Title IX and Sexual Harassment in Colleges and Universities:

Let's Not Forget Due Process

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Title IX regulations require:

Title IX regulations outline three key procedural requirements. Each school or college must:

- (1) disseminate a notice of nondiscrimination;
- (2) designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX;
- (3) adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee sex discrimination complaints

Sexual Violence defined:

• Sexual violence . . . refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (e.g., due to the student's age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent).

Questions and Answers on Title IX and Sexual Violence:

- The training should include:
- information on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence;
- the proper standard of review for sexual violence complaints (preponderance of the evidence);
- information on consent and the role drugs or alcohol can play in the ability to consent.

Required Mediation is Not Appropriate when Accuser alleges Forcible Rape: *T.S. v. Alexander* (Wash. Ct. App. 2008)

- A lack of appropriate discipline of her rapist,
- treating the victim equally with the rapist in the mediation process,
- allowing her rapist's denial of wrong-doing to be accepted at face value at the mediation,
- keeping the matter out of the public eye to avoid negative publicity,
- · offering only a repeated mediation as an alternative remedial measure,
- discouraging S.S. from filing a police report,
- top administrators not notifying the UW's own police force of the report of a violent sex crime,
- repeatedly suggesting that S.S. leave her job with the football program while her rapist would remain,
- wearing S.S. down until she believed that further complaints would be futile etc.

The 2011 Dear Colleague Letter

- Requires "preponderance of the evidence" standard for resolving Title IX grievances.
- Lawyers are not required but if one party to a grievance has an attorney present, the opposing party has the same right.
- College must maintain documentation of proceedings.
- All persons involved in implementing grievance procedure. should be trained or have appropriate experience.
- Typically, an investigation should take no more than 60 days
- Both parties in grievance must be informed of final outcome.

Dixon v. Alabama State Bd. of Educ. (5th Cir. 1961)



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- Students suspended or expelled from HCBU after participating in a sit-in at a lunch counter. They were notified by letter with no explanation of the charges.
- A student at a public university may not be suspended or expelled without being afforded due process.
- At a minimum, due process requires notice of the charges, an opportunity to defend against the charges, and a fair tribunal.

Barnes v. Zaccari (11th Cir.2012)

- Even students who are potentially dangerous are entitled to due process if faced with suspension or expulsion.
- Zaccari expelled without due process. He sued and won \$900,000 settlement.



Osteen v. Henley (7th Cir. 1993)

• Student threatened with suspension is not entitled to full representation by lawyer.



Osteen v. Henley (7th Cir. 1993)

• "To recognize such a right would force student disciplinary proceedings into the mold of adversary litigation. The university would have to hire its own lawyer to prosecute these cases and no doubt lawyers would also be dragged in-from the law faculty or elsewhere--to serve as judges. The cost and complexity of such proceedings would be increased, to the detriment of discipline as well as of the university's fisc. . . . The danger that without the procedural safeguards deemed appropriate in civil and criminal litigation public universities will engage in an orgy of expulsions is slight.

OCR Recommendations for training:

- the importance of accountability for individuals found to have committed sexual violence;
- the need for remedial actions for the perpetrator, complainant, and school community;
- how to determine credibility; how to evaluate evidence and weigh it in an impartial manner;
- how to conduct investigations;
- confidentiality;
- the effects of trauma, including neurobiological change;
- and cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.

Marshall v. Indiana Univ. (S.D. Ind. 2016): Student permanently expelled based on hearsay evidence

- Student not entitled to representation by legal counsel at sexual misconduct hearing. Attorney present at hearing but could not speak.
- University case was presented by non-practicing lawyer who then consulted with other panel members.
- Accuser did not testify and Marshall found responsible based on hearsay evidence. Marshall had police officer only people who testified.
- Marshall was restricted in his access to evidence and prohibited from interviewing witnesses.
- Marshall stated claim of discriminatory enforcement based on allegation that university investigated a woman's charge against him but did not investigate man's charge against a woman.

Doe v. Univ. of Cincinnati (6th Cir. 2016)

- Female student filed charges against Doe, claiming he engaged in nonconsensual sex with her in his apartment. Doe claimed sex was consensual.
- At hearing, Doe testified, but his accuser did not appear. Her non-sworn statement was read into the record. Panel ruled unanimously against Doe and suspended him for one year. Trial court enjoined university from suspending Doe based on his claim that he was denied due process.
- On appeal, the Sixth Circuit affirmed the trial court's injunction.



Doe v. Univ. of Cincinnati (6th Cir. 2016)

- "Accused students must have the right to cross-examine adverse witness in the most serious cases."
- Cross-examination can take place via skype or other electronic means.
- Right to cross-examine is <u>critical</u> when accuser's testimony provides only evidence of sexual misconduct.
- "Evaluation of a witness's credibility cannot be had without some form of presence, some method of compelling a witness to stand face to face with the [fact finder] in order that it may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

Doe v. Univ. of Cincinnati (6th Cir. 2016)

- Cross-examination is the best way to "expose testimonial infirmities such as forgetfulness, confusion, or evasion . . . thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness' testimony."
- Doe's case, the court noted, required the ARC panel to determine whether it believed Doe or Roe "Yet, the panel resolved this problem of credibility without assessing Roe's credibility. In fact, it decided [Doe's] fate without seeing or hearing from Roe at all. That is disturbing and, in this case, a denial of due process."

Doe v. Univ. of Cincinnati (6th Cir. 2016)

- "Reaching the truth through fair procedures is an interest that Doe and UC have in common."
- After all, "if a university's procedures are insufficient to make issues of credibility and truthfulness . . . clear to the decision makers, that institution risks removing the wrong students, while overlooking those it should be removing."
- Cross-examination, the court reiterated, is the principle way for testing the believability of a witness and can reduce the likelihood of a mistaken decision.

Doe v. Baum (6th Cir. Sept. 7, 2018)

- Roe and Doe met at "Risky Business" fraternity party at University of Michigan.
- They drank, danced, and kissed and then went up to Doe's room in fraternity house. According to Doe, the two engaged in consensual sex.
- Roe said "she was drunk and unaware of her surroundings" when she went to Doe's room. She said "no sex," but Doe undressed her and had sexual intercourse with her while she "laid there in hazy state of black out.' She vomited, and another female helped her find her clothes."

- Two days after encounter, Roe filed sexual-misconduct complaint against Doe, claiming she was too drunk to consent to sex.
- Over 3 month period, a UM investigator interviewed 23 witnesses. Almost all male witnesses (mostly Doe's fraternity brothers) corroborated Doe's story. All female witnessed backed Roe.
- Investigator concluded that the conflicting testimony of witnesses made it impossible to conclude that Doe engaged in sexual misconduct. Investigator recommended that the administration rule in Doe's favor and close the case.

- Roe appealed and three-member appeal board reversed without hearing any new evidence or interviewing any students. The board concludd that Roe's witnesses were more credible and proceeded the sanctions stage.
- Doe, facing possible expulsion, withdrew from the university. He was 13.5 credits short of graduating.
- He sued in federal court, alleging violation of due process and a violation of Title IX under the erroneous outcome theory.
- A federal trial court dismissed Doe's case on UM's motion.

• Sixth Circuit rules Doe was denied due process. "Due process requires cross-examination in circumstances like this because it is the greatest legal engine ever invented for uncovering the truth. Not only does cross-examination allow the accused to identify inconsistencies in the other side's story, but it also give the fact-finder an opportunity to assess a witness's demeanor and determine who can be trusted. So if a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination to satisfy due process."

• "Time and again, this circuit has reiterated that students have a substantial interest at stake when it comes to school disciplinary hearings for sexual misconduct. Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life. The student may be forced to withdraw from his classes and move out of his university housing. His personal relationships might suffer. And he could fac difficulty obtaining educational and employment opportunities down the road, especially if he is expelled."

- That is not to say, however, that the accused student always has the right to personally confront his accuser and other witnesses."
- "[T]he university could allow the accused student's agent to conduct cross-examination on his behalf. After all, an individual aligned with the accused can accomplish the benefits of cross-examination—its adversarial natue and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker."
- "[I]f credibility is in dispute and matgerial to the outcome, due process requires cross-examination."

- 6th Circuit rejected UM's argument that deposition in civil trial was an adequate substitute for cross-examination in university proceeding.
- Court also ruled that Doe had made out a "erroneous outcome" claim under Title IX. He made a plausible claim that appeal board was bias based on his sex.

• "'[T]he Board credited exclusively female testimony (from Roe and her witnesses) and rejected all of the male testimony (from Doe and his witnesses). [T]he Board explained that witnesses lacked credibility because many of them were fraternity brothers of Doe. But the Board did not similarly note that several of Roe's witnesses were her sorority sisters, nor did it note that they were female. This is all the more telling in that the initial investigator who actually interviewed all of these witnesses found in favor of Doe. The Board, by contrast, made all these credibility findings based on a cold record."

Doe v. Claremont McKenna College (Cal. App. Aug. 8, 2018)

- Male student accused of sexual misconduct by student from nearby school. She accused him of having sex without a condom over her objection.
- Student faced one-year suspension.
- Accuser did not appear at the hearing, which violated Doe's right to a fair hearing, court said.
- California appellate court ruled that accuser must be present or appear via videoconference.
- All hearing committee members must hear from accuser, not just one committee member who had participated in investigation.

Final Thoughts

- Due process encompasses the fundamental concept of fairness. Focus on fairness. Make sure all college personnel involved in processing grievances have appropriate training and experience.
- At least wo federal appellate-court decisions have ruled that defendants in sexual violence hearings have a constitutional right to cross-examine their accusers.
- Cross-examination may take place through electronic means such as videoconferencing.
- Acknowledge the difficulty of determining wrongdoing in grievances involving sexual violence. Determining consent is often difficult in situations where there are no witnesses and alcohol and drugs may be factors.