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Sixth Annual Title IX Summit

Jun 11th, 9:45 AM - 11:00 AM

How to Avoid a Title IX Lawsuit

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Hamill, Esq., Patricia and Dakessian, Esq., Lorie, "How to Avoid a Title IX Lawsuit" (2018). *Title IX Summit*. 3.

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**Conrad
O'Brien**

How to Avoid a Title IX Lawsuit:
Lessons Learned and Best Practices
from Attorneys for Respondents

6th Annual Title IX Summit
Rowan University

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Patricia M. Hamill is the Chair of the Title IX, Due Process and Campus Discipline practice at Conrad O'Brien, PC. She represents college students nationwide, and more recently college professors, who are subjected to campus disciplinary proceedings or who have been disciplined by their colleges for alleged sexual misconduct following such proceedings. Ms. Hamill often attempts to resolve cases behind the scenes. Where resolution cannot be achieved, she has filed lawsuits for breach of contract, violation of Title IX (or other civil rights statutes) and tort liability on the basis that colleges' investigation and adjudication procedures failed to ensure the students' fundamental due process rights, discriminated against them on the basis of sex and breached the schools' contractual obligations. Notably, Patricia was the lead attorney in *Doe v. Brandeis* in the District of Massachusetts, one of the most often cited cases in this area. Outside of the Title IX arena, Patricia is a commercial litigator who also represents clients regarding government investigations.

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Lorie Dakesian is the Vice Chair of the Title IX, Due Process and Campus Discipline practice at Conrad O'Brien, PC. She represents college students and professors who are subjected to campus disciplinary proceedings or who have been disciplined by their colleges for alleged violations of sexual harassment and misconduct policies following such proceedings, or complainants who raise and pursue sexual assault or harassment claims, to ensure that each client understands the university's process, seeks procedural safeguards, and is afforded a fair hearing. She works closely with students and their families to help them navigate and fully prepare for investigations and hearings, and is experienced with working with students whose situations may be complicated by mental health concerns or the need for disability accommodations. In addition to her representation of college students, Lorie represents clients in several practice areas, including white collar and internal investigations, complex commercial litigation, and data privacy matters. She also is a Certified Information Privacy Professional (CIPP/US), the global standard for privacy certification.

Current Environment

Brief Title IX Overview

Title IX Litigation Overview

The Disciplinary Process from Complaint to Appeal

Questions

Current Environment

Legitimate Concerns about Victims of Sexual Assault

because his home was mere blocks away—he could have easily wanted man riding a motorcycle extraordinarily slowly on a cold night and pu again, he was arrested. What Chris failed to realize was that the charge where he lived meant that even his first offense was to be treated as DUJ, he confronted much more severe consequences with harsher prier the risk of losing everything—his construction business, girlfriend, frier license—because of the zero-tolerance policy now connected with DI

Rape


Rape is another example of a crim sion in its definition over time. While crime and considered *mala in se*, how i has changed. For example, originally, t “carnal knowledge of a female forcibly 2011, the FBI definition was changed that are considered rape: “penetration the vagina or anus with a body part tion by a sex organ of another person, victim.” This change included boys an behavior beyond the penetration of a the FBI removed the word *forcibly* fro reflect contemporary understanding, d not necessarily involve force, but such as when a person is unconsc example is that of rapist Brock Tur University, was caught in the a three felony charges: assault wit woman, sexually penetrating an f object, and sexually penetrating a eign object. Turner’s victim was t it happened behind a trash cont fraternity house on campus.

Additional changes in laws i rape can occur between married definition could not occur betw all states have marital rape laws, to recognize the seriousness of r

(Some people argue that it is still not taken seriously.) South marital rape a crime. In 1993, North Carolina became the l

There are countless instances of behaviors that have l or decriminalized. These changes reflect transformations in and shifts in societal norms. In the past, rape was considere marital rape seemed impossible. Today researchers and other of power and control. Thus, statutes were changed to refle

rape: A type of violent crime considered *mala in se* that includes “penetration, no matter how slight, of the vagina or anus with a body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”



Serious Consequences for those Found Responsible



TIME'S UP

The clock has run out on sexual assault, harassment and inequality in the workplace. It's time to do something about it.



“No student should be forced to sue their way to Due Process”

-Betsy DeVos, Secretary for Education

What's at stake here?

- Commentary Magazine, The Campus Sex-Crime Tribunals are Losing (September 8, 2017)
<https://www.commentarymagazine.com/articles/campus-sex-crime-tribunals-losing/>
- The Atlantic, “The Uncomfortable Truth about Campus Rape Policy” (September 7, 2017)
<https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/>
- The Wall Street Journal, “Witch Hunt on the Quad” (January 27, 2017)
<https://www.wsj.com/articles/witch-hunt-on-the-quad-1485477033>

Title IX Overview

“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 education program or activity receiving Federal financial assistance...”

20 U.S.C. § 1681

Title IX of the Educational Amendments of 1972

- OCR's 2011 "Dear Colleague" Letter ("DCL")
- **Preponderance of Evidence Standard Instituted** ("a school's grievance procedures...must use a preponderance of evidence standard...Grievance procedures that use [a 'clear and convincing' standard] are not equitable under Title IX)
- No mediation (in sex assault cases)
- No cross examination of parties
- Clearer guidance on optimal time frames



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

April 4, 2011

Dear Colleague:

Education has long been recognized as the great equalizer in America. The U.S. Department of Education and its Office for Civil Rights (OCR) believe that providing all students with an educational environment free from discrimination is extremely important. The sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime.

- May permit Informal Resolution, such as mediation, if it is appropriate and if all parties voluntarily agree.
- Schools should provide written notice to the responding party of the allegations, including sufficient details and with adequate time to prepare a response before any initial interview.
- Title IX investigations must be led by a person free of actual or reasonably perceived conflicts of interest and biases.
- Discretion to apply either the preponderance of the evidence standard or the clear and convincing evidence standard.
- Appeals are not required, but a school may choose to allow appeals solely by the responding party or by both parties.

The burden is on the school—not on the parties—to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred...

A trained investigator should analyze + document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses and synthesize all available evidence—including both inculpatory and exculpatory evidence...

Restricting the ability of either party to discuss the investigation (i.e. through Gag Orders) is likely to deprive the parties of the ability to obtain and present evidence or otherwise to defend their interests and therefore is likely inequitable.

Guidance issued by the Department of Education's Office for Civil Rights in 2001 specifically incorporates principles of due process into Title IX with respect to university sexual misconduct proceedings.

- The Constitution guarantees due process to students in public and State-supported schools who are accused of certain types of infractions. The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding.
- Adequate, reliable and impartial investigation of complaints, including the opportunity to present witnesses and other evidence.
- Designated and reasonably prompt timeframes for the major stages of the complaint process.
- Schools should be aware of these rights and their legal responsibilities to individuals accused of sexual harassment.

- **The response from Universities has been tepid**
 - National Review, “Campus Kangaroo Courts: Blame Colleges, Not Just the Federal Government - <http://www.nationalreview.com/article/456157/campus-kangaroo-courts-history>
 - “The University of Chicago is not considering making changes to its disciplinary policies...” - <https://www.chicagomaroon.com/article/2017/9/8/read-uchicago-response-devos-pledge-roll-back-titl/>
 - “Harvard is ‘reviewing’ new federal Title IX guidance....[C]hanges to our policy made since the 2011 guidelines...will not be rolled back.” - <http://www.thecrimson.com/article/2017/9/25/harvard-responds-to-devos-guidelines/>
 - “UC Berkeley...stands firmly in support of the profoundly important policies enacted in recent years....” - <http://news.berkeley.edu/2017/09/07/uc-responds-to-trump-administrations-troubling-title-ix-changes/>
- *Equal Means Equal v. Department of Education* - lawsuit filed in the District of Massachusetts challenging the new guidance
- *SurvJustice v Dept of Education* - lawsuit filed in the Northern District of California challenging the new guidance
 - https://www.washingtonpost.com/news/grade-point/wp/2018/01/25/lawsuit-challenges-trumps-rollback-of-guidance-on-campus-sexual-violence/?utm_term=.70a234ad3de6
- **Increased public awareness:** Celebrity sexual assault accusations / #MeToo / #TimesUp

California Institute of Technology (CAL TECH): “For violations of Caltech’s Unlawful Harassment Policy, you can choose whether to pursue informal resolution (such as having someone talk to the alleged harasser and ask them to stop the problematic behaviors), or bring a formal complaint which will be investigated by one or more investigators who will make recommendations to the Dean regarding the outcome and disciplinary actions for the accused, if found to have violated the policy. Caltech runs a thorough and equitable process that clarifies the concerns that have been reported and takes actions to support our students when appropriate.”

<http://titleix.caltech.edu/FAQ>

OBERLIN COLLEGE: “When the initial Title IX assessment determines that informal resolution is an option, the college will take action to end the hostile environment and to be sure the reporting party has access to all employment, educational, and extracurricular opportunities at the college. Informal resolution does not involve a formal adjudication process so it does not result in disciplinary action against the responding party. Participation in informal resolution is voluntary for all parties, and a reporting party can request to end informal resolution at any time. At that time, the report may be referred for formal resolution.”

<https://www.oberlin.edu/equity-diversity-inclusion/sexual-misconduct/report-is-made/informal-resolution>

SYRACUSE UNIVERSITY: “The process through which the targeted individual expresses a desire for resolution other than through the Office of Student Rights and Responsibilities or through criminal processes. Once a report is filed with the University, options for informal resolution will be reviewed with [University’s Title IX Coordinator], who coordinates the informal resolution process.”

<http://inclusion.syr.edu/complaint-process/formal-informal-resolutions/>

“Rosen: What about due process for the accused?

Ginsburg: Well, that must not be ignored and it goes beyond sexual harassment. The person who is accused has a right to defend herself or himself, and we certainly should not lose sight of that. Recognizing that these are complaints that should be heard. There's been criticism of some college codes of conduct for not giving the accused person a fair opportunity to be heard, and that's one of the basic tenets of our system, as you know, everyone deserves a fair hearing.

Rosen: Are some of those criticisms of the college codes valid?

Ginsburg: Do I think they are? Yes.”

- Supreme Court Justice Ruth Bader Ginsburg, A Conversation with Justice Ruth Bader Ginsburg, 2018 Owen J. Roberts Memorial Lecture (February 12, 2018)(interview with Jeffrey Rosen)



The Disciplinary Process from Complaint to Appeal

Individual Bias

- Public Comments
- “Google-able” biases (e.g. CVs, affiliations, non-academic articles)

Conflicts

- External Conflicts (e.g. panel member knows one of the parties, witnesses, advisors)
- Internal Conflict (e.g. an individual playing multiple, inconsistent, roles within the process)

- “The goal of reducing sexual assault, and providing appropriate discipline for offenders, is certainly laudable. **Whether the elimination of basic procedural protections – and the substantially increased risk that innocent students will be punished – is a fair price to achieve that goal is another question altogether.**
- Each case must be decided on its own merits, according to its own facts. **If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision.”**

-Doe v Brandeis, D. Mass., 2016

- “An equitable investigation of a Title IX complaint **requires** a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence – including **both inculpatory and exculpatory evidence** – and take into account the unique and complex circumstances of each case.”
 - 2017 Guidance

- Initial Notice
- Notice of Charge
- Basis for Decision
- Record – Form and Access
- Meaningful determination to investigate

- “Without adequate notice, government officials can attempt...to construct a post hoc justification for their missteps by suggesting that ambiguous phrases...served as adequate notice. Due process will not allow this; **this notice must be sufficient to allow an accused student a meaningful opportunity to prepare. And an opportunity is not meaningful where, as here, the accused student is unaware of the factual bases on which he can be found responsible for a misconduct violation.**”
 - *Doe v George Mason University, 2016*
- Substantive, written notice “including sufficient **details** and with sufficient **time** to prepare a response before any initial interview. Sufficient details include the **identities** of the parties involved, the specific **section of the code** of conduct allegedly violated, the **precise conduct** allegedly constituting the potential violation, an the **date and location** of the alleged incident...”
 - 2017 Interim Guidance Question No. 6

- An accusation not yet substantiated
- If necessary to implement, should not be overreaching
- Meaningful and timely opportunity to challenge
- Could result in a permanent gap in Education Record even if ultimately found “not responsible”

- An accusation of sexual assault can be painful and scary
- Creates crisis
- Support and Respondent Services needed
- Often times Respondent is
 - Cut off from friends
 - Has to move dorms / out of University Housing
 - Isolated, ostracized
 - Unsure of who they can talk to about the process
 - Some schools prohibit talking about the event
 - Confidentiality

The Investigation – Danger of Victim Centered Techniques & Trauma Informed Theories

- The Atlantic, “The Bad Science Behind Campus Response to Sexual Assault” -
<https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211/>
- SAVE Report - <http://www.saveservices.org/wp-content/uploads/SAVE-Believe-the-Victim.pdf>
- SAVE Open Letter - SAVE Open Letter -
<http://www.saveservices.org/2015/02/save-open-letter-to-senate-help-committee/>

- Interviews need to be thorough and unbiased
- Narrative should not be presumed before interview
- Make a record of the questions and the answers
- Conduct sufficient interviews to get the full story and/or provide meaningful opportunity for follow up



- Evidence
 - What is considered?
 - Who is providing it?
 - What is out of bounds?
 - What is the method of objection?
 - Clear policies and consistent application
 - Beware of weighing too heavily cumulative testimony
 - Full disclosure of evidence to both Parties
- Witnesses
 - Interview ALL relevant parties – do not limit self to two interested individuals
 - Realistic consideration of biases
- Experts
 - Can the school bring in an expert?
 - Can the accused have an expert?



- Investigative Reports should be:
 - Thorough
 - Unbiased
 - Fact-Driven
- If you are going to provide the opportunity to comment or reply to the report, make sure you are open to any comments you get
- Consider transcripts over summaries to ensure clarity and transparency

Hearing

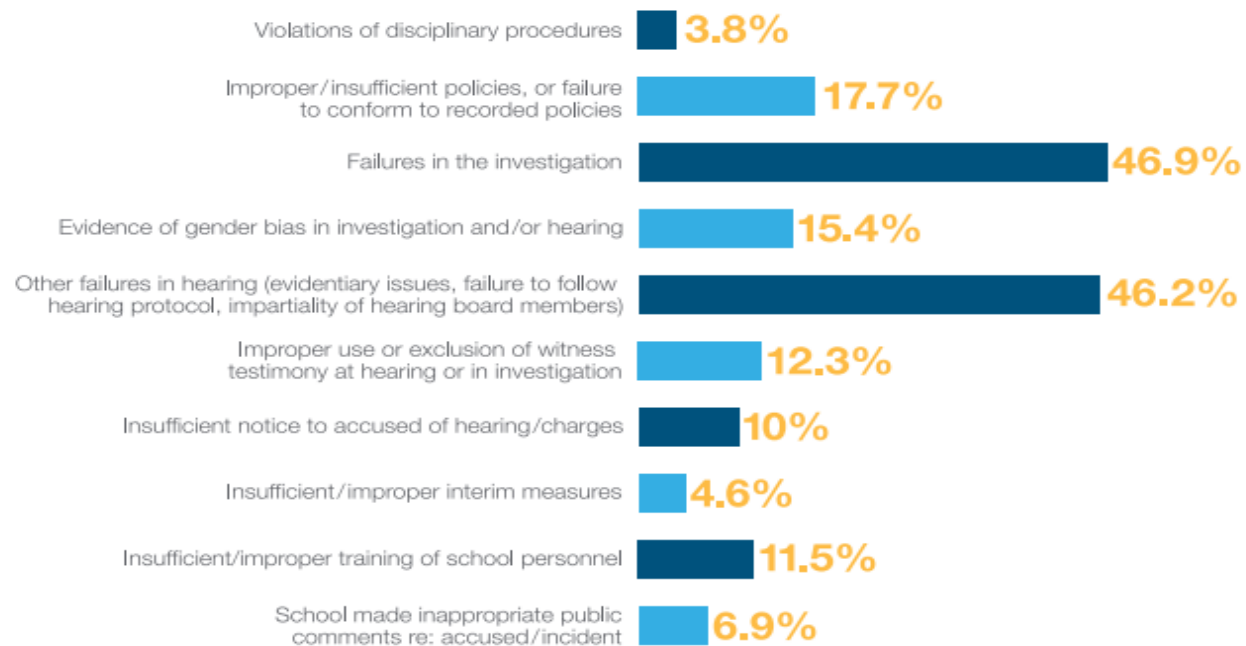
- Diverse
- Eliminate Actual or Appearance of Any Conflict of Interest
- Adequate Notice of Composition and Opportunity to Object
- Training

- Clear rules about what evidence will be considered
- Meaningful role for the advisor at the hearing
 - Provide opportunities for consultation between student and advisor and real advocacy by the advisor on the student's behalf
- Meaningful cross-examination procedures
- External Adjudicator
- Clarity re potential violations that are in question
 - Shadow Policies (e.g. condom use)
- Student Disabilities - Accommodations

- Sanction should not be imposed until conclusion of appeal or the appeal period has passed if an appeal is not taken
- No open ended sanctions
- Be transparent about use of 'precedent'
- Consider sanctions below suspension/expulsion
- Consider allowing student to complete semester
- Transcripts – clearly note what, if any, notations will appear on student's transcript and for how long

- Basis of Finding/Sanction
- Clear grounds for appeal (and consistent application)
 - Clear, written policies regarding appeals including grounds for appeal, who is the decision-maker, and what sort of evidence is appropriate
- Do not shift theories justifying finding an appeal
- Do not rubber stamp, especially regarding analysis of evidence

“Mistakes” Cited in the 130 Cases – A look at where schools allegedly made mistakes

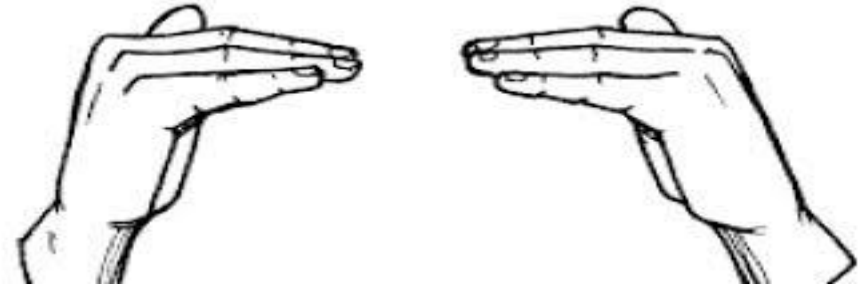


-Proskauer: Title IX Report
August 29th, 2017

- **Inadequate Notice** - *Doe v George Mason University, Doe v. Skidmore College*
- **Interviewing** students before they have been properly noticed about the charges against them - *Sterrett v Cowan*
- Failure to **collect relevant evidence** - *Doe v Amherst, Doe v Notre Dame, Doe v , Doe v Carr, Painter v Adams*
- **Ignoring claims** by males concerning female accusers - *Saravanan v Drexel University*
- Clear **gender bias** - *Gischel v University of Cincinnati, Doe v The Trustees of the Univ. of Pennsylvania*
- Lack of **cross-examination** of the accuser - *Doe v U. Cincinnati, Doe v Brandeis, Doe v Carry, Doe v Glick*
- Putting the **burden on the respondent to prove consent** - *Mock v University of Tennessee-Chattanooga*
- Use of a **single investigator** to perform multiple functions - *Doe v Brandeis*
- **Slanting investigative reports** against respondents and/or treating complainants and respondents differently throughout the process - *Prasad v Cornell University*
- Applying a **different definition** than the one applicable at the time of the conduct - *Doe v Brown*

Reasons to Do More than the Minimum

- It's the Right Thing to Do
- Greater Perception of Integrity in Result
- Avoids or Lessens Risk of Liability
- Support in the Law:
 - Recent Case Law Decisions
 - Cumulative Impact of Lack of Fairness



1. Robust support services for respondents
2. Openness to Informal Resolution
3. Well trained investigators and panel members
4. Notice of charges and their factual basis
5. Clear/understandable and accurate record of investigation
6. Access to record and meaningful opportunity to comment
7. No single investigator playing multiple roles
8. Live hearing with meaningful opportunity to confront witnesses
9. Decision with articulated support
10. Meaningful appeal
11. No open ended sanctions

Questions?

