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Title IX investigations expand dramatically

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By Daniel Spencer, Tad Devlin and Vince Green

Across the country college students have returned to school and begun their fall semester. In the media, we are constantly reminded of an epidemic of sexual violence occurring on college campuses. Both public and private universities are subject to federal oversight under Title IX of the Education Amendments of 1972, which has undergone significant changes under the Obama administration. On April 4, 2011, the Department of Education issued the "Dear Colleagues Letter" to colleges and universities that received federal funding. In that letter, the U.S. Department of Education (DOE) and its Office for Civil Rights (OCR) expanded the definition of sexual harassment of students to include acts of sexual violence as a form of sex discrimination prohibited by Title IX. While there has been an ongoing debate regarding these changes, colleges and universities are required to investigate allegations of sexual assault, take appropriate action to deter future conduct, and administer disciplinary action to the alleged perpetrator.

The recent, widely covered Stanford case (*People v. Brock Allen Turner*, B1577162), offers one example of a student who was convicted of rape and eventually expelled from the university. In many cases, expulsion does not occur. Recently in San Diego and Los Angeles, courts have overturned student disciplinary decisions because the alleged perpetrator was not afforded due process during the disciplinary hearing. (*DOE v. Regents of the UC San Diego*, 37-2015-00010549-CU-WMoCTL, and *DOE v. USC*, 246 Cal. App. 4th 221 (2016)).

Academic institutions must ensure investigations are compliant with Title IX mandates, while also ensuring victims and accused students are afforded procedural due process in the investigation and disciplinary process. Under current Title IX guidance from the OCR, it may be difficult to implement all changes to ensure a fair and impartial hearing (the letter discourages cross examination and the burden of proof is by a preponderance of the evidence). Yet, there are several areas that colleges and universities can improve or bolster to make internal investigations fair and ensure there is an unbiased administrative forum for students who have been the victims of sexual violence. The following recommendations should be considered to improve investigations:

Independent investigators

Many cases begin with an investigation conducted by an employee of the school. One could argue this presents a potential conflict, and especially so if there is disagreement between the investigator and the school about the investigation, and fact finding. Also, there can be issues regarding the investigator's background and training that makes them qualified to act as the investigator. Often, the investigator is an employee of the university Title IX department, with a particular skill or expertise in another academic discipline as part of their regular job with the school (e.g., the dean of the school, or her or his staff, will conduct the investigation). The investigators may lack the training, skill and experience to appropriately determine what evidence is needed, weigh credibility of witnesses, and issue findings regarding the alleged conduct. Moreover, investigators with any inherent bias present immediate grounds for overturning a decision on the basis that the accused student or victim was denied a fair and impartial investigation. Hiring counsel will help lessen these problems since they are independent, trained to investigate facts, weigh credibility, and apply those facts to the law.

Transcribed witness statements

Most witness interviews are not recorded and there is typically no record beyond the investigator's notes. Memories fade and recollections change over time. Investigators typically rely on their notes, which can lead to discrepancies that can later be disputed to the detriment of the investigation and credibility of the investigators. Either recording or transcribing the interviews (with a court reporter present for transcription) should be considered to ensure accurate memorialization and lessen discrepancy and challenge.

Provide the accused student with the ability to fully participate in the hearing, including providing access to all information obtained during the investigation

In the *Doe v. USC* case, a student's expulsion was overturned by the Los Angeles County Superior Court because he was not "provided any information about the factual basis of the charges against him" and was not afforded the opportunity to examine evidence supporting the victim's statements. The student was also not permitted to appear before the panel issuing a decision on his case. Both the victim and the accused should be allowed access to video and audio recordings, investigation notes and any other materials which were relied on or obtained by investigators.

Allow attorneys to participate on behalf of the victim and the accused, especially in consideration of the potential civil and criminal ramifications

Many schools have chosen to restrict the use of legal counsel and only allow students to have an advisor; the advisor may or may not be an attorney. In most cases, regardless of whether the advisor is an attorney, the advisor is typically not permitted to communicate directly with the school and cannot speak or write directly on behalf of the students (both victims and accused); they may only assist the student in making the response. In accordance with the Dear Colleagues letter, both the victim and student must be allowed to have their attorney present. Permitting attorney involvement has a higher level of criticality, because there is potential civil lawsuit exposure and criminal implications that must be evaluated and delicately balanced as part of the due process that must be afforded for the students.

Unbiased avenues for appeal

In most cases, a school official is the presiding authority for appeals and not all appeals are required to be heard. Additionally, in accordance with the Title IX guidance, if appeals are authorized, both students must have the right to appeal. Thus, creating a scenario where an investigator could conclude that the student did not violate the applicable code of conduct, but the decision from the investigation is appealed and could arrive at a different conclusion.

Overall, Title IX issues are delicate, emotional and much is at stake for all parties involved. Schools need to protect their student bodies to ensure compliance with Title IX and avoid the risk of media scorn and civil litigation, not to mention alumni rebuke and diminished private funding and contributions.

Therefore, it is advisable that schools conduct an internal audit of their policies, practices and procedures to ensure they are compliant with best practices under the current academic and social media climate (in which any campus or off-campus incident is typically photographed and shared through social media). The costs and potential exposure to the academic institutions is not insignificant. There is insurance available with coverage solutions for various types of risks. Institutions should examine their insurance coverage (with their insurance professionals and insurance counsel) to ensure that they have specific coverage for these risks.

It is recommended that colleges and universities retain qualified legal counsel to review the applicable student code, bi-annually, to ensure compliance with the DOE mandates and current case law, as well as conduct investigations and provide recommendations to the institution.

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