

Section C

Protecting Accused Students In Title IX University Investigations

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PROTECTING ACCUSED STUDENTS & FACULTY IN TITLE IX INVESTIGATIONS
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- I. BACKGROUND OF TITLE IX (1972)
 - a. Education Amendments Act of 1972: 20 U.S.C. §§1681 – 1688
 - b. Prohibits sex discrimination among other things
 - c. These are enabling regulations where Dept of Education and other agencies add color to these laws by formal rulemaking procedures
 - d. Example: Quid pro quo scenarios with professors & faculty, or peer to peer sexual harassment
 - e. Requires universities to examine claims of sexual harassment/sexual assault
 - f. Covers K-12 institutions plus colleges receiving federal funding (all public and about 99 percent of private colleges)

- II. THE DEAR COLLEAGUE LETTER (2011)
 - a. Dept of Education did not solicit feedback for proposed regulation changes (no formal notice & comment process)
 - b. Came out of nowhere
 - c. Evisceration of due process for the accused
 - i. Mandated a low standard of proof (preponderance) versus clear & convincing standard
 - ii. Discouraged cross-examination & permitted schools to limit an advisor to being a “potted plant”
 - iii. Urged colleges to allow for double-jeopardy by permitting accuser to appeal a “not responsible” (i.e. not guilty) decision
 - iv. No required presumption of innocence for the accused
 - v. Continued to promulgate bad definitions of sexual harassment
 - vi. Routinely deny accused students to access to evidence
 - d. No real notice requirement to accused students of nature of violation, warning that what is said may be used in a criminal proceeding, students usually go in without an advisor and are caught off guard
 - e. Resulted in more than 180 lawsuits against colleges for allegedly conducting unfair disciplinary procedures
 - i. Intentional exclusion of exculpatory evidence by the university was often alleged to occur
 1. To be fair, the new regulations also require the university to turn of inculpatory evidence against the accused

- III. EXAMPLES OF EXPERIENCES
 - a. University of Minnesota Football case

- b. Basketball case (officer refuses to attend hearing to authenticate report & testify re accuser said uncomfortable kiss versus rape a year later)
- c. Macalaster College (despite entire list of school approved investigators, school permitted same investigator for two separate complaints despite conflict of interest concerns, and also did not accommodate attorney court conflict to effectively disqualify lawyer, plus only permitting review of report without any copy available, no cross examination permitted, assault threat to student without any discipline to retaliatory conduct towards accused)
- d. LaCrosse: attorney as potted plant, no responses to inquires as to what principles would be applied during grey area in time

IV. FINAL RULE

- a. Public comment period with notice & comment
- b. Took effect 8/14/2020
- c. New Regulations/Rights given to the accused
 - i. Express presumption of innocence
 - ii. Live hearings with cross examination conducted by advisor of accused's choice (like an attorney)
 - iii. Require sufficient time and information including access to interviews
 - iv. Required impartial investigators and decision makers
 - v. All relevant evidence must receive an objective evaluation
 - vi. Bans the "single investigator" (judge and jury) model
 - vii. More standardized across the nation now
- d. Attacks to seek preliminary injunctions recently denied (NY & DC)
 - i. Bipartisan shutdown of efforts to prohibit the new regulations
- e. Refusal to implement can strip a school of its federal funding
- f. Schools are in the process of revising their policies
 - i. Court decisions also require schools to revise their policies
- g. Jurisdiction limited to conduct within a school's education program or activity (including frats, sororities), but NOT off campus misconduct like off campus housing
- h. Watch out: title IX violation versus just a "university policy" that does not exist within Title IX
 - i. So school may try to say a policy of no sex harassment that occurs away from campus housing, school may try to get around Title IX that way

V. "CONSENT" IN SEX ACTS

- a. Affirmative consent vs criminal laws
 - i. Affirmative consent: presumption that sex was NOT consensual
 - ii. Stage by stage of the sexual act requires affirmative consent at each stage

VI. HARASSMENT TAKES ON THE SUPREME COURT DEFINITION

- a. Peer on peer sexual harassment now uses the SCOTUS definition (1999 Davis v. Monroe Co Bd of Education)
 - i. Dear Colleague Previously used broadly defined “any verbal conduct of a sexual nature”
 - ii. Supreme Ct determined
 - 1. Severe (harassment not annoyance)
 - 2. Pervasive (hard to avoid)
 - 3. Objectively offensive (offensive to a reasonable person)
 - 4. Unwelcome to the person it’s directed at
 - 5. And effectively prevent the person from getting an education (if 2 students get into an off campus conflict, what should the school be able to do so they don’t have universal jurisdiction?)
 - b. IN 2001 GUIDANCE, THE RULE SLICED & DICED SEVERE AND PERVASIVE, ALLOWING ONLY ONE TO EXIST FOR A VIOLATION
 - i. FINAL RULE requires all of the Davis elements
- VII. GENERAL PROCESS OF TITLE IX COMPLAINT
- a. Complainant alleges conduct, for example a sexual assault
 - b. Title IX coordinator gathers the allegation
 - c. Title IX coordinator conducts interviews
 - i. TIP: ATTEND THE INTERVIEW WITH YOUR CLIENT
 - 1. Keep the investigator at bay if they try to go outside of the scope and fish around
 - ii. TIP: Get the school’s training materials (FOIA request if they won’t comply)
 - d. Timeline often accelerated
 - e. Title IX coordinator or investigator makes initial determination of responsibility or not responsible
 - f. Appeal of initial determination to hearing (mini trial)
 - i. Challenging the determination OR the punishment (or both)
 - g. Prehearing conference (set up evidence parameters, number of witnesses, procedures, allotted time for hearing)
 - h. Panel hearing
 - i. Appeal of panel decision to provost
 - j. After administrative remedies exhausted, can initiate lawsuit in federal court
- VIII. OPEN CRIMINAL INVESTIGATION DURING TITLE IX INVESTIGATION
- a. 5th amendment versus adverse inference
 - b. Danger: trained police investigators versus fairly untrained school investigators
- IX. RULES OF EVIDENCE OR LACK THEREOF
- X. DESCRIPTION OF THE SETTING/GENERALLY LIKE ADMINISTRATIVE HEARING

- XI. FINDING THE SCHOOL POLICIES
- XII. CONSIDER AN OBJECTION LETTER, MAKING THE RECORD AHEAD OF TIME
- XIII. TALKING WITH COLLEGE LEGAL OFFICE/STAFF
- XIV. THINKING OUTSIDE OF THE BOX FOR RESOLUTION

Resources:

<https://www.ed.gov/category/keyword/title-ix>

heavy reading: <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf>

<https://sites.ed.gov/titleix/policy/#fact-sheet>

<https://www.thefire.org/new-title-ix-regulations-carefully-balance-the-rights-of-all-students/>

<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf>