



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

June 15-16, 2020 | Summer Certification Series

YOUR FACULTY



W. SCOTT LEWIS, J.D.

Partner, TNG
Advisory Board, ATIXA



DANIEL C. SWINTON, J.D., ED.D.

President, TNG
Vice President, ATIXA

- I. Case Law Review and Application to Professional Practice**
 - a. Deliberate Indifference
 - b. Appeals
 - c. Retaliation
 - d. First Amendment
 - e. Title IX: Due Process, Erroneous Outcome, Selective Enforcement, and Gender-Based Claims
 - f. Title IX Potpourri
- II. Recent OCR Resolutions: Michigan State University and Chicago Public Schools**
- III. OCR Update: Review of the Proposed Regulations**
- IV. Train the Trainer: VAWA Section 304 Compliance**

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”

SHIFTING TERMINOLOGY



ATIXA IS SHIFTING ITS TERMINOLOGY TO MATCH THE NEW REGS:

- You = Recipient
- Various titles = Title IX Coordinator
- Reporting Party = Complainant
- Responding Party = Respondent
- Resolution = Grievance Process
- ATIXA model policy offenses NCSL/NCSI = sexual assault
- Intimate Partner Violence = Dating and domestic violence

AND OCR DEFINITIONS OF THESE OFFENSES MUST BE ADOPTED:

- Including OCR definition of Sexual Harassment, Clery Act definition of sexual assault, and VAWA definitions of DV/DV and stalking.

CURRENT STATE



- Withdrawn:
 - 2011 Dear Colleague Letter (DCL)
 - 2014 Q&A on Title IX and Sexual Violence
 - 2016 DCL on Transgender Students
- Still in effect:
 - 1975 Regs, as amended
 - 2001 OCR Revised Sexual Harassment Guidance (has force and effect of law; conflicts with 2020 Regs)
 - 2003 DCL on Title IX and Free Speech
 - 2010 DCL on Harassment and Bullying
 - 2013 DCL on Pregnant and Parenting Students
 - 2015 DCL on the role of Title IX Coordinators
 - 2017 Q&A on Campus Sexual Misconduct issued as interim guidance, still in place

CURRENT STATE



- 2020 Title IX Regulations
- Issued May 6th, 2020 (Publication date May 19th, 2020)
- Effective and enforceable August 14th, 2020
 - Amend the Code of Federal Regs. and have force and effect of law
 - Some provisions already mandated by due process case law in some jurisdictions
 - Intervening variables (litigation and election) may impact enforcement in the shorter or longer term
 - Lawsuits against Regs anticipated from:
 - SSAIS, KYIX (represented by ACLA), etc.
- Regulations are significant, legalistic, surprisingly prescriptive, very due-process heavy, and go well beyond what any court has required under 5th/14th Amendment case law.

COMMITMENT BEYOND COMPLIANCE



- Industry standards = the floor. Best practices = the ceiling.
- Statutes, case law, and federal regulations set the floor.
- Some states have laws that exceed federal requirements and do not conflict with 2020 Regs. Where they do conflict, Regs control.
- Aiming for the floor = doing the bare minimum
 - Will continue the cycle of inequity and unfairness; Activists won't stand for it
- Civil rights issues demand more than the bare minimum
- Effect of new “not deliberately indifferent” OCR standard is to institutionalize deference, rather than encourage excellence.
 - OCR is saying to schools: Congrats, at least you didn't *completely* ignore invidious discrimination.

BRIEF LEGAL PRIMER

NOT FOR DISTRIBUTION

COURT SYSTEM IN A NUTSHELL

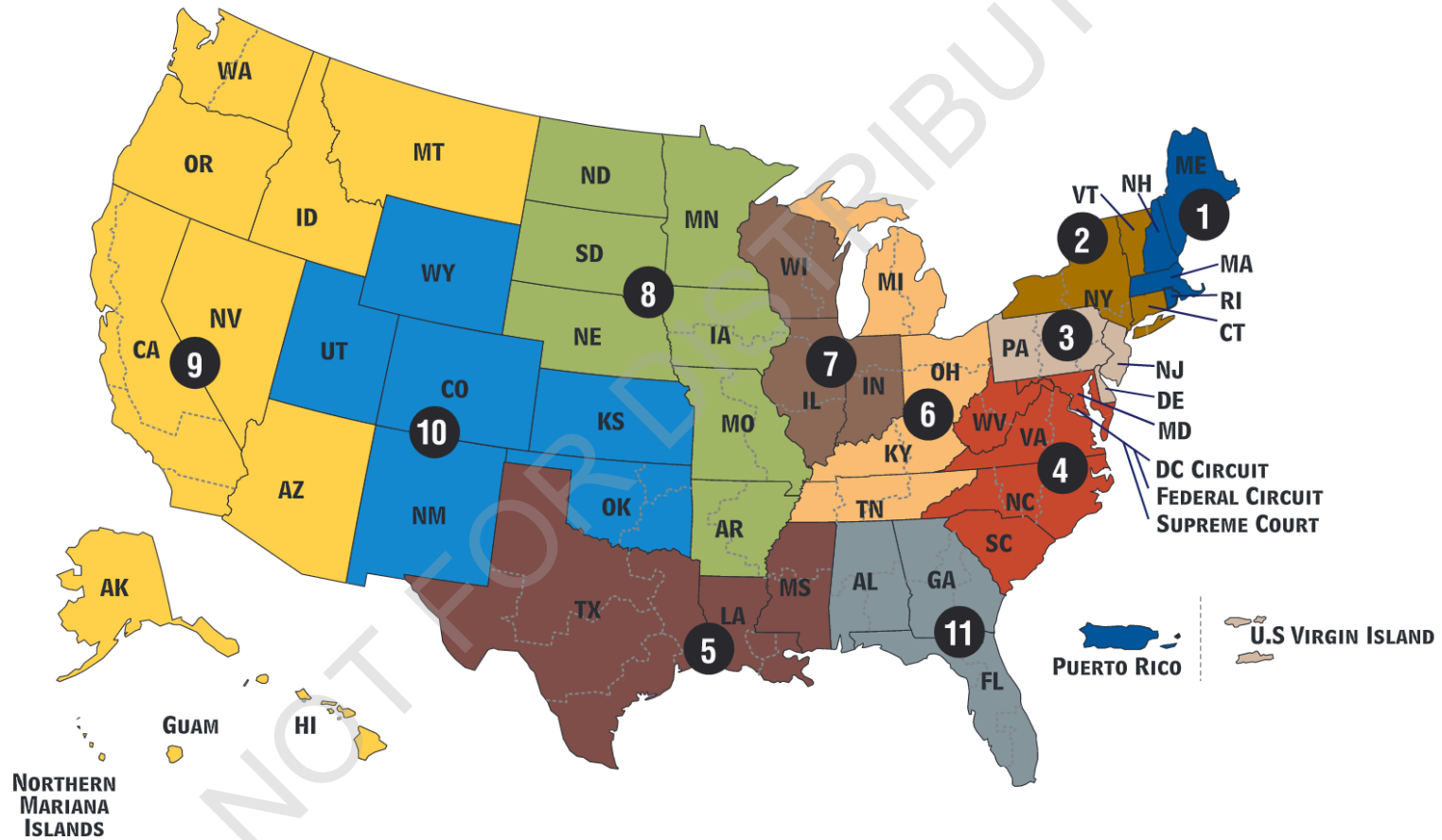


- Federal Court
 - **U.S. District Court**
 - Trial Court; Single judge or magistrate judge; Decisions binding only on single District
 - **U.S. Courts of Appeals (“Circuit Courts”)**
 - 12 Geographic Circuits: 11 + DC Circuit
 - Panel of three judges (also *en banc* option)
 - Decisions binding on entire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

U.S. COURTS OF APPEALS MAP

Geographic Boundaries

of United States Courts of Appeals and United States District Courts



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

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

RECENT CASE LAW



TOPICS



Due Process

Erroneous Outcome &
Selective Enforcement

Negligence/Duty

Deliberate
Indifference

First Amendment

Retaliation

DELIBERATE INDIFFERENCE & NOTICE

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DELIBERATE INDIFFERENCE STANDARD



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

Lawsuit

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

Administrative Action (OCR)

- Initiated by OCR.
- Voluntary compliance or findings
- Requires:
 - Actual OR constructive notice (“knew or should have known”).
 - Investigate.
 - End harassment.
 - Remedy impact.
 - Prevent recurrence.
- **THIS IS NO LONGER OCR’S APPROACH**

NOTICE: COURT VS. 2020 REGS



Actual Notice (Lawsuit)

- Recipient receives notice of alleged incident reported to employee with authority to take corrective action.
- No formal complaint required.
- No formal distinction between Higher Ed and K-12.
- Requires a response that is not deliberately indifferent.

Actual Knowledge (OCR)

- Alleged incident reported to employee with authority to take corrective action.
 - K-12: All employees
 - Higher Ed: Only “Officials with Authority”
- Formal complaint required to investigate.
- Requires offering supportive measures to the parties
- Requires a response that is not deliberately indifferent

2020 REGS & DELIBERATE INDIFFERENCE



- OCR has now shifted to a deliberate indifference approach that closely mirrors the court-based standard:
 - 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 promptly 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.**

2020 REGS & DELIBERATE INDIFFERENCE



- In the 2020 proposed regulations, OCR suggests a recipient may avoid deliberate indifference by:
 - Responding to notice of potential sexual harassment
 - Informing the complainant of formal resolution options
 - Offering supportive measures
 - Explaining informal resolution options
 - 34 CFR § 106.44
 - Initiating an investigation when a formal complaint is filed and observing all regulatory requirements related to communication and access
 - 34 CFR § 106.45

Facts

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

Facts (cont.)

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

Holding

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

Takeaways

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

2020 REGS, JURISDICTION & STUDENT ORG HOUSES



- Title IX covers education programs and activities, including “buildings owned or controlled by a student organization that is officially recognized by postsecondary institution.”
 - “where a postsecondary institution does choose to officially recognize a Greek letter association, buildings owned or controlled by that fraternity or sorority are part of the postsecondary institution’s education program or activity under these final regulations.”
 - This includes most Greek letter organization houses – whether owned by the chapter, the national corporation, or others.

Facts

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

Facts (cont.)

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

Facts (cont.)

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

Decision

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

Decision

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

Takeaways

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

Takeaways

- Although students are entitled to have an institution respond in a manner that is not deliberately indifferent, a complainant has no right to their *preferred* remedy or preferred sanction.
 - 2020 Regs refused to require specific sanctions or remedies
- Decision makers, particularly in public institutions, should maintain some knowledge of clearly established constitutional rights that may bear upon their decisions.

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.

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 heightened 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.

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 ruling 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**.
- 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.

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 “**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.”

Facts

- David Daniels, a renowned singer, was hired by UM into a tenure fast-track position.
- During the hiring process, UM faculty and administrators discussed Daniels' known history of predatory behavior with younger students and how to mitigate the risk, including discussing with Stephen West, the Chair of the Vocal Department at SMTD.
- Daniels was granted tenure in spite of UM's knowledge of serious sexually-related allegations

Facts

- Lipian was a student in the prestigious School of Music, Theater, and Dance (SMTD) at University of Michigan (UM).
- Lipian alleges Daniels subjected him to repeated and incessant sexual harassment.
- Lipian also alleges that Daniels sexually assaulted him at Daniels' home; incident involved Daniels' alleged use of Ambien to incapacitate Lipian.

LIPIAN v. UNIV. OF MICHIGAN,

NO. 18-13321 (E.D. MICH, APR. 9, 2020).



Facts

- Daniels and his husband were indicted in Texas for criminal assault after a student in Houston accused them of rape – UM police assisted in conducting the investigation.
- UM eventually investigated Lipian's allegations, but only after Lipian filed a civil suit.

Holding

- The court found that discussions with West during Daniels' hiring were sufficient to constitute actual notice of a potential threat to SMTD students prior to Lipian's allegations, making it plausible that UM was deliberately indifferent to acts of sexual misconduct Daniels committed at SMTD.

Takeaways

- Expanded “actual notice” standard – may be satisfied by knowledge of Daniels’ past behavior and the foreseeability of future harm.
 - The court implied that directed communications and training efforts might have met UM’s due diligence responsibility by letting Daniels know what constituted appropriate interactions with students at UM.
- Anonymous report combined with knowledge of Daniels’ past conduct should have moved UM to a more robust inquiry, including a disciplinary conversation with Daniels.
- UM could still be deliberately indifferent if the measures did not result in stopping or preventing future occurrences.
- Despite law enforcement hold, UM may have been deliberately indifferent in taking no action.

Facts

- Jane Doe, a student at Sarah Lawrence College (SLC), was allegedly sexually assaulted by another student in an SLC residence hall.
- Doe reported the assault to SLC administrators three days later.
- SLC immediately notified the respondent of the allegations and did not launch any formal investigation.
- SLC encouraged Doe to medically withdraw from classes and vacate her residence hall room after struggling to keep up with class attendance and assignments.
- Doe was told she had to leave campus but might be able to stay if she apologized to professors and explained her absences and missing work.

Facts

- Doe was instructed to leave campus immediately, and attempted suicide by hanging herself from the shower head.
- Three months later, Doe learned SLC had taken no action on her report because she had failed to file a formal complaint.
- Five months later, SLC held first Title IX hearing and found respondent not responsible.
- Appeal resulted in separate hearing before a different panel.
- Second hearing was nine months after Doe's report. Respondent was found not responsible.

Holding

- SLC argued they were not obligated to investigate because Doe had not filed a formal complaint.
- The court found Doe was not initially informed regarding retaliation protection, availability of supportive measures, or the formal resolution process.
- SLC's decision to immediately inform the respondent of the allegations subjected Doe to an ongoing hostile environment.
- SLC should have informed Doe of formal complaint procedure, retaliation protections, and available supportive measures during Doe's meeting with Title IX Investigator

Takeaways

- This case may preview the impact of the 2020 Title IX regulations on recipients' grievance processes.
 - Courts may expect recipients to promptly respond to notice of alleged sexual harassment, regardless of the school's procedures for lodging a "formal complaint."
 - Recipients should steadfastly observe processes related to responding to notice, including providing sufficient information about supportive measures and formal resolution options.
 - Recipients should consider the impact on the complainant of informing the respondent of the allegations. Appropriate supportive measures and retaliation protections should be in place, and the complainant should be fully informed prior to notifying the respondent.

APPEALS

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APPEALS (2020 REGS)



- Must offer equitable appeal based on determination or dismissal of any allegations.
- All parties receive notification of any appeal.
- Opportunity for all parties to support or oppose outcome.
- Written decision with rationale delivered simultaneously to the parties.
- Appeal decision-maker cannot have had any other role in the investigation or resolution process.
- “Reasonably prompt” timeframe for producing appeal decision.

APPEALS GROUNDS (2020 REGS)



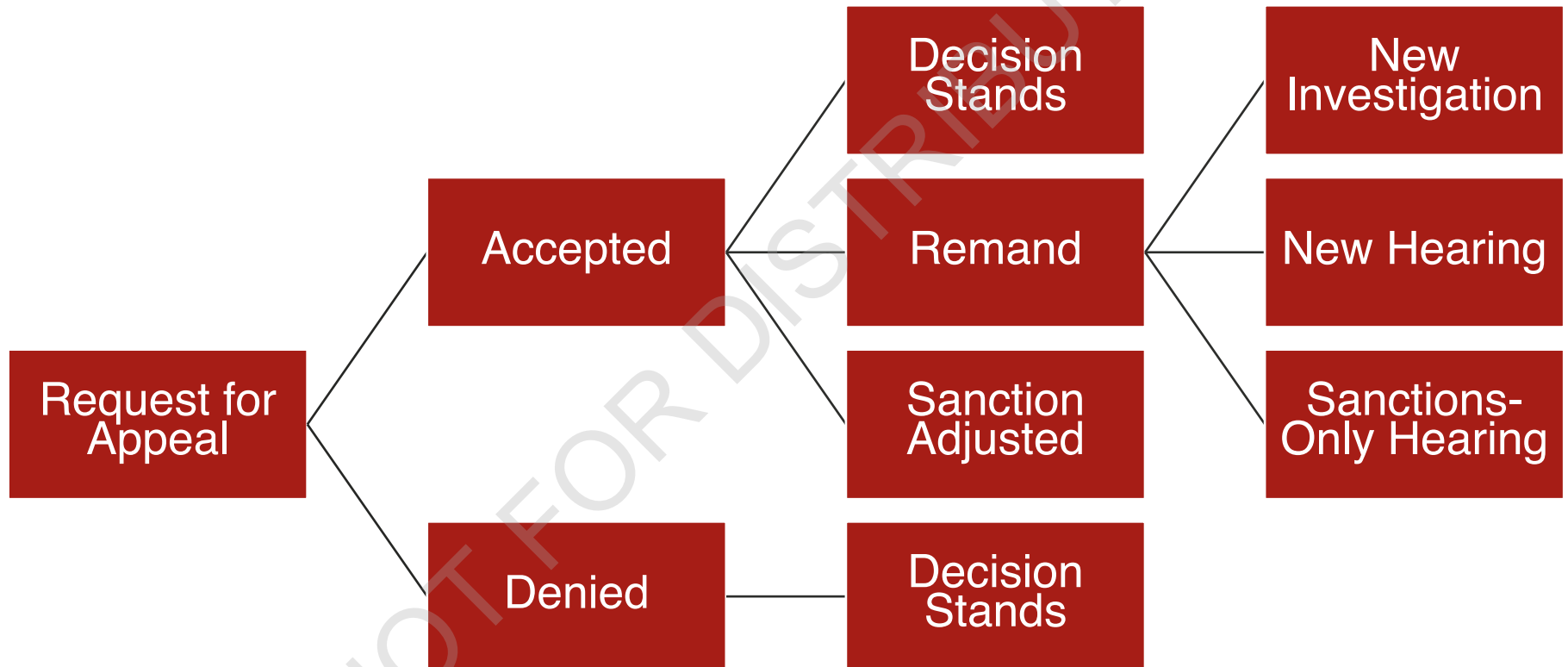
- A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

APPEALS: KEY ELEMENTS



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

APPEALS: THE PROCESS



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



- **Facts**

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

- **Facts (cont.)**

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

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



- **Facts (cont.)**

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

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



- **Facts (cont.)**

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

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



- **Free Speech claim:**

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

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- **Fourteenth Amendment claim:**

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

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



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

RETALIATION

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No recipient or other person may:

- Intimidate, Threaten, Coerce, Discriminate
- Against any individual for the purpose of interfering with any right or privilege secured by Title IX, or
- Because the individual has:
 - Made a report or complaint, testified, assisted, or participated or refused to participate
 - In any manner in an investigation, proceeding, or hearing under Title IX.

2020 REGS: RETALIATION



- Intimidation, threats, coercion, or discrimination, *for the purpose of interfering with any right or privilege secured by title IX or this part*, constitutes retaliation.
- Charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, *for the purpose of interfering with any right or privilege secured by title IX or this part*, constitutes retaliation.

2020 REGS: RETALIATION



- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).
- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation as long as a policy recognizes that determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

ELEMENTS OF A RETALIATION CLAIM



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

TITLE IX RETALIATION FOUNDATIONS

JACKSON v. BIRMINGHAM BD. OF ED.



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

TITLE IX RETALIATION FOUNDATIONS

JACKSON v. BIRMINGHAM BD. OF ED.



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

Facts

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

Facts

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

Facts

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

Retaliation Analysis Under Title VII:

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

Holding

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

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

Holding

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

Takeaways

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

FIRST AMENDMENT AND TITLE IX

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TITLE IX & THE FIRST AMENDMENT



- **Title IX cannot be enforced or use to infringe on First Amendment protections.**
 - This is emphasized in the 2020 Regs
- **Time, place, and manner** limitations on expression must be applied consistent with the forum in question.
 - Content neutral
 - Narrowly tailored to serve a significant state/gov't interest
 - Leave ample alternative channels for communication of the information

TITLE IX & THE FIRST AMENDMENT



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

TITLE IX & THE FIRST AMENDMENT



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

Facts

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

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

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



Facts

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

Facts

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

Decision

- The Fourth Circuit reversed, finding that FMF had raised sufficient concerns that UMW was “deliberately indifferent” to the sex discrimination.
- Despite the harassment occurring online, UMW had substantial control over both the harassers and the context in which the harassment occurred:
 - Messages concerned events occurring on campus.
 - Specifically targeted UMW students.
 - Originated on or within the immediate vicinity of the UMW campus.
 - Used the university’s wireless network.

Decision

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

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

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



Takeaways

- Sets up a slippery slope - institutions may be held liable for failing to address discrimination/harassment that occurs online by unknown individuals within a forum not controlled by the institution.
- Institutions must take reasonable steps to investigate anonymous behavior where they control the context and, likely, the harasser.
- Institutions/schools may not “do nothing” on the basis that the posts are anonymous.
- Don’t get blinded by First Amendment concerns initially. Title IX requires an investigation as to whether the conduct is severe, persistent or pervasive, and objectively offensive – and you can then determine if the First Amendment analysis requires the protection of speech.

Facts

- 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 . . .)”

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 if a reporting party desires, the BRT invites the accused 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.

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.

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.
 - E.g.: FIRE, Speech First, etc.

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.

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



Facts

- 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.

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
- Iowa's actions failed "strict scrutiny," in that revoking BLIC's RSO status was not narrowly tailored
- Injunction awarded; Iowa required to reinstate BLIC.
- School officials entitled to qualified immunity.
- BLIC awarded nominal damages in the amount of \$1.

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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Facts

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

Facts

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

Facts

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

Holding

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

Takeaways

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

Takeaways

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

CASE STUDY #1: “iPHONE”



CASE STUDY: IPHONE



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

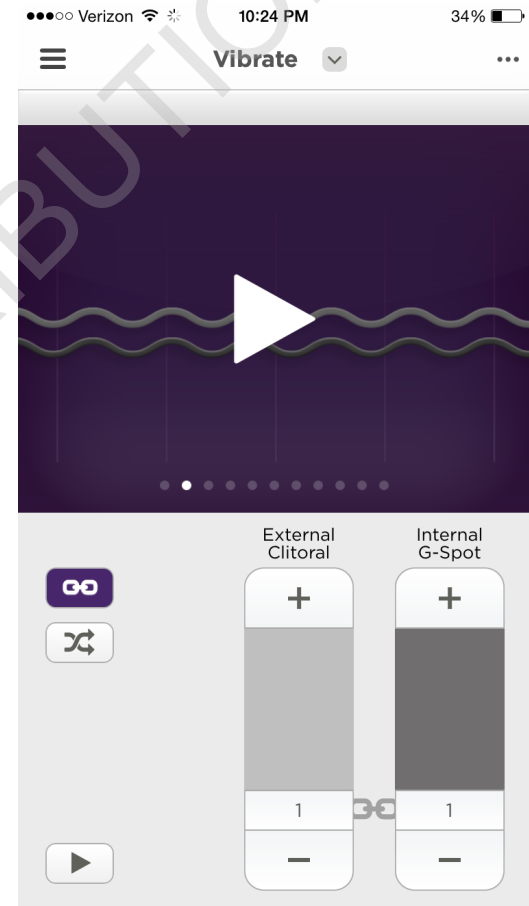
CASE STUDY: IPHONE



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

CASE STUDY: IPHONE

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



CASE STUDY: IPHONE



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

CASE STUDY: IPHONE



CASE STUDY: IPHONE



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

CASE STUDY: IPHONE



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

CASE STUDY: IPHONE



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

CASE STUDY: IPHONE



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

DUE PROCESS FOUNDATIONS

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WHAT IS DUE PROCESS?

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

DIXON V. ALABAMA STATE BD. OF ED.

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



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

DIXON V. ALABAMA STATE BD. OF ED.

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



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

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



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

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

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



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

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



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

KEY TITLE IX ISSUES

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

- **6th Circuit's decision**

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

Facts

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

Facts

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

Decision

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

Decision

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

Takeaways

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

Facts

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

Facts

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

Holding

The First Circuit:

- Declined to adopt the Sixth Circuit’s “direct confrontation” requirement from *Doe v. Baum*.
- Upheld the expulsion, ruling that:
 - “[A] process that affords an opportunity for real-time cross-examination by posing questions through a hearing panel or other third party, like the process used by UMass, meets due process requirements”
- Found that the Board was so effective at questioning, it cured the errors related to “calming” questions and the administrator paring down questions that never got to the Board.

Holding

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

Takeaways

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

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

Facts

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

Facts

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

Facts

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

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Holding

The Seventh Circuit reversed and remanded, finding that:

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

Holding

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

Holding

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

Holding

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

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Takeaways

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

Facts

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

Facts

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

Facts

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

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Decision

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

Takeaways

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

Facts

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

Facts (cont.)

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

Holding

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

Takeaways

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

Facts

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

Facts (cont.)

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

Facts (cont.)

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

Decision

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

Takeaways

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

DOE v. SYRACUSE UNIVERSITY,

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



- **Facts**

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

DOE v. SYRACUSE UNIVERSITY,

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



- **Facts (cont.)**

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

DOE v. SYRACUSE UNIVERSITY,

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



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

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

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

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

DOE v. SYRACUSE UNIVERSITY,

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



• Doe's Allegations Regarding the Hearing and Decision

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

DOE v. SYRACUSE UNIVERSITY,

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 the "technical difficulties" with the recording.
- Appeals Board upheld the decision and rejected his procedural and substantive challenges to the investigation, hearing, and decision.

- **Court's Analysis**

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

- **Takeaways**

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

Facts

- Lee was a Ph.D. student at UNM when UNM police forwarded information regarding sexual misconduct involving Lee to UNM.
- Lee was banned from campus but allowed to continue graduate studies.
- “Student Grievance Procedure” includes report, evidentiary hearing, parties may present and question witnesses and evidence.
- “Discrimination Claims Procedure” has no opportunity to test credibility or weight of evidence, know witness identities, review statements, or evidentiary hearing

Facts

- UNM conducted an investigation and produced an investigation report finding Lee responsible for sexual misconduct policy violations.
- Lee was allowed to provide “new” evidence but not contextualize or offer a theory of the case based on the evidence.
- Determination was upheld and Lee selected an administrative sanctioning hearing.
- Lee was expelled, and “underage drinking” was cited as justification for the heavy sanction.

Holding

- Lee alleged due process violations
 - not made aware of all the charges against him
 - not allowed to question the complainant or witnesses
 - not informed of the sanctions that would be imposed
- In the court's initial opinion on UNM's motion to dismiss, the court opined that the preponderance of the evidence standard was not appropriate for sexual misconduct proceedings, but the court revised this opinion and concluded the preponderance standard does not offend due process.

Holding

- No apparent compelling interest for the difference in procedures.
- Recognized UNM's strong interest in limiting direct cross-examination but some form of live questioning must be provided in an evidentiary hearing.
- UNM's consideration of underage drinking in determining sanctions constituted a relevant disputable issue to which Lee was not given the opportunity to respond.
- Noted existing precedent in accepting procedural deviations as support for an inference of gender bias.

Takeaways

- Grievance procedures should deal with similar misconduct similarly, with no major procedural protections or rights omitted arbitrarily between processes.
- Title IX-based grievance resolution processes must include an evidentiary hearing, with the right to present evidence, dispute or challenge adverse evidence, and question opposing witness and party testimony.
- Particularly when the determination turns on credibility, the court cited *Doe v. Baum* and *Doe v. Purdue* in justifying a requirement for live questioning in front of the decision-maker.

Takeaways

- Recipients must outline *all* charges for which the respondent is expected to answer.
- New or modified charges must be communicated to the parties with sufficient time to prepare a meaningful response.
- Gender bias claim + statistical data + other circuit decisions showing complainants and respondents correspond overwhelmingly with females and males.
- Procedural deviations as evidence in claims of Title IX gender bias.

2020 REGS & DUE PROCESS



- Due process contained in Section 106.45 of the 2020 Regs. Some key components:
 - Equitable treatment
 - Formal Complaint
 - Written notice to the parties
 - Allegation/investigation, meetings, report, hearing, appeal, outcome
 - Advisors – providing & role
 - Separation of roles – investigator, decision-maker, appeals officer
 - Presumption of Innocence
 - Standard of Proof
 - Robust investigation

- Sec. 106.45 (cont.)
 - Prompt timeframes
 - Report writing
 - Report and evidence review – provide evidence
 - Hearing
 - Questioning & Cross examination
 - Use of technology
 - Appeals required; equitable
 - Informal resolution
 - Differences between Higher Ed and K-12

TITLE IX POTPOURRI

Hazing

Transgender Students

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Facts

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

Facts (cont.)

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

Analysis

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

Decision

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

Takeaways

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

Takeaways

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

Facts

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

Facts (cont.)

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

Facts (cont.)

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

Decision

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

Decision (cont.)

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

Takeaways

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

OCR CAIC RESOLUTION ON TRANSGENDER STUDENT ATHLETES



- Connecticut Interscholastic Athletic Conference(CIAC) has a policy permitting students to participate consistent with their gender identity.
 - CIAC’s policy is consistent with Connecticut law.
- Students and families from six districts filed an OCR complaint against CIAC.
- Complaint alleged that CIAC’s “Revised Transgender Participation Policy” denied girls opportunities to compete:
 - Including in state and regional meets, and
 - To receive public recognition critical to college recruiting and scholarship opportunities.
 - And that its application denied opportunities to girls competing in interscholastic girl their sex.

OCR CAIC RESOLUTION ON TRANSGENDER STUDENT ATHLETES



- OCR launched an investigation, finding CIAC in violation of Title IX.
- OCR then drafted a “Letter of Impending Enforcement Action” or a “Section 305” Letter.
 - VERY rare to see a 305 letter.
 - Issue is also pending in federal court
 - “OCR issues this Letter of Impending Enforcement Action because the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury have to date failed to voluntarily enter into resolution agreements to remedy the identified violations.”

OCR CAIC RESOLUTION ON TRANSGENDER STUDENT ATHLETES



- “OCR determined that the CIAC, by permitting the participation of certain male student-athletes girls’ interscholastic track in the state of Connecticut, pursuant to the Revised Transgender Participation Policy, denied female student-athletes athletic benefits and opportunities, including advancing to the finals in events, higher level competitions, awards, medals, recognition, and the possibility of greater visibility to colleges and other benefits.”

(<http://www.adfmedia.org/files/SouleDOEImpendingEnforcementLetter.pdf>)

OCR CAIC RESOLUTION ON TRANSGENDER STUDENT ATHLETES



- OCR wrote:
 - CIAC schools “placed female student-athletes in athletic events against male student-athletes, resulting in competitive disadvantages for female student-athletes. The athletic events in which the female student-athletes competed were coeducational; female student-athletes were denied the opportunity to compete in events that were exclusively female, whereas male student-athletes were able to compete in events that were exclusively male. Accordingly, the district’s participation in the athletic events sponsored by CIAC denied female student-athletes athletic opportunities that were provided to male student-athletes.”

(<http://www.adfmedia.org/files/SouleDOEImpendingEnforcementLetter.pdf>)

RECENT OCR RESOLUTION AGREEMENTS

- Michigan State University
- Chicago Public Schools

MICHIGAN STATE UNIVERSITY SCANDAL



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

ALLEGATIONS AGAINST MSU



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

SEPTEMBER 2019 RESOLUTION AGREEMENT AND FINDINGS LETTER



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

RESOLUTION AGREEMENT: POLICY AND TITLE IX STRUCTURE



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

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

RESOLUTION AGREEMENT: INDEPENDENT OVERSIGHT AND MONITORING



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

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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.

RESOLUTION AGREEMENT: EMPLOYEE ACCOUNTABILITY



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

RESOLUTION AGREEMENT: TRAINING



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

CLERY ACT FINDINGS AND AGREEMENT



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

CLERY ACT FINDINGS AND AGREEMENT



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

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



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

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



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

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



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

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



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

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



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

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



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

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RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



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

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



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

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



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

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



Training Personnel

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

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



Training Personnel

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

Student and Parent Training

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

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



Student and Parent Training

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

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



Records Maintenance

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

RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



Documentation and Personnel Files

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

QUESTIONS?



CONTACT INFORMATION

DANIEL C. SWINTON, J.D., ED.D.

daniel.swinton@tngconsulting.com

W. SCOTT LEWIS, J.D.

scott.lewis@tngconsulting.com

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