13864

On Thursday, March 21, 2019, President Donald J. Trump signed the Executive Order on Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities.

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NOTICE OF PROPOSED RULEMAKING

- On January 17, 2020, the U.S. Department of Education published a Notice of Proposed Rulemaking to implement new regulations in response to several executive orders including Executive Order 13864.
- Comments on the proposed regulations were due by February 18, 2020.

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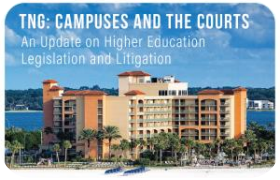

PUBLIC INSTITUTIONS

The proposed regulations would require public institutions to meet the following additional conditions of participation in the Department's grant programs:

- To comply with the First Amendment to the U.S. Constitution, as a material condition of the grant; and
- To ensure faith-based student organizations are treated the same as secular student organizations, as a material condition of the grant.

The Department will determine that a public institution has not complied with the First Amendment only if there is a final, non-default judgment by a State or Federal court that the public institution or an employee of the public institution, acting in his or her official capacity, violated the First Amendment.

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PUBLIC INSTITUTIONS

- A public institution shall not deny to a religious student organization at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including full access to the facilities of the public institution and official recognition of the organization by the public institution) because of the beliefs, practices, policies, speech, membership standards, or leadership standards of the religious student organization.

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PRIVATE INSTITUTIONS

The proposed regulations would require private institutions to meet the following additional condition of participation in the Department's grant programs:

- To comply with their stated institutional policies regarding freedom of speech, including academic freedom, as a material condition of the grant

The Department will determine that a private institution has not complied with stated institutional policies regarding freedom of speech or academic freedom only if there is a final, non-default judgment by a State or Federal court to the effect that the private institution or an employee of the private institution, acting on behalf of the private institution, violated its stated institutional policy regarding freedom of speech or academic freedom.

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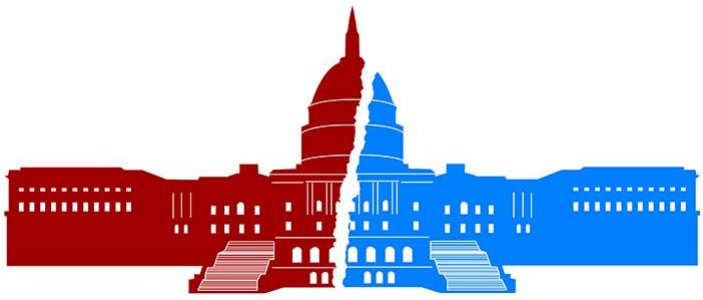
THE 116TH CONGRESS



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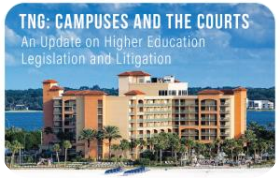

COLLEGIATE FREEDOM OF ASSOCIATION ACT

Collegiate Freedom of Association Act (H.R. 3128) would:

- Protect the rights of students to form and join single-sex social organizations.
- Prohibit institutions from taking action against students for their membership in a single-sex social organization.
- Prohibit institutions from placing recruitment restrictions on single-sex social organizations not placed on other social organizations.

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COLLEGIATE FREEDOM OF ASSOCIATION ACT

- Representative Ruben Gallego (D-AZ) is the primary sponsor of the Collegiate Freedom of Association Act (H.R. 3128) and it currently has 28 cosponsors.

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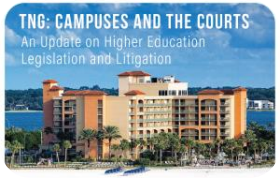

THE CLERY ACT

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CLERY ACT FINES INCREASED

- The U.S. Department of Education published a notice in the *Federal Register* on January 14, 2020 increasing the amount of Clery Act fines to $58,328.
- Applicable only to civil penalties assessed after January 14, 2020 whose associated violations occurred after November 2, 2015.
- The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 requires for annual inflation adjustments of civil monetary penalties, including for the Clery Act.

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ENFORCEMENT OF THE CLERY ACT

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MICHIGAN STATE UNIVERSITY

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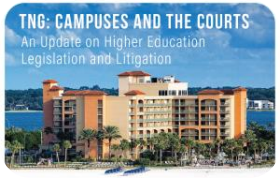

MICHIGAN STATE UNIVERSITY

On December 14, 2018, the U.S. Department of Education notified Michigan State of the outcome of the Department's evaluation of the institution's compliance with the Clery Act as well as Drug-Free Schools and Communities Act. Areas of non-compliance identified by the Department included:

- "Lack of institutional control" (p. 33)
- "Failed to compile and disclose accurate and complete crime statistics because its crime statistics did not include the sex crimes that Nassar committed during the years in which the statistics were reported" (p. 8)

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MICHIGAN STATE UNIVERSITY

- "Failed to issue Timely Warnings to students and employees regarding *Clery*-reportable crimes that may have posed an ongoing threat to students and employees during the review period" (p. 13)
- "Substantially failed to actively seek out, identify, and notify institutional officials who are or were CSAs" (p. 22)
- "Michigan State substantially failed to develop and implement an adequate *Clery Act* compliance program during the years under review" (p. 33)

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MICHIGAN STATE UNIVERSITY

On September 5, 2019, the U.S. Department of Education announced that it had reached a settlement agreement with Michigan State University to resolve the Clery Act violations. Under the agreement, Michigan State agreed to take various steps including:

- Pay a fine of $4,500,000.
- Appoint a Clery Act compliance officer.
- Appoint a Clery Compliance Committee.
- Engage in a system wide review to identify all Campus Security Authorities.
- Implement CSA training and reporting forms.
- Post-Review Monitoring by the Department for 5 years.

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UNIVERSITY OF NORTH CAROLINA—CHAPEL HILL

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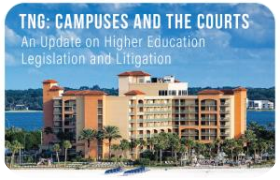

UNIVERSITY OF NORTH CAROLINA—CHAPEL HILL

On August 23, 2019, the U.S. Department of Education notified the University of North Carolina—Chapel Hill of the outcome of the Department's evaluation of the institution's compliance with the Clery Act as well as the HEA fire safety requirements.

- "UNC substantially failed to develop and implement an adequate Clery Act compliance program during the program review period." (p. 7)
- "The University has failed to meet its regulatory responsibilities in numerous and serious ways. Such a failure calls into question the willingness and the ability of UNC to meet its obligations not only to the Department under the PPA, but also to its students, employees, and the campus community." (pp. 7-8).

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UNIVERSITY OF NORTH CAROLINA—CHAPEL HILL

Specific areas of non-compliance identified by the Department included:

- Failed to correctly identify its Clery Geography for crime log and statistical reporting purposes;
- Failed to issue timely warnings for certain ongoing threats;
- Failed to accurately compile and disclose crime statistics in annual ASRs and to the Department;
- failed to reconcile the campus crime statistics that were included in its ASRs with the statistical data submitted to the Department;

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UNIVERSITY OF NORTH CAROLINA—CHAPEL HILL

Specific areas of non-compliance identified by the Department included:

- Failed to identify and advise CSAs for their reporting obligations and further failed to actually collect crime reports from these same CSAs; 6)
- Failed to comply with the Clery Act's sexual assault prevention, response, and disciplinary requirements;
- Failed to retain records of potentially Clery-reportable crimes to the Honor Court for Clery reporting purposes; and
- Failed to comply with the Clery Act's fire safety requirements.

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PROPOSED LEGISLATION TO AMEND THE CLERY ACT

- Creating Accountability Measures Protecting University Students Historically Abused, Threatened, and Exposed to Crimes Act (H.R. 761)
- Ravi Thackurdeen Safe Students Study Abroad Act (H.R. 2875 & S. 1572)
- Safe Equitable Campus Resources and Education Act (H.R. 2026 & S. 984)
- Tyler Clementi Higher Education Anti-Harassment Act (H.R. 2727 & S. 1492)

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CAMPUS HATE CRIMES ACT

Creating Accountability Measures Protecting University Students Historically Abused, Threatened, and Exposed to Crimes Act (H.R. 761) would:

- Require institutions to adopt and has implement a program to prevent and adequately respond to hate crimes which includes an annual report addresses:
  - Standards of conduct and sanctions for acts or threats of violence, property damage, harassment, intimidation, or other crimes that specifically target an individual based on their race, religion, ethnicity, handicap, sexual orientation, gender, or gender identification.
  - State and federal definitions of and penalties for hate crimes.
  - Descriptions of counseling and other support services for victims of hate crimes.

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CAMPUS HATE CRIMES ACT

Creating Accountability Measures Protecting University Students Historically Abused, Threatened, and Exposed to Crimes Act (H.R. 761) would:

- Require institutions to conduct an quadrennial review of the a program to prevent and adequately respond to hate crimes to determine its effectiveness
- The CAMPUS HATE Crimes Act (H.R. 761) is sponsored by Representative Anthony G. Brown (D-MI) and has 12 cosponsors.

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RAVI THACKURDEEN SAFE STUDENTS STUDY ABROAD ACT

Ravi Thackurdeen Safe Students Study Abroad Act (H.R. 2875 & S. 1572) would:

- Require institutions to report statistics for students who are victims of crimes while participating in study abroad program in the Annual Security Report.
- Require institutions to include in the Annual Security Report a statement that the institution has adopted and implemented a program to protect students participating in a program of study abroad from crime and harm.
  - As part of this program to protect students, the institution must complete a biennial review of its study abroad programs and the institution's efforts to protect students from crime and harm.

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RAVI THACKURDEEN SAFE STUDENTS STUDY ABROAD ACT

Ravi Thackurdeen Safe Students Study Abroad Act (H.R. 2875 & S. 1572) would:

- Require institutions to provide students interested in study abroad with pre-trip orientation session and advising.
- Require institutions to provide students who have returned from study abroad with post-trip orientation session and exit interviews.
- The bill is sponsored by Representative Sean Patrick Maloney (D-NY) and Senator Rob Portman (R-NY).

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SAFE EQUITABLE CAMPUS RESOURCES AND EDUCATION ACT

Safe Equitable Campus Resources and Education Act (H.R. 2026 & S. 984) would:

- Require institutions to track and report statistics on the victims of sexual offenses, domestic violence, dating violence, and stalking who are individuals with a disability.
- Ensure that emergency response and evacuation procedures take into account the needs of students and staff with disabilities.
- Ensure that all documents prepare under the Clery Act made available in a timely manner in accessible formats for individuals with disabilities.

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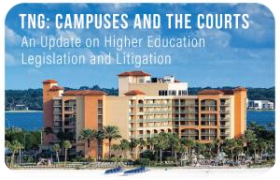

SAFE EQUITABLE CAMPUS RESOURCES AND EDUCATION ACT

Safe Equitable Campus Resources and Education Act (H.R. 2026 & S. 984) would:

- Include individuals with a disability in hate crime reporting.
- Require that in disciplinary proceedings governed by the Clery Act that the accused and the accuser have the right to to be accompanied to any such meeting or proceeding by an interpreter, transliterator, or other individual providing communication assistance.
- Require that in disciplinary proceedings governed by the Clery Act that all documents are provided in accessible formats.

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SAFE EQUITABLE CAMPUS RESOURCES AND EDUCATION ACT

- Safe Equitable Campus Resources and Education Act (H.R. 2026 & S. 984) is sponsored by Representative Debbie Dingell (D-MI) and Senator Robert P. Casey Jr. (D-PA).

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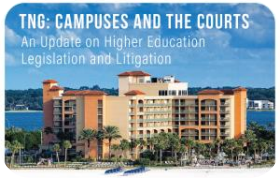

TYLER CLEMENTI HIGHER EDUCATION ANTI-HARASSMENT ACT

Tyler Clementi Higher Education Anti-Harassment Act (H.R. 2747 & S. 1492) would:

- Require institutions to include in the Annual Security Report a statement of policy regarding harassment on the basis of a student's actual or perceived race, color, national origin, sex (including sexual orientation, gender identity, pregnancy, childbirth, a medical condition related to pregnancy or childbirth, and a sex stereotype), disability, or religion.

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TYLER CLEMENTI HIGHER EDUCATION ANTI-HARASSMENT ACT

The required policy must include the following elements:

- A prohibition on the harassment of students on campus and through electronic means.
- A description of the institution's programs to combat and respond to harassment.
- A description of the procedures a student should to follow when harassment occurs.
- A description of the procedures the institutional will follow when harassment is reported.
- A detailed description of the cases in which a pattern of harassment occurred and what the institution's response was.

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TYLER CLEMENTI HIGHER EDUCATION ANTI-HARASSMENT ACT

The required policy must include the following elements:

- The procedures for timely institutional action in cases of alleged harassment, including a statement that both the accused and the accuser will be notified of the outcome.
- Possible sanctions that may be imposed for harassment through the disciplinary process.
- Notification of existing counseling, mental health, or student services for victims or perpetrators of harassment.
- Identifying a designated employee or office to receive and track reports of harassment.

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TYLER CLEMENTI HIGHER EDUCATION ANTI-HARASSMENT ACT

- Tyler Clementi Higher Education Anti-Harassment Act (H.R. 2747) is sponsored by Representative Mark Pocan (D-WI) and has 92 cosponsors.
- Tyler Clementi Higher Education Anti-Harassment Act (S. 1492) is sponsored by Senator Patty Murray (D-WA) and has 24 cosponsors.

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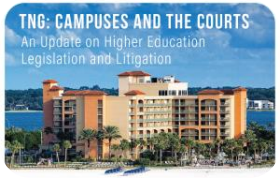

HAZING LEGISLATION

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PROPOSED HAZING LEGISLATION

- Educational Notification and Disclosure of Actions risking Loss of Life by Hazing Act (H.R. 3267 & S. 2711)
- Report and Educate About Campus Hazing Act (H.R. 662 & S. 706)

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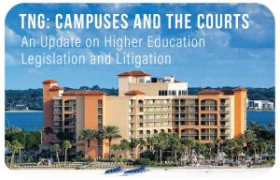

END ALL HAZING ACT

Educational Notification and Disclosure of Actions risking Loss of Life by Hazing Act (H.R. 3267 & S. 2711) would:

- Require institutions to publish information twice yearly (January 1 and July 1) regarding:
  - Student organizations that have been found responsible for violations of the institution's standards of conduct, or of Federal, State, or local law, relating to hazing.
  - Student organizations that have been found responsible for other conduct that threatens a student's physical safety, including a violation involving the abuse or illegal use of alcohol or drugs.
  - Provide a general description of the violation, the charges, the findings of the institution, and the sanctions placed on the organization.

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END ALL HAZING ACT

Educational Notification and Disclosure of Actions risking Loss of Life by Hazing Act (H.R. 3267 & S. 2711) would:

- Require institutions to report to campus police and appropriate law enforcement authorities any allegation of hazing that involved serious bodily injury or a significant risk of serious bodily injury that is reported to the institution.

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END ALL HAZING ACT

HAZING.—The term 'hazing' means any intentional, knowing, or reckless act committed by a student, or a former student, of an institution of higher education, whether individually or in concert with other persons, against another student, that—

i. was committed in connection with an initiation into, an affiliation with, or the maintenance of membership in, any student organization; and

ii. causes, or contributes to a substantial risk of, physical injury, mental harm, or personal degradation.

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END ALL HAZING ACT

- Educational Notification and Disclosure of Actions risking Loss of Life by Hazing Act (H.R. 3267) is sponsored by Representative Marcia L. Fudge (D-OH) and has 16 cosponsors.
- Educational Notification and Disclosure of Actions risking Loss of Life by Hazing Act (S. 2711) is sponsored by Senator Bill Cassidy (R-LA) and has 5 cosponsors.

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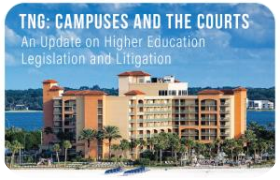

REACH ACT

Report and Educate About Campus Hazing Act (H.R. 662 & S. 706) would amend the Clery Act to:

- Require that statistics regarding allegations of hazing reported to a campus official are included in the Annual Security Report.

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REACH ACT

Report and Educate About Campus Hazing Act (H.R. 662 & S. 706) would require institutions to provide a comprehensive program to prevent hazing including:

- A campus-wide program for students, staff, faculty, and other campus stakeholders (such as alumni and families of students).
- Be research based.
- Include information on hazing awareness, hazing prevention, the institution's policies on hazing, how to report hazing, and the process used to investigate hazing.
- include skill building for bystander intervention, information about ethical leadership, and the promotion of strategies for building group cohesion without hazing.

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REACH ACT

The term 'hazing' means any intentional, knowing, or reckless act committed by a student, or a former student, of an institution of higher education, whether individually or in concert with other persons, against another student (regardless of that student's willingness to participate), that—

I. was committed in connection with an initiation into, an affiliation with, or the maintenance of membership in, any organization that is affiliated with such institution of higher education (including any athletic team affiliated with that institution); and

II. contributes to a substantial risk of physical injury, mental harm, or degradation or causes physical injury, mental harm, or personal degradation.

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REACH ACT

- Report and Educate About Campus Hazing Act (H.R. 662) is sponsored by Representative Marcia L. Fudge (D-OH) and has 72 cosponsors.
- Report and Educate About Campus Hazing Act (S. 706) is sponsored by Senator Amy Klobuchar (D-MN) and has 6 cosponsors.

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BEYOND THE BOX

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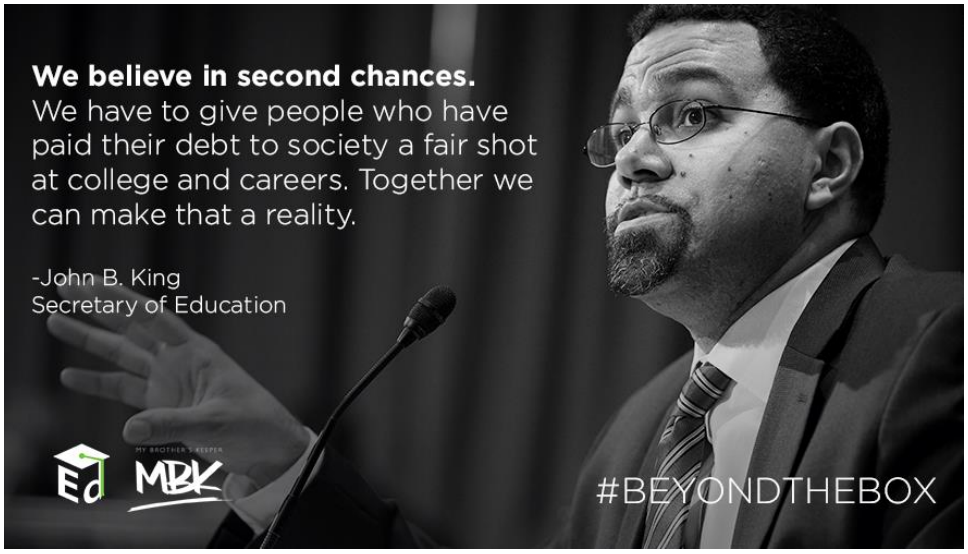
SECRETARY OF EDUCATION JOHN B. KING



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BEYOND THE BOX

"Colleges and universities using disciplinary history as admissions criteria should consider how to design admissions policies that do not have the unjustified effect of discriminating against individuals on the basis of race, color, national origin, sex, religion, and disability." (p. 6, https://www.ed.gov/beyondthebox)

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BEYOND THE BOX FOR HIGHER EDUCATION ACT

Beyond the Box for Higher Education Act (H.R. 2563 & S. 1338) would instruct the Secretary of Education to:

- Issue guidance and recommendations for institutions of higher education to remove criminal and juvenile justice questions from their application for admissions process. The guidance should:
  - Encourage institutions to consider whether these questions are needed.
  - Encourage institutions which decide to keep these questions to delay asking these questions until after admissions are made.
  - Encourage institutions to ask questions which are specific and narrowly focused.

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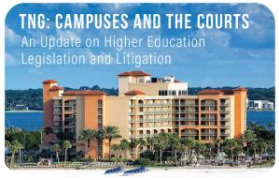

BEYOND THE BOX FOR HIGHER EDUCATION ACT

- Beyond the Box for Higher Education Act (H.R.) is sponsored by Representative Cedric L. Richmond (D-LA) and has 1 cosponsor.
- Beyond the Box for Higher Education Act (S. 1338) is sponsored by Senator Brian Schatz (D-HI) and has 18 cosponsors.

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FOR MORE INFORMATION

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1

YOUR FACULTY

W. Scott Lewis

Partner
The NCHERM Group, LLC.

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A BRIEF HISTORY OF TITLE IX 1972-PRESENT

- Key Regulatory and Sub-Regulatory Guidance from OCR
  - 1997 Guidance → 2001 Revised Sexual Harassment Guidance.
  - 2011 Dear Colleague Letter (The "DCL").*
  - Questions and Answers on Title IX and Sexual Violence (April 2014).*
  - 2015 Dear Colleague Letter, Dear Coordinator Letter & Resource Guide.
  - 2016 Guidance on Transgender Students.*
  - 2017 Interim Guide: Q&A on Campus Sexual Violence.
- "Not Alone" – White House Task Force to Protect Students From Sexual Assault (April 2014) (disbanded).
- Also: The Clery Act, VAWA 2013: Section 304.
- *Since rescinded

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OVERVIEW OF OCR SEPT. 2017 ACTION

- Sept. 22, 2017 Dear Colleague Letter
  - Withdrew the April 4, 2011 Dear Colleague Letter
  - Withdrew Q&A on Title IX and Sexual Violence (April 29, 2014)
  - Rulemaking: Called for Notice and Comment on "Title IX responsibilities arising from complaints of sexual misconduct"
  - Provided "Interim Guide" on Campus Sexual Misconduct
- OCR's stated reasons for withdrawing 2011 DCL/2014 Q&A
  - Released without providing for notice and comment (APA)
  - "Created a system that lacked basic elements of due process"
  - "Created a system that…failed to ensure fundamental fairness"

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OVERVIEW OF PROPOSED REGULATIONS

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

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INTERVENING VARIABLES

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

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ULTRA VIRES ACTION BY OCR?

- OCR can only enforce within the statutory ambit of Title IX
- Any action exceeding this authority is called *ultra vires*
- Many observers concerned that due process elements in the proposed regulations have no legal basis in Title IX
  - Sex-equity based law – not a due process-based law
  - What is source of OCR authority to require a formal hearing, cross examination by advisors, etc.?
  - Shouldn't due process be up to Congress and the courts?
  - Many due process elements are a best practice, but likely will be up to courts to decide if properly within OCR's regulatory purview
  - Obama's OCR also arguably exceeded Title IX's scope, but only in sub-regulatory guidance, not in regulations.

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OBAMA OCR: (OVER?) ZEALOUS ENFORCEMENT AND EQUITY IMBALANCE

- Dramatically ramped up enforcement; became feared
- Provided extensive sub-regulatory guidance
- Made investigations and outcomes public
- Had a pro-reporting party imbalance to their approach
- Field shifted from an imbalance toward the responding party to an imbalance toward the reporting party
- Resulted in widespread abrogation of due process rights for responding parties

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DUE PROCESS CASE LAW

- 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

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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

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CIVIL LAW SUITS V. OCR ENFORCEMENT & TITLE IX (PRE-2019)

Lawsuit

- File in federal court
- Monetary damages, injunction
- Requires:
  - Actual notice
  - Employee with authority to take action
  - Deliberate indifference

Administrative Action

- Initiated by OCR
- Voluntary compliance or findings
- Requires:
  - Actual OR constructive notice ("knew or should have known").
  - Investigate
  - End harassment
  - Remedy impact
  - Prevent recurrence

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"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?

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UNIFYING STANDARDS?

- Proposed regulations would mostly unify the court and administrative enforcement standards
  - Would raise administrative enforcement standard to match legal standard of deliberate indifference
  - Would significantly limit OCR's authority (and efficacy?)
  - Will likely lead to a wave of litigation by all parties
- In some ways, OCR going beyond court standard. *Davis* notice-based standard vs. formal complaint standard

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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 Circuit
  - District Court – binding on District
- State case law – **Force of law**; binding only in that state based on court jurisdiction

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STAY ABOVE THE FLOOR

- Law, Case law, 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

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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

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DUE PROCESS

What is Due Process?
Due Process in Procedure
Due Process in Decision
Comparative Due Process

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WHAT IS DUE PROCESS?

- Due Process (public institutions):
  - Federal and state constitutional and legal protections against a state institution taking or depriving someone of education or employment.
- "Fundamental Fairness" (private institutions):
  - Contractual guarantee that to impose discipline, the institution will abide substantially by its policies and procedures.

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WHAT IS DUE PROCESS?

- Ultimately, both are the set of rights-based protections that accompany disciplinary action by an institution with respect to students, employees, or others.
  - Informed by law, history, public policy, culture etc.
- Due process in criminal and civil courts vs. due process within an institution.
- Due process analysis and protections have historically focused on the rights of the responding party.

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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.

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WHAT IS DUE PROCESS?

- **Due Process in Procedure** - A school's process should include (at a minimum):
  - Notice — of charges and of the hearing/resolution process.
  - Right to present witnesses.
  - Right to present evidence.
  - Opportunity to be heard and address the allegations and evidence.
  - Right to decision made based on substantial compliance and adherence to institutional policies and procedures.
  - Right to a hearing? (TBD)
  - Right to appeal (recommended).

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WHAT IS DUE PROCESS?

- **Due Process in Decision** - A decision must:
  - Be based on a fundamentally fair rule or policy.
  - Be made in good faith (i.e., without malice, partiality, or bias).
  - Based on the evidence presented.
  - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence.
  - Not be arbitrary or capricious.
- Sanctions must be reasonable and constitutionally permissible.

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PROPOSED TITLE IX REGULATIONS

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DUE PROCESS OVERVIEW

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

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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
  - PreK-12 teachers are "officials" – post-secondary faculty are not
  - Mere ability or obligation to report does not qualify as "official"

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NOTICE TO THE INSTITUTION

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

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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;

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RESPONSIBLE EMPLOYEES?

- Proposed regulations shift "actual notice" to:
  - Anyone who has the authority to take action to redress the harassment
  - All PreK-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

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JURISDICTION

- 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

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JURISDICTION

- 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…"

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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

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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

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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)

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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

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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

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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?

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"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?

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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 PreK-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

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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?

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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

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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

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LIVE HEARING

- Proposed regulations mandate live hearing for postsecondary institutions, optional for PreK-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?)

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ADVISORS

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

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APPEALS

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

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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

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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

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OTHER ELEMENTS IN THE PROPOSED REGS

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

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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 PreK-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

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ATIXA DUE PROCESS CHECKLIST

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DUE PROCESS CHECKLIST

- Right to access to an advisor of your choice throughout the process for all meetings, interviews and proceedings.
  - May restrict role in meetings and hearing? (Proposed Regs may limit this)
  - Written notification of right to advisor at the outset of investigation
  - Attorney, parent, roommate, friend, etc.
  - Advisor should not hold up the process.
  - Panel of trained advisors.
  - Cross-examination? (TBD)
  - What about union reps?

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DUE PROCESS CHECKLIST

- Right to the least restrictive terms necessary if interim suspension is implemented, and a right to challenge the imposition of the interim suspension.
  - Beware of overreacting.
  - Interim measures should reflect the nature of the allegations.
  - Threat of harm to reporting party and others.
  - Mechanics of the opportunity to challenge.
  - If interim suspension is used, reevaluate regularly during resolution process for continued necessity

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DUE PROCESS CHECKLIST

- Right to un-infringed due process rights, as detailed in the college's procedures, if subject to interim actions
  - Be sure procedures have such elements
  - Provide timeline for a prompt challenge
  - Recognize need to expedite resolution process if interim suspension is used
  - Right to advisor applies

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DUE PROCESS CHECKLIST

- Right to clear notice of the policies allegedly violated if and when the formal allegation is to be made.
  - Written, detailed notice (to all parties).
  - List each of the specific policies allegedly violated – include policy language, not just the name of the policy.
  - Right to not have formal allegation made without reasonable cause.

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DUE PROCESS CHECKLIST

- Right to clear notice of any hearing in advance, if there is to be a hearing.
  - Written notice.
  - Provide the parties with a copy of hearing procedures.
  - "Hearing" in this context is a formal, in-person hearing with either an administrator or a panel.
  - With sufficient time to prepare (Proposed Regs say 10 days)
  - Opportunity to challenge hearing panel members for bias.

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DUE PROCESS CHECKLIST

- Right to receive COPIES of all reports and access to other documents/evidence that will be used in the determination, reasonably prior to the determination (these may be provided in redacted form).
  - Case law is increasingly overwhelming on this point.
  - Neither FERPA nor employment laws prohibit providing copies.
  - STOP making people come to an office to review evidence. NOT a best practice.
  - Transparency is important to fairness.

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DUE PROCESS CHECKLIST

- Right to suggest witnesses to be questioned, and to suggest questions to be asked of them (excluding solely character witnesses).
  - Institution should determine which witnesses are questioned ("suggest").
  - If you do not have a formal hearing, this is even more important.
  - Provides a right to a form of cross-examination without the negatives of in-person confrontation.

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DUE PROCESS CHECKLIST

- Right to decision-makers and a decision free of demonstrated bias/conflict of interest (and advance notice of who those decision-makers will be).
  - Danger of wearing multiple hats.
  - Previous interaction does not disqualify, but be careful
  - Bias - *See*: Doe v. George Mason University.
    - Not just ANY bias.
  - Cannot be the appellate officer or legal counsel
  - Separation of responsibilities
    - Proposed Regs indicate decision-maker should not be the investigator or the TIX Coordinator.

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DUE PROCESS CHECKLIST

- Right to clear policies and well-defined procedures that comply with state and federal mandates.
  - Not enough to just follow your policies and procedures.
  - Must be fundamentally fair, grounded in principles of due process.
  - Courts increasingly looking for clear, detailed procedures.
  - Laws, caselaw, and regulatory guidance.
  - Proposed Regs would dramatically increase the import of this point

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DUE PROCESS CHECKLIST

- Right to a process free of (sex/gender/protected class etc.) discrimination.
  - Claims of selective enforcement on the rise in the courts.
  - Equitable rights to the parties
  - Beware making decisions on basis of external variables (fear of OCR, courts, PR, etc.).

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DUE PROCESS CHECKLIST

- Right to an investigation interview conducted with the same procedural protections as a hearing would be.
  - Interviewee verification of notes.
  - Consider recording interviews.
  - Right to ask questions of witnesses and other parties through the interviewer(s).
  - Right to review (receive copies of) all evidence prior to a decision being made.
  - Right to suggest witnesses.
  - Advisor.
  - Right to review report.

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DUE PROCESS CHECKLIST

- Right to a fundamentally fair process (essential fairness).
  - Would be dramatically impacted by Proposed Regs.
  - Notice of charges.
  - Opportunity to be heard.
  - Private schools: Fundamental Fairness.
  - Public schools: Due Process.
  - See: ATIXA's Due Process Checklist. ☺

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DUE PROCESS CHECKLIST

- Right to know, fully and fairly defend all of the allegations, and respond to all evidence, on the record.
  - Not possible without ability to review all evidence.
  - Detailed and prompt Notice of Allegations (including all applicable policies).
  - Review draft report prior to finalization.
  - Regardless of whether employee, faculty, or student.
  - Right to cross-examination (TBD RE: Direct cross-examination)

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DUE PROCESS CHECKLIST

- Right to a copy of the investigation report prior to its finalization or prior to the hearing (if there is one).
  - Allows for full review of all evidence prior to decision being made.
  - Serves as a check to ensure report is accurate and thorough.
  - Enhances "opportunity to be heard".

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DUE PROCESS CHECKLIST

- Right to know the identity of the reporting party and all witnesses (unless there is a significant safety concern or the identity of witnesses is irrelevant).
  - Except in limited situations, it is a violation of basic fairness to do otherwise.
  - More often see desire to remain anonymous in employment cases.
  - Strengthen retaliation provisions in policy and practice.
  - Inform all parties of retaliation provisions and provide examples.
  - Additionally, failure of reporting party to participate may severely limit ability of an institution to proceed.

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DUE PROCESS CHECKLIST

- Right to regular updates on the status of the investigation/resolution process.
  - Lack of communication from investigators enhances fear, worry, and stress for all parties.
  - Update at least weekly, even if nothing new to report.
  - Helps encourage prompt inquiries.
  - Opportunity to provide parties information about resources and remedies on a regular basis.

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DUE PROCESS CHECKLIST

- Right to clear timelines for resolution.
  - Prompt:
    - No set # of days; "Good faith effort"
    - 60 days is good guide for more difficult cases, but strive for faster.
    - Very different in Pre-K-12
    - Promptness should almost never undermine thoroughness.
    - Due process lawsuits repeatedly allege "too prompt."
  - For each stage of the investigation.
    - Typical stages: Gatekeeping/preliminary investigation, Investigation, Pre-hearing, Hearing, Appeals.
  - In procedures, provide timelines but give yourself some flexibility.
    - E.g.: "typically within 14 days", "absent mitigating circumstances…", etc.

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DUE PROCESS CHECKLIST

- Right to have procedures followed without material deviation.
  - Emphasis on the word "material".
  - Detailed procedures help ensure compliance.
  - Be willing to have some flexibility as long as fairness is maintained.

"Remember, you have no side other than the integrity of the process."

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DUE PROCESS CHECKLIST

- Right to a process that conforms to all pertinent legal mandates and applicable industry standards.
  - Caselaw.
  - Federal laws: Title IX, VAWA/Clery, Title VII, ADA, Sec. 504, etc.
    - Federal Regulations
  - OCR Guidance.
  - Industry standards: The "Standard of Care".
  - Associations: ATIXA, NACUA, ASCA, NASPA, AAAED, CUPA-HR, etc.
  - Remember to rise above the bare minimum of laws and case law – strive for best practices.

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DUE PROCESS CHECKLIST

- Right to have only relevant past history/record considered as evidence.
  - Disciplinary history of both parties is typically irrelevant, except during sanctioning.
  - Sexual history of both parties typically irrelevant.
    - However, sexual history between the parties can be relevant (e.g. to help determine what patterns exist as to how consent is given or received, etc.).
  - Previous good faith allegations that are substantially similar may be considered (even if found not responsible).
  - Proving pattern v. proving offense. Which are you investigating?

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DUE PROCESS CHECKLIST

- The right to have the burden of proving a violation of policy borne by the institution.
  - An allegation does not create a presumption that the policy was violated.
  - Policies should clearly state that the responding party is presumed to be not responsible until a finding has been made.
  - Not up to the responding party to disprove the allegation.
  - Preponderance of the evidence & equity.

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DUE PROCESS CHECKLIST

- Right to the privacy of the resolution/conduct process to the extent of and in line with the protections and exceptions provided under state and federal law.
  - Does not abridge rights of parties to review all evidence as well as finding, sanction, and rationale (including in employment cases).
  - "Need to know" under FERPA.
  - File management and protection.
  - Proposed Regs require much more sharing of information
  - When a case is made public by one of the parties…

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DUE PROCESS CHECKLIST

- Right to a finding that is based on the preponderance of the evidence.
  - Not based solely on "gut," the attitude of the parties, the likeability of the parties, or a presumption of responsibility.
  - Credibility determinations are sufficient to reach preponderance of the evidence (but not at the expense of the evidence).
  - Must be able to articulate a detailed, specific rationale.
  - Is a function of credible, probative, and articulable evidence.

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DUE PROCESS CHECKLIST

- Right to a finding that is neither arbitrary nor capricious
  - Arbitrary and capricious decisions are often based on external variables.
    - E.g. personalities, identity, money, influence or status, power imbalance, corruption, discriminatory variables.
  - "Picking the plaintiff" is arbitrary and capricious.
  - Decisions should be based on evidence, credibility, prompt, thorough, and impartial investigation by trained investigators
  - Bias and partiality are everywhere…

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DUE PROCESS CHECKLIST

- Right to be timely informed of meetings with each party, either before or reasonably soon thereafter (unless doing so would fundamentally alter or hamper the investigation strategy).
  - A right of the parties under VAWA Sec. 304.
  - Fosters communication between investigators and the parties.
  - Helps parties to prepare for possible retaliation.
  - Allows opportunity for the parties to send questions to ask of the other.
  - Investigation strategy example: Sometimes the first meeting with a party is strategically unannounced.

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DUE PROCESS CHECKLIST

- Right to sanctions that are proportionate with the severity of the violation and the cumulative conduct record of the responding party.
  - Serious violations warrant serious sanctions.
  - What about "precedent"?
  - Conflict at times with "educational" sanctions.
  - Balancing act: Do not overreact or over-sanction.
  - Avoid automatic sanctions as each case is different.
    - Consider use of "presumptive" sanctions.
  - OCR indicates that sanctions should account for the impact on the responding party's education or work.

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DUE PROCESS CHECKLIST

- Right to the outcome/final determination of the process in writing as per VAWA §304.
  - No longer sufficient to simply tell the parties the outcome.
  - Must be provided to both parties.
    - Need not be identical, but should contain same key elements.
  - Must be provided "simultaneously".
  - Must provide each stage that could be "final".
  - Finding, sanction, and rationale (see next slide).

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DUE PROCESS CHECKLIST

- Right to a detailed rationale for the finding/sanctions
  - VAWA requires finding, sanction, and rationale.
  - Case law overwhelmingly supports this requirement.
  - Written detailed rationale provided to the parties (allows for appeal).
  - Rationale for decision on any challenged interim measures, findings, appeals, any change in finding or sanction.

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DUE PROCESS CHECKLIST

- Right to an equitable appeal on limited, clearly identified grounds:
  - A procedural error or omission occurred that significantly impacted the outcome of the hearing.
  - To consider new evidence, unknown or unavailable during the original hearing or investigation, that could substantially impact the original finding or sanction.
  - The sanctions imposed are substantially disproportionate to the severity of the violation (or: the sanctions fall outside the range of sanctions the university/college has designated for this offense).

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DUE PROCESS CHECKLIST

- Right to competent and trained investigators and decision-makers.
  - Competent:
    - Able, trained, unbiased, intelligent, analytical, commitment to due process and fairness.
  - Trained: Minimum of 2-4 days per year.
    - Title IX-compliant.
    - VAWA-compliant.
    - Key topics: Questioning, Credibility, Analyzing Evidence, Report Writing, Consent, Victimology, Due Process, etc.

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DUE PROCESS CHECKLIST

- Right to a written enumeration of these rights.
  - Insert into your policies and procedures (see e.g.: ATIXA's 1P1P).
  - Fosters transparency.
  - Visible representation of commitment to fairness.
  - Fosters institutional accountability.

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QUESTIONS?

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CONTACT INFORMATION

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