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Lessons Learned: DO's, DON'Ts, and Tips for Navigating the World of Title IX Litigation

LESSONS LEARNED: DO's, DON'Ts AND TIPS FOR NAVIGATING THE WORLD OF TITLE IX LITIGATION

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I. Introduction

The 2020 Title IX regulation 2020 codified a number of trends that have been evident in respondent-initiated litigation for nearly a decade. The current legal and regulatory framework that governs how colleges and universities respond to sex and gender-based harassment and discrimination has its roots in the original enactment of Title IX in 1972. This paper will briefly trace the history of both Title IX litigation and regulations since its 1972 enactment to date. It will then summarize current litigation trends, specifically outlining claims primarily focused on due process violations and discriminatory bias through erroneous outcome and selective enforcement theories, and how some of these theories (particularly erroneous outcome and selective enforcement) are manifested in the 2020 Title IX regulations. We conclude with a summary of restorative practices as permitted by the 2020 Title IX regulations, recent movement by the Biden administration in response to the 2020 regulations, and a discussion of how these factors may impact future litigation trends in this area. Finally, we offer three appendices for practitioners to use as Title IX resources: (1) case law summaries of recent notable Title IX decisions not directly discussed in the body of this paper[1]; (2) suggestions for strategic positioning in Title IX litigation, including practical tips for both counsel and institutional investigators and adjudicators; and (3) a summary of the requirements for sexual harassment proceedings from the 2020 Title IX Regulation.

II. Developments in Title IX Litigation: The First 40 Years

Examining the history of Title IX and how it transformed from a statute focused initially on gender equity in Athletics, to one that has become synonymous with schools' mandate to address sexual assault on college campus, helps explain how and why we are now in a new phase of Title

[1] The authors extend a special thanks to LaKeshia Banks, Womble Bond Dickinson (US) LLP, Winston-Salem, NC, for her work editing this paper and drafting the case law summaries.

IX: respondent litigation. When Congress enacted Title IX of the Education Amendments Act of 1972, its broad mandate was to provide for gender equity in schools. Title IX was essentially Congress' recognition of the lack of opportunity for women in athletics. While we continue to see challenges to gender equity in college and university athletic programs across the country, in large part Title IX has met its higher education expectations.[2]

After its enactment, much of the attention over the next twenty years would be on athletics, with the focus on sexual harassment quietly brewing and making its way to the courts in 1977, when a group of former Yale University students filed the first Title IX lawsuit alleging a failure of an institution to address sexual harassment on its campus. *See Alexander v. Yale Univ.,* 459 F. Supp. 1 (D. Conn. 1977), *aff'd,* 631 F.2d 178 (2d Cir. 1980). That case involved claims of a failure on the university's part to address sexual harassment on campus. *Id.* While the District Court dismissed the majority of complaints for reasons that all but one of the students' allegations did not amount to a deprivation of Title IX rights, it recognized a private right of action under Title IX where the claimant alleged the university failed to address *quid pro quo* allegations that a male faculty member had promised to grant better grades in exchange for sex.[3] On appeal as Yale had established procedures for reporting sexual harassment during the pendency of the case, the 2nd Circuit dismissed the Title IX complaint in its entirety for reasons that the plaintiffs lacked standing and that the university had implemented a procedural mechanism for addressing sexual harassment claims within the university community. The appellate ruling did not, however, eliminate the recognition of a right to pursue a private action under Title IX for an institution's failure to address sexual harassment on campus. Moreover, the court's recognition and praise for Yale's creating an avenue for students to report sexual harassment complaints,[4] signaled an expectation that colleges and universities have established avenues for sexual harassment complaints to be addressed.

In 1997, the Federal Government published its "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties", a recognition of what had been acknowledged in *Alexander v. Yale Univ*.[5] What would follow were the Supreme Court *Gebser*[6] and *Davis v. Monroe*[7] decisions, establishing the triggers for institutional monetary liability in private actions, while leaving the power to the U.S. Department of Education's Office for Civil Rights (OCR) to enforce Title IX's "nondiscrimination mandate".[8] OCR issued its first Dear

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[2] Alia Wong, *Where Girls Are Missing Out on High-School Sports*, The Atlantic, June 26, 2015, https://www.theatlantic.com/education/archive/2015/06/girls-high-school-sports-inequality/396782/ (discussing history of Title IX, noting that from 1972 to 2015 the number of women competing in college-level sports has increased five-fold).

[3] On remand, the District Court dismissed the individual complainant's *quid pro quo* action, as there was no evidence that the faculty member actually assigned the complainant a lesser grade. *See Alexander v. Yale Univ.,* 631 F.2d 178 (2d Cir. 1980).

[4] *Alexander,* 631 F.2d at 184 (acknowledging that the systems put in place by Yale amounted to the "major relief sought in this suit").

[5] Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (Mar. 13, 1997), available at: https://www.govinfo.gov/content/pkg/FR-1997-03-13/html/97-6373.htm.

[6] *Gebser v. Lago Vista Indep. Sch. Dist.,* 524 U.S. 274 (1998).

[7] *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).

[8] U.S. Department of Education, Office of Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties,* January 2001, at i-ii (discussing Supreme Court rulings).

Colleague Letter (DCL) on sexual harassment in 2001,[9] followed by a second in 2011, which amplified the expectations and requirements for higher education, and prompted a flurry of complaints filed with OCR alleging institutional failures to comply with Title IX. The 2011 DCL coincided with and leant support for the origins of the #MeToo movement[10] as well as the Obama administration's #ItsOnUs initiative[11] - a call to end to rape and sexual assault on college campuses. [12]

Many institutions of higher education, in response to the 2011 DCL – if they were not already in compliance – brought themselves into compliance in advance of or through voluntary resolution processes offered by OCR.[13] As those changes were being solidified, students accused of sexual assault began to take notice of the institutions that were failing them through flawed processes that resulted in their being found responsible through processes that were gender biased and applying differing evidentiary standards to complainants and respondents – ones that disfavored respondents.

The rise in respondent litigation over Title IX claims correlates with the shift away from the focus of the 2011 OCR Dear Colleague Letter – one that had focused largely on the rights of complainants, and the need for institutions to adequately address sexual assault and combat "rape culture" on their campuses. This focus stemmed from a history of academic institutions attempting to mediate or smooth over sexual assault allegations through education focused remedies, conducting hearings that were likened to "kangaroo courts", and permitting complainants to be subjected to victim blaming and hostile lines of questioning. The result: sexual assault victims being reluctant to report. Currently, the rise in respondent actions does not appear to have resulted in a decrease in reporting sexual harassment on college campuses – perhaps a testament to the socio-political movements that prompted changes to institutions' handling of Title IX reports, and the transformation many institutions have actually made in their Title IX processes.

III. Current Trends in Title IX Litigation

Fast forward from 2011 to 2019, with – according to some accounts – an estimated 20,000 respondents[14] having been accused of sexual misconduct, we see the rise of respondent private

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[9] *Id.*

[10] Chicago Tribune, *#MeToo: A Timeline of events* (Feb. 4, 2021), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html (covering the history of "Me Too" – the phrase coined by Tarana Burke in 2006 – to becoming the slogan for the campaign against sexual harassment, widely in use today).

[11] Tanya Somander, *President Obama Launches the "It's On Us" Campaign to End Sexual Assault on Campus* (Sept. 19, 2014), https://obamawhitehouse.archives.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus.

[12] Valerie Jarrett, *A Renewed Call to Action to End Rape and Sexual Assault,* (Jan. 22, 2014), https://obamawhitehouse.archives.gov/blog/2014/01/22/renewed-call-action-end-rape-and-sexual-assault.

[13] The U.S. Department of Education's Office for Civil Rights announced in January 2017 that it was investigating 225 colleges and universities for alleged Title IX violations; the Washington Post relatedly reported a total of 306 investigations underway across those institutions. CS Staff, *The Office of Civil Rights' caseload has increased dramatically over the last five years,* Campus Safety, (Jan. 30, 2017), https://www.campussafetymagazine.com/clery/ocr_investigating_colleges_sexual_assault_title_ix_violations/.

[14] In an August 2019 article, president of the Association of Title IX Administrators, Brett Sokolow, is referenced as saying "more than 300 students across the nation have filed lawsuits challenging their Title IX outcomes, but he estimated that as many as 20,000 students at the nation's 4,500 colleges may have been disciplined for sexual

actions filed in courts.[15] If we look to the early cases of respondent litigation, we see a number of cases that point to institutions' flawed process and/or untrained personnel conducting their assessments.[16] However, to more recent cases we see allegations raised by respondents that are more nuanced and pointing to flawed processes that are arguably less overt, but no less meaningful.

As explained more fully herein, the majority of claims primarily filed by men accused of sexual misconduct, allege that their due process rights have been violated through inequitable sexual misconduct investigations conducted by their academic institution. [17]

A. Title IX Respondent Private Right of Actions

Title IX states: "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." The right to a private right of action under Title IX was recognized by the U.S. Supreme Court in *Gebser v. Lago Vista Indep. Sch. Dist.,* 524 U.S. 274 (1998). The Court in *Gebser* held that while Congress' intent with Title IX was geared more towards avoiding "the use of federal resources to support discriminatory practices and to provide individual citizens effective protection against those practices," the statute did not preclude individuals' rights to private action under Title IX.

Following the groundswell of complaints filed with OCR against academic institutions, after the inception of the 2011 Dear Colleague Letter, the courts began – and continue – to see an opposite and equal response from sexual misconduct respondents taking legal action in the courts for academic institutions allegedly violating their rights under Title IX through unfair, mishandled and biased investigative and adjudicatory processes. To date, more than 500 cases have been filed against institutions by respondents.[18] The victories for most respondents have been at the appellate level.[19]

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misconduct." Teresa Watanabe, *Students accused of sexual harassment sue California universities,* Los Angeles Times (Aug.3, 2019) https://www.latimes.com/california/story/2019-08-02/california-universities-face-class-action-suits-by-students-accused-of-sexual-harassment.

[15] *See e.g., Doe v. Columbia Univ.,* 831 F.3d 46(2d Cir. 2016) (male student accused of sexual assault and suspending following finding of responsibility by the university, was motivated in part by discrimination based on sex, fueled by a growing student sentiment and criticism acknowledged by the press that the university "was turning a blind eye to female students' charges of sexual assaults by male students").

[16] *See e.g., Doe v. Brandeis Univ.,* 177 F. Supp. 3d 561 (D. Mass. 2016) (court identifies absence of the following from institutional procedures: not right to notice of charges, no right to counsel, no right to cross-examination directly or through counsel, no right to examine evidence or witness statements, no access to investigatory report until entire proceeding concluded, no separation of "investigator, prosecutor, judge and jury", no appeal right, adherence to lesser "preponderance of the evidence" when other institutional processes apply "clear and convincing evidence).

[17] Emily Yoffe, *Joe Biden's Record on Campus Process Has Been Abysmal. Is it a Preview of His Presidency?* Reason (Nov. 12, 2019), https://perma.cc/W4F8-ZXKU.

[18] Alexandra Brodsky, Dana Bolger, Sejal Singh, *A Tale of Two Title IXs: Title IX Reverse Discrimination Law and Its Trans-Substantive Implications for Civil Rights,* UC Davis Law Review, (Mar. 23, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3808034.

[19] Greta Anderson, *More Title IX Lawsuits by Accusers and Accused,* Insider Higher Ed., (Oct. 3, 2019), https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings.

For respondents, these private rights of actions involve claims primarily focused on due process violations and discriminatory bias, specifically through erroneous outcome and selective enforcement theories.[20] For purposes of this discussion, respondent Title IX allegations are addressed as follows:

> **Erroneous Outcome**: claims that cast doubt on the outcome and suggest bias in violation of Title IX;
>
> **Selective Enforcement**: allegations that parties are treated differently throughout an institutions' sexual misconduct procedures, and/or the penalties/sanctions imposed on the responsible party are too harsh, and therefore violate Title IX;
>
> **Plausible Inference:** a more recently applied theory that questions whether the alleged facts, if true, raise a plausible inference of discrimination on the basis of sex;
>
> **Breach of Contract**: allegations that an institution failed to meet a respondent's reasonable expectations through its implementation of its policy and procedures;
>
> **Negligence**: allegations that an institution owed the respondent a standard of care that the institution breached through implementation of its disciplinary process.[21]
>
> **Petition for Writ of Administrative Mandamus**: challenge to an institution's final decision.

Perhaps the two most salient types of issues that jurisdictions have taken differing approaches on are those that relate to: (1) what constitutes discriminatory bias that supports a Title IX claim, and (2) the extent to which due process is tantamount to live confrontation by parties.

Erroneous Outcome Claims

For a plaintiff to proceed on an "erroneous outcome" claim, they must allege facts to (1) cast some articulable doubt on the accuracy of the disciplinary proceeding's outcome and (2) demonstrate a particularized causal connection between the flawed outcome and sex discrimination. *See e.g., Doe v. Miami Univ.,*882 F.3d 579, 592-93 (6th Cir. 2018). How the

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[20] *See Doe v. Univ. of Michigan,* 448 F. Supp. 3d 715, 729 (E.D. Mich. 2020). The theory of "deliberate indifference" is typically associated with complainants alleging an institution's failure to address a report of sexual harassment.

[21] Negligence claims have largely been rejected, finding that no duty owed outside the contractual terms. With breach of contract claims in the context of Title IX respondent litigation, the courts have typically found that the contract upon which a plaintiff typically relies – the student code of conduct/sexual misconduct policy and procedures – are not considered contracts that give rise to breach of contract actions. Courts have permitted negligence claims to proceed where a plaintiff challenges an institution's failure to meet its duty of care as it relates applying its student code of conduct. *See* Steven Richard, *Is There A Duty of Reasonable Care in a Title IX Disciplinary Process*, Nixon Peabody (Feb. 27, 2019), https://www.nixonpeabody.com/en/ideas/articles/2019/02/28/is-there-a-duty-of-reasonable-care-in-a-title-ix-disciplinary-process, citing *Doe v. Univ. of St. Thomas,* 368 F. Supp. 3d 1309 (D. Minn. 2019), *aff'd but criticized,* 972 F.3d 1014 (8th Cir. 2020).

courts have weighed and interpreted alleged facts in connection with potential gender bias underlies the holding that either support or reject a finding of sex discrimination or gender bias.

In *Doe v. Miami,* the court focused on the university hearing panel's "terse" finding that relied solely on the complainant's account, coupled with the complainant's inconsistent statements about whether she consented to the alleged acts, and determined them sufficient to create 'some articulable doubt' as to the accuracy of the decision." *Id.* The court also examined statistical evidence that it concluded showed a "pattern of gender-based decision-making" and "external pressure on Miami University," sufficient to show "a potential pattern of gender-based decision making that 'raise a reasonable expectation that discovery will reveal' circumstantial evidence of gender discrimination." *Id.*

Unlike the *Doe v. Miami Univ.* panel, the Eighth Circuit recently rejected the application of statistical data in supporting an erroneous outcome claim. *See Rossley v. Drake Univ.,* 979 F.3d 1184 (8th Cir. 2020). In *Rossley,* the court – aligning itself with the First Circuit – found it "unreasonable to draw such an inference" from statistics and an institution's "victim-centered approach" supported a pattern of "preordained gender-based decision making"; emphasizing that statistical data does not take into account the many alternative (*i.e.,* non-gender based discriminatory) explanations for "the disparity between the number of males and females charged with sexual assault. *Id.* at 1195.

Selective Enforcement Claims

Selective Enforcement claims focus on the role that gender plays in a finding of responsibility on the part of the respondent. "[T]o succeed on a selective enforcement theory, plaintiff must show that 'the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender." *Sheppard v. Visitors of Virginia State University,* 993 F.3d 230, 234 (4th Cir. 2021) (quoting *Yusuf v. Vassar College*, 35 F.3d 709, 715). *See e.g., Doe v. Quinnipiac University*, 404 F.Supp. 3d 643 (D. Conn. 2019)(citing evidence of gender bias as including an acknowledgment of complainant stating she felt scared; but disregard for respondent claim he felt scared).

The courts are clear that to proceed beyond the pleading stage of a Title IX complaint under selective enforcement, plaintiffs must allege facts that go beyond suggesting an "inference of gender discrimination" and relate to the specifics of an individual case. *See e.g., Doe v. Rollins College*, 352 F.Supp.3d 1205, 1210-1211 (M.D. Fl. 2019) (factoring in not only institution's self-criticism of its handling of sexual misconduct claims but the imbalanced/inconsistent analysis of similar evidence relating to the complainant and respondent).[22]

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[22] In *Rollins* the court pointed to: "the investigative report credited the testimony of witnesses who were friends or sorority sisters of Jane Roe while rejecting testimony from friends or fraternity brothers of Plaintiff's—based, in part, on the male witnesses' fraternity associations without making the same leap about the female witnesses' sorority associations. (*Id.* ¶ 58.) The report also excused any inconsistencies in Jane Roe's account concerning whether she verbalized consent but entirely disregarded Plaintiff's assessment of consent on account of Plaintiff's prior sexual history, which Plaintiff contends should not have been considered. (*Id.* ¶¶ 55–57)." 352 F.Supp.3d at 1211.

Plausible Inference

In *Sheppard v. Visitors of Virginia State,* the Fourth circuit – aligning itself with the Seventh, Eighth and Ninth circuits – elected to apply a newer standard set forth by the Seventh Circuit: "plausible inference". *See* 993 F.3d at 234, *citing Doe v. Purdue Univ.,* 928 F.3d 652, 667 (7th Cir. 2019). The court explained: "holding [the two categories of erroneous outcome and selective enforcement] merely describe ways a party could allege discrimination on the basis of sex", whereas the plausible inference analysis is "an approach that more closely tracks the text of Title IX, asking merely 'do the alleged facts, if true, raise a plausible inference that the university discriminated against [the student] on the basis of sex?'" *Id.*

While the Seventh Circuit has effectively disposed of selective enforcement and erroneous outcome theories for a Title IX pleading standard,[23] the Fourth Circuit acknowledged that its adoption of the plausible inference standard was not a rejection of erroneous outcome or selective enforcement theories, but rather support for an additional standard that supports the language of the statute.[24]

Breach of Contract

Breach of contract actions in connection with institutions' handling of sexual misconduct allegations have been filed by complainants and respondents, and the courts' rulings largely hinge on the application of state contract law and whether the plaintiff's reliance on a given document gives rise to an actual contract claim. *See e.g., Doe v. Columbia Coll. Chi.,* 933 F.3d 849 (7th Cir. 2019) (acknowledging a contractual relationship based on an institution's catalogues and bulletins), *citing Raethz v. Aurora Univ.,* 346 Ill. App. 3d 728 (2d Dist. 2004); *But see e.g., Quinnipiac Univ.*, 404 F. Supp. 3d 643 (denying summary judgment, in part, on grounds that student handbook raised a triable issue of fact as to whether the handbook created a contractual relationship between the university and the respondent); *Doe v. Marymount Univ.,* 297 F. Supp. 3d 573, 588-89 (E.D. Va. 2018) (acknowledging that it was undisputed that the institution's sexual misconduct policy and student handbook were not contracts; rejecting implied contract theory that tuition payment gives rise to a contract claim).

Petition for Writ of Administrative Mandamus

While not a theory specific to Title IX claims, it is worth mentioning a litigation tool used in state courts to challenge administrative decisions in the context of sexual harassment adjudicatory processes in higher education: the petition for writ of administrative mandamus. Review of published caselaw does not suggest that the mechanism is widely used in the context of Title IX, however we know that petitions for writ of administrative mandamus are being filed

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[23] *See Doe v. Purdue University,* 928 F.3d 652, 667-68 (7th Cir. 2019).

[24] *Id.* at 235-36*, citing See Doe v. Univ. of Sciences,* 961 F.3d 203, 209 (3d Cir. 2020) ("[T]o state a claim under Title IX, the alleged facts, if true, must support a plausible inference that a federally-funded college or university discriminated against a person on the basis of sex. Although parties are free to characterize their claims however they wish, this standard hews most closely to the text of Title IX."); *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 864 (8th Cir. 2020) ("To state a claim, therefore, [plaintiff] must allege adequately that the University disciplined him on the basis of sex—that is, because he is male."); Schwake v. Ariz. Bd. of Regents, *967 F.3d 940, 947 (9th Cir. 2020)* ("We adopt [the Seventh Circuit's] far simpler standard for Title IX claims. ...").

by students challenging the outcome of their institution's findings against them. Petitions for writ of administrative mandamus filed in the context of Title IX seek to reverse or dispose of an institution's outcome in a sexual misconduct proceeding – typically alleging that an institution deviated from its own procedures and failed to apply its policy appropriately and consistently.[25] In short, "a petition for writ of administrative mandamus provides 'an adequate opportunity for de novo judicial review,'"[26] – resulting in institutions having to commence new Title IX investigations so as to correct procedural deficiencies identified by the courts.

IV. 2020 Title IX Regulations

The 2020 Title IX regulations, published in the Federal Register on May 29, 2020, went into effect on August 14, 2020.[27] While the regulations are over 2,000 pages long, the mandate set forth in the regulations can be boiled down in large part to changing: what acts trigger Title IX and what rights, mechanisms and support institutions must provide for complainants and respondents alike.

The underpinnings of erroneous outcome and selective enforcement theories are embedded in the 2020 Title IX regulations, with both demanding adherence to due process and impartiality (lack of bias) from the start to the conclusion of institutions' handling of sexual misconduct allegations.

The notice requirement under the 2020 regulations is one of "actual notice" – meaning unlike the prior administration's expectations of when an institution must respond to a Title IX matter (*i.e.,* constructive notice; known or should have known),[28] the new regulations require a response only when an institution is on *actual* notice of a report of sexual harassment – explained as: either the "Title IX coordinator or any official of the [institution] who has authority to institute corrective measures" is notified of a report of sexual harassment.[29]

The 2020 regulations limit the jurisdiction of Title IX to responding to sexual harassment "in the school's education program or activity", including those locations, events or circumstances that an institution has "substantial control over both the respondent and the context in which the sexual harassment occurs (*i.e.*, buildings owned or controlled by recognized student clubs or organizations, such as fraternities)."[30] The regulations also set forth a host of procedural requirements for institutional "grievance" processes, focusing primarily on ensuring equitable application of the investigative procedures. A summary of those requirements has been included

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[25] *See Doe v. Regents of the Univ. of California,* 891 F.3d 1147, 1152 (9th Cir. 2018) (explaining a writ petition as a "state-law procedural mechanism" and "vehicle" for petitioner's federal claims…used "under California law 'for the purpose of inquiring into the validity of any final administrative order[.]'").
[26] *Id.* at 1154.
[27] 34 C.F.R. Part 106. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, available at https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf.
[28] The new regulations explain: "The mere ability or obligation to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures." *Id.* at 30043.
[29] *Id.*
[30] Under the Obama administration, sexual harassment that occurred off campus and not in a setting over which an institution had control, but may none-the-less have had an impact on a student's ability to access education, could be considered a matter falling under Title IX (i.e., student-student harassment occurring at a bar off-campus, or in off-campus private housing).

herein at Appendix C. The implementing administration touted the new regulations as "restor[ing[balance to the scales of justice in our schools, ending one of the most infamous and damaging overreaches of the previous administration"[31] – a characterization that no doubt, the new administration disputes, as it sets out to examine and reconsider the regulations.[32]

The public reaction to the 2020 Title IX regulations has been mixed – largely criticized by sexual assault advocates and supported by those representing accused individuals. While the regulations are examined by the Biden administration, institutions are best served to adhere to the hearing requirement set forth in the 2020 Title IX regulations. Should the current administration lift that requirement for institutions of higher education, institutions will need to look to their residing jurisdiction to make a determination on whether to continue that model. At present, institutions are best served permitting direct cross-examination by a party's representative as opposed to through an adjudicator, hearing panelist, or other institution official; and consider modifying in accordance with their jurisdiction if the Title regulations are modified. It is critically important that regardless of jurisdiction – and arguably regardless of whether the Title IX regulations are modified – that at a minimum: all evidence submitted by the parties is made known to one another; parties must be permitted to identify witnesses with relevant information and propose questions to be asked of one another through an investigator/hearing panelist; parties ought to have an opportunity to fully respond to findings before a conclusion regarding responsibility is reached; and that sexual misconduct processes not allow for *ex parte* communications with the Title IX adjudicators. Finally – and as the courts have focused on for the last several years – whether the 2020 regulations survive, the courts will no doubt continue to focus on the equitable treatment of parties and the rejection of gender bias influencing the outcome of sexual misconduct proceedings.

There is no question that the mandate set forth in the 2011 Dear Colleague Letter resulted in the Title IX pendulum successfully encouraging those students facing sexual harassment to come forward and challenge their institutions for failed/inadequate processes. Similarly, with the retraction of 2011 DCL and progression to the current Title IX regulations, the pendulum has seemingly swung back, resulting in respondents pushing back on a perceived Title IX overreach. That perception, coupled with notable respondent court victories, will likely result in a continuation of the pendulum return and increase in respondent litigation. While public institutions of higher education may be at greater risk of liability, due to the constitutional requirements specific to them, all institutions – public and private – are currently expected to adhere to the due process provisions set forth in the 2020 Title IX regulations. And whether the new administration changes that expectation, institutions will still need to navigate what the courts now require under Title IX.

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[31] Press Office, *U.S. Department of Education Launches New Title IX Resources for Students, Institutions as Historic New Rule Takes Effect,* (Aug. 14, 2020), https://www.ed.gov/news/press-releases/us-department-education-launches-new-title-ix-resources-students-institutions-historic-new-rule-takes-effect.

[32] *See* U.S. Dept. of Educ., Office of Civil Rights, *Letter to Students, Educators, and other Stakeholders re Executive Order 14021*(Apr. 6, 2021.), https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf.

V. How Will the Biden Administration Affect Title IX Litigation?

On March 11, 2021, President Biden issued an *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity.*[33]

The Executive Order provides:

> [A]ll students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity.

On April 6, 2021, OCR Issued a *Letter to Students, Educators, and other Stakeholders re Executive Order 14021.*[34]

1. OCR's Immediate Actions will include a comprehensive review of:
   - Department's existing regulations, orders, guidance, policies, and any other similar agency actions, including the amendments to the Department's recently enacted Title IX regulations (eff. August 14, 2020)
   - Will solicit feedback
   - Affirmatively acknowledges sexual orientation and gender identity based harassment and discrimination of students
2. OCR planning a Public Hearing to hear from students, educators, and others with interest and expertise in Title IX to offer oral comments and written submissions. Dates and Times TBD – *see* (https://www.ed.gov/ocr/newsroom.html) and in a forthcoming Federal Register notice.
3. Forthcoming Q&A
4. Anticipated Proposed Rule Making

Whether the Biden administration successfully overhauls the 2020 Title IX regulations, with the courts paying closer attention to due process and bias claims, institutions are well served to align their policies and practices with the same heightened focus and, at the risk of oversimplifying, what the regulations require: (1) right to a live hearing; (2) right to cross examination; and (3) fair and balanced process devoid of gender-based discriminatory bias.

As the 2020 Title IX regulations stand in comparison to the courts' treatment of these issues, it is clear that the courts are fairly consistent across jurisdictions with their review and assessment of gender-based discriminatory bias. The right to direct cross-examination in a live hearing,

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[33] The White House Briefing Room, Executive *Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity*, (Mar. 8, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity/.

[34] U.S. Dept. of Educ., *supra* note 36.

however, remains a source of division. *See e.g., Doe v. Baum,* 903 F.3d 575, 578 (6th Cir. 2018) (holding "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); *Contra Haidak v. Univ. of Massachusetts-Amherst,* 933 F.3d 56 (1st Cir. 2019) (holding that direct cross-examination not required).

The First Circuit acknowledges in *Haidak* the very history that underlies much of the impetus for the 2011 DCL – and that is the potential for students questioning one-another going awry, stating: "In the hands of a relative, tyro-cross-examination can devolve into more of a debate. And when the questioner and witness are the accused and the accuser, schools may reasonably fear that student-conducted cross-examination will lead to displays of acrimony or worse."[35] The *Haidak* court further acknowledged: "we are simply not convinced that the person doing the confronting must be the accused student or the student's representative," and agreed with the approach of cross-examination through a hearing panel.[36] Therefore, whether live hearings are required if there are changes to the 2020 Title IX regulations, it may be that regardless of any change on that front, we continue to see the courts divided over the necessity of confrontational cross-examination by students/representatives.

VI. Resolving Title IX Cases Using Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) options may ideally avoid litigation, thus negating the utility of the tips as outlined above. Considering ADR alternatives now that OCR has expressly permitted colleges and universities to "facilitate an information resolution process, such as mediation, that does not involve a full investigation and adjudication"[37] may be an additional strategy to consider with respect to litigation.

Scholarly literature is rife with explanations and examples of how alternative methods to the traditional hearing process that is outlined in the regulations may result in better outcomes for survivors and student development, provided appropriate safeguards are in place.[38] Student conduct systems not only provide due process with respect to violations of campus behavior codes, but they are grounded in student development, desires to develop the "whole student" address civic engagement and social responsibility and often incorporate community justice goals.[39] The focus of this manuscript, however, is litigation related to Title IX complaints, and as such, we aim to summarize alternatives to the formal adjunctive processes authorized by 34 C.F.R. § 106.45(b)(9) that may impact litigation.

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[35] *Haidak v. Univ. of Massachusetts-Amherst,* 933 F.3d 56, 69.
[36] *Id.*
[37] 34 C.F.R. § 106.45(b)(9).
[38] For general summaries of alternative dispute resolution in the Title IX context, we commend "A Restorative Justice Approach to Information Resolution of Sexual Student Misconduct", written by Joran Draper, David R. Karp, and Patricia Petrowski, presented at the June 23, 2019 annual conference as an initial summary of materials related to "restorative justice" as a means of alternative dispute resolution. In addition, Adam Laytham, *Mediation and Misconduct: A Better Way to Resolve Title IX Disputes*, 2020 J. Disp. Resol. available at https://scholarship.law.missouri.edu/jdr/vol2020/iss1/13 makes the case for implementation of mediation and other ADR techniques into Title IX processes.
[39] Mary P. Koss, Jay K. Wilgus, & Kaaren M. Williamsen, *Campus Sexual Misconduct :Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE, & ABUSE 248-249, 257 (2014).

A. Informal Resolution in the Final Rule

Universities are now explicitly permitted (in matters alleging sexual misconduct between students) to offer informal resolutions. The only requirements for informal resolutions are that universities do not require parties waive their rights to investigations and adjudications of formal complaints, nor may universities require participation in an informal resolution process. Informal resolution processes require that parties:

> (1) receive in writing:
> - notice of the allegations;
> - an explanation of the informal resolution process, including the right to withdraw and resume the formal process;
> - any consequences from participating, including what records are maintained and can be shared; and
>
> (2) provide voluntary written consent to participate in informal resolution and (3) not be offered informal resolution where there are allegations that an employee sexually harassed a student.[40]

As many had previously interpreted the 2011 Dear Colleague Letter and guidance offered by OCR since 2001 to prohibit mediation in cases of alleged sexual assault, many campuses have begun modifying existing ADR procedures or implementing new ones targeted at sexual misconduct pursuant to the 2020 Title IX regulations.[41] Indeed, the Preamble explicitly notes that the Department declined to define what kind of alternative dispute resolution would be appropriate as it "may have the unintended effect of limiting parties' freedom to choose the resolution option that is best for them, and recipient flexibility to craft resolution processes that serve the unique educational needs of their communities.[42]

B. Options for Informal Resolution

In order to fully utilize this flexibility, university counsel should be aware of the growing body of research related to restorative practices and give some thought to how they may be applied to mitigate the risk of litigation against their institutions.

There is a social science of "restorative practices" which focus on how to reduce crime, violence and bullying, improve behavior, strengthen society, provide leadership, restore relationships and repair harm.[43] A component of these processes would be considered restorative justice, which is reactive to some wrong-doing after it occurs. More particular for colleges and universities, a

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[40] 34 C.F.R. § 106.45(b)(9).

[41] *See*, *e.g.,* the Informal/Alternative Dispute Resolution processes outlined by Massachusetts Institute of Technology's Institute Discrimination & Harassment Response Office, https://idhr.mit.edu/alternative-dispute-resolution (last visited May 9, 2021), and the University of Michigan's Office of Student Conflict Resolution's explanations of Adaptable Conflict Resolution (ACR), https://oscr.umich.edu/article/adaptable-conflict-resolution-acr (last visited May 9, 2021).

[42] *See* 34 C.F.R. Part 106, *supra* note 31, at 30401.

[43] Ted Wachtel, *Defining Restorative*, INTERNATIONAL INSTITUTE FOR RESTORATIVE PRACTICES at 1 (2016) available at https://www.iirp.edu/restorative-practices/defining-restorative/.

restorative justice process would involve key stakeholders to determine how to repair the harm caused by the wrongdoing. The goal is a meaningful emotional exchange and decision making for victims who need reparation, offenders who need to take responsibilities and the community which needs reconciliation.[44] This is to be contrasted with the "retributive" justice models of "an eye for an eye". School communities are uniquely situated to implement restorative justice as "relational cultures", where relationships are to be protected and encouraged.[45] Restorative justice approaches, such as those described below, use open ended questions in order to help process events and reach a solution.

1. *Mediation* is "generally defined as '…conciliatory interventions by an acceptable third party who works with individuals or groups in conflict to facilitate the development of a shared and mutually acceptable solution to their problem.'"[46] The parties select an impartial neutral person who facilitates dialogue and negotiates the parties' differences. Mediators must rapport with all parties, and communicate each party's position directly, persuasively, and neutrally. Additionally, a trained mediator addresses faculty strengths and weaknesses, and assists in crafting the resolution agreement. Mediation, however, does not "presume a harm-causing party" and there is no requirement that anyone take responsibility for a harm. It simply seeks a mutually agreeable solution in a dispute. This requires that issues be negotiable, and because the negotiation with respect to sexual misconduct revolve around a factual dispute with respect to communication, and relate to the abuse of power, mediation may not be an ideal informal resolution.[47] A successful mediation results in an agreement, but there is no requirement that the agreement include an acceptance of responsibility. Because mediation treats parties as equal partners and provides neutrality, it may be an inappropriate resolution process in response to sexual violence.[48]
2. Restorative Practices
    a. *Restorative Conference:* "A facilitated meeting between the wrongdoer and the person harmed to discuss the situation, harm and solutions;" this is more formal than a restorative dialogue (an informal conversation using restorative language to avoid conflict and address less serious issues).[49] Restorative conferences contrast with mediation because from the outset, there is an acknowledgement of harm. A successful conference will result in the acceptance of responsibility.

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[44] *Id. at 3.*

[45] Trevor Fronius, Sean Darling-Hammond, Hannah Persson, Sarah Gukenburg, Nancy Hurley & Anthony Petrosino, *Restorative Justice in U.S. Schools: An Updated Research Review*, 5, WESTED JUSTICE &PREVENTION RESEARCH CENTER,(March 2019).

[46] Koss, *supra* note 43, at 245.

[47] Madison Orcutt, Patricia M. Petrowski, David R. Karp & Joran Draper, *Restorative Justice Approach to Informal Resolution of Sexual Student Misconduct*, 45 J.C. & U.L.2 204, 217 (2020).

[48] Koss, *supra* note 43, at 246.

[49] Fronious, *supra* note 49, at 46.

b. *Restorative Circle:* "A facilitated meeting that allows survivor, respondent and others to come together for community building-problem solving, resolving disciplinary issues, receiving content instruction, and discussing concerns." [50] This broader approach may enhance broader institutional compliance with Title IX, as the entire community is involved in articulating their shared values with respect to the harm caused by sexual misconduct

C. Recordkeeping

Due to the consequences for future litigation, it is also critical that counsel at institutions implementing or considering using informal resolution procedures pay careful attention to 34 C.F.R. § 106.45(b)(9)(i)'s requirement, that parties opting for an informal resolution, received notice of "the records that will be maintained or could be shared;" In addition to maintaining written documentation that references the commitment by both parties to the informal process, a written outline of the variety of options available, providing parties a notice of what information from an informal resolution will be shared, may further complicate a campus's ability to fully offer informal resolution. Reconciling FERPA disclosure rights, state public records laws, privileges available in your jurisdiction for alternative dispute resolution (and potential future discovery) requests is a complicated burden. Practitioners should work carefully with their campus constituents so that the parties are clear to what future disclosures may be provided. For instance, will an acceptance of responsibility in an informal process be documented for or reported to a university system? If so, it may be a record that must be disclosed under a state public records statute. Will the institution maintain a copy of the informal resolution? If so, it could be discoverable if future litigation were to result. One workable solution may be to document the desire to participate in an informal process with an agreement that clearly sets forth the institution's expectations as well as those of all participants, including what rights and responsibilities there may be with respect to future disclosure. Once an informal resolution agreement is executed, at the conclusion of the process, "the parties are bound by the agreement's terms, cannot return to a formal resolution process, and are subject to the consequences included in the . . . agreement for failing to comply with its terms."[51] Additional considerations may include incorporating a waiver of pursuit of future legal action into these agreements, and mutual promises not to disclose any information disclosed during the informal resolution.[52] Finally, because sexual misconduct may have an underlying criminal component, even though campus and criminal systems have different goals and objectives, it may be that if there are concurrent criminal charges, informal resolution is not viable. Another option may be to receive a commitment from your local prosecutor's office not to pursue records related to informal resolutions in any subsequent criminal actions.[53]

Often cases on campus do not just involve a survivor and a respondent, but two circles of supporters which disrupts the larger community. Utilizing alternative dispute resolution for Title IX cases may mitigate the risks that an institution has failed to provide due process, and

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[50] *Id*.

[51] Orcutt, *supra* note 51, at 225.

[52] Orcutt, *supra* note 51, at 226.

[53] Koss, *supra* note 43, at 245.

eliminate arguments that procedural mistakes resulted in a fundamentally flawed result. Accordingly, from a litigation perspective, it is a tool that practitioners should consider supporting their clients' interests in developing.

VII. Conclusion

The goal of Title IX of prohibiting discrimination on the basis of sex has moved well beyond its original focus on insuring gender equity in athletics and seemingly even beyond – at least for the time being – combatting sexual assault on college campuses. Whether the regulatory focus on Title IX reclaims the focus on sexual assault as opposed to the rights of the accused, remains to be seen. What is evident, is that respondent-initiated litigation is not slowing down. As the Biden administration reviews the 2020 Title IX regulations and the courts continue their focus on due process and the elimination of gender bias in institutional processes, colleges and universities are best served by aligning their policies and practices with the same heightened focus. In addition to shoring up investigatory and adjudicatory processes, institutions may find that exploring restorative practices in the area of sexual misconduct provides an opportunity to forego an adversarial process for those involved, while potentially benefitting and building stronger campus relationships for the entire community. Critically, using alternative dispute resolution for Title IX cases may mitigate the risks that an institution has failed to provide due process, and eliminate arguments that procedural mistakes resulted in a fundamentally flawed outcome.

Appendix A: Summaries of Notable Recent Decisions

Actual Knowledge

Posso v. Niagara Univ., No. 19-CV-1293-LJV-MJR, 2021 WL 485699 (W.D.N.Y. Feb. 10, 2021)

Plaintiffs, four former student athletes at Niagara University, were subjected to harassment, sexual assault and unequal treatment in the administration of the Title IX program, after reporting ongoing harassment. The plaintiffs alleged they experienced sexual and gender based harassment by male swimmers which resulted in loss of scholarship, status on the team and intimidation. The harassment was reported to and witnessed by the University but no remedial action was taken despite the University's requirements under a Voluntary Resolution Agreement from a different sexual harassment complaint. The plaintiffs brought a lawsuit based on unequal treatment and gender-based harassment.

The court found that the University had actual knowledge of the risk of sexual assault due to the repeated sexualized language used by male swimmers toward female swimmers on an ongoing basis. As the behavior "fell under the definition of sexual harassment prohibited under Title IX" the University was under an obligation to guard against it. The court also held while one of the plaintiffs was not a member of the swim team, it had no bearing despite the University's assertion on the school's responsibility as the University knew of sexual misconduct within the team for at least two years, knew there was a lack of supervision and took no measures to address the sexual misconduct or implement any structural changes. The Court held that "it seems arbitrary that the 'actual notice' line must somehow stop with female swimmers being the only students at substantial risk from th[e] misconduct." There was an "official policy" of deliberate indifference at the University and the claims could proceed.

Consent

Doe v. Purchase Coll. State Univ. of New York, 192 A.D.3d 1100 (N.Y. App. Div. 2021)

Plaintiff, a student a SUNY Purchase, was suspended for a year after being found in violation of policy based on sexual misconduct due to lack of consent. During the hearing the board found that the complainant's statements were conflicting and unreliable and contained considerable gaps in memory, but still found she consented to the initial stages of that evening's encounter but not to sexual intercourse. The plaintiff alleged the College wrongfully found him responsible for sexual misconduct as the finding was unsupported by substantial evidence.

The court found that, while there was inadequate evidence on verbal consent, the plaintiff claimed there was consent through actions and the hearing board failed to elicit or consider testimony regarding this fact. In light of the fact that consent under the law can "be given by words or actions" the court found the final determination of the hearing board to be "surmise, conjecture, or speculation" and ordered the decision be annulled, sanctions vacated, and all references to the incident expunged from the plaintiff's academic record.

Bias

Doe v. Washington & Lee Univ., No. 6:19-CV-00023, 2021 WL 1520001 (W.D. Va. Apr. 17, 2021)

Plaintiff, a former undergraduate student at Washington & Lee University, filed a discrimination lawsuit based on the University's actions in the sexual misconduct proceeding. The plaintiff argued that the disciplinary proceeding for sexual misconduct was conducted in a manner that was discriminatory against him on the basis of his sex. The plaintiff claimed that the University's conduct violated Title IX when its determination was based on "biased assumptions regarding the sexual preferences of men and women." Specifically, the panel had no reservations with crediting the complainant's "personal rule" of having "everything up to vaginal penetration" with someone whom she was not interest in a relationship with, as a basis for its decision, but discredited the plaintiff's view that while he could not receive oral sex from a friend, he could have sexual intercourse with her.

The court found there was "starkly different treatment" of the testimony of the complainant and plaintiff which could lead a jury to find that the University followed the policy in relation to the female student but did not follow the same policy in relation to the plaintiff. The court held that the plaintiff showed evidence of a genuine issue of material fact concerning whether the University discriminated against him on the basis of sex in violation of Title IX and the claim should proceed to trial.

Doe v. New York Univ., No. 1:20-CV-01343-GHW, 2021 WL 1226384 (S.D.N.Y. Mar. 31, 2021)

Plaintiff, a former student at New York University, was expelled for sexual misconduct despite being assured that the charges against him did not warrant expulsion. After a relationship turned toxic, a disciplinary hearing was launched against the plaintiff based on complaints of gender based misconduct. Early in the process, an advisor appointed by the University told the plaintiff that he would not be expelled and that he could file a Title IX claim against the complainant once her claim was resolved. Based on this advice, the plaintiff chose not to retain a lawyer, and not to defend himself from Australia where he was studying at the time. Despite several technology issues during the hearing which impacted his ability to hear and participate, the plaintiff was found responsible for several acts of misconduct including sexual harassment and stalking and was expelled. An appeal based on new evidence was submitted and the University confirmed the original decision. When he attempted to file his Title IX complaint against the complainant, the University declined to investigate and informed him that the matter was closed. The plaintiff brought a Title IX claim alleging the University discriminated against him during the investigation and adjudication because of his gender, that there were procedural concerns during the proceeding and that he was not permitted to file complaints against complainant for similar violations of the University policy.

The court found that there were technology glitches in the Zoom hearing process which impacted the plaintiff's ability to fairly participate and that there was weakness in the evidence which could cast some "articulable doubt" on the proceedings outcome. In addition, the court found a plausible inference of gender bias based on public pressure and criticism following social media posts that accused the University of not protecting female students just two days before the denial of the plaintiff's appeal.

Doe v. Coastal Carolina Univ., No. 4:18-CV-00268-SAL, 2021 WL 779144 (D.S.C. Mar. 1, 2021)

Plaintiff, a former student at Coastal Carolina University, filed a claim after he was permanently dismissed from the University when it found him responsible for alleged sexual misconduct. At his initial hearing, the panel found the plaintiff had not violated University policy when he engaged in sex with the complainant. The complainant appealed the decision, under an unknown basis not provided in the policy, and a new hearing was ordered. At the second hearing, the panel found the plaintiff violated policy and he was permanently dismissed from the University. Plaintiff brought suit asserting a violation of Title IX asserting gender bias in the University's decisions. The University moved for summary judgment.

The court denied the University's motion for summary judgment finding that the difference in outcomes from his first and second hearing raised a genuine issue regarding the accuracy of the outcome. "The fact that plaintiff was found not guilty in his first hearing, … raises articulable doubt as to his guilt." Despite the evidence the University alleged supported the plaintiff's guilt, the first panel did not seem convinced that this evidence showed he violated policy. On the issue of gender bias, the court found there was a genuine issue regarding the connection between the outcome and gender bias. The University data showed a "pattern of bias against male respondents" in sexual misconduct cases. When combined with circumstantial evidence of bias, the data could survive summary judgment. The court further held a "departure from typical adjudicatory or procedural norms might be so perplexing that it supports an inference of gender bias." The court determined that the University's review process on appeal could permit a reasonable jury to find gender bias based on the decision to have the first hearing appealed as the policy limited the grounds for appeal and the appeal was not granted on one of those basis.

Deliberate Indifference

Simonetta v. Allegheny Coll., No. CV 20-32, 2021 WL 927534 (W.D. Pa. Mar. 11, 2021)

Plaintiff, a student athlete at Allegheny College, was placed on academic probation and suspended from the football team after she reported unwelcomed sexual conduct from teammates. The plaintiff alleged that despite actual knowledge of harassment and discrimination, the College was deliberately indifferent by failing to respond and remedy the issues and rather the College retaliated against her for reporting the conduct.

Deliberate indifference requires a "response or failure to respond that is clearly unreasonable in light of the known circumstances." The court held the deliberate indifference claim failed as the reported conduct did not constitute "severe and pervasive harassment" as defined under the statute and the plaintiff failed to allege that the harassment had "a concrete, negative effect on her ability to receive an education." However, the court held that the plaintiff's retaliation claim was sufficient because she properly alleged that after she reported the alleged harassment, the College placed her on academic probation and suspended her from the team.

Foster v. Bd. of Regents of Univ. of Michigan, 982 F.3d 960 (6th Cir. 2020)

Plaintiff, a student at the University of Michigan, suffered sexual harassment from a peer and continued harassment throughout the program. The plaintiff alleged the University had shown deliberate indifference to her because her complaints were about another student. The University alleged it had taken appropriate steps by conducting an investigation, implementing a no contact order after her first complaint, removing the student from the last day of the program, and issuing an order that he could not attend graduation.

The Court affirmed the district court's finding of summary judgment in favor of the University because the University had implemented disciplinary measures and took prompt action to remedy the issues. The court further held that while there were more extreme measures like expulsion and a no trespassing order which could have been considered, there is no evidence to suggest that it would have stopped his harassment and it does not amount to deliberate indifference. "Under Title IX, a school may be held liable only for what it can control." The court held that an ineffective response does not necessarily mean a jury would find deliberate indifference.

Davis v. Univ. of N. Carolina at Greensboro, No. 1:19CV661, 2020 WL 5803238 (M.D.N.C. Sept. 29, 2020)

Plaintiff, a former student in the doctor of nursing program at the University of North Carolina at Greensboro, reported sexual harassment from a male supervisor to the program administrator. In response, the program administrator attempted to downplay the conduct as accidental and intimidated the plaintiff into not making the complaint. The plaintiff refused to withdraw her complaint and no meaningful investigation or action was taken by the University. Following her complaint, the plaintiff was reassigned to work with the same supervisor. Upon reporting to a hospital administrator, the plaintiff learned that neither the administrator nor the hospital were aware of her prior sexual harassment complaint or that interactions with the employee should be restricted. When she reported continued concerns to the program administrator, the plaintiff was reprimanded for not following the chain of command. In addition, the plaintiff's request for reasonable accommodations for testing was met with resistance, interruptions and ridicule. When she complained, the plaintiff was subjected to harassment and retaliation including dismissal from the program one month prior to completion. The plaintiff brought eight claims against the University, the Board of Governors and the Nursing Anesthesia program, including Title IX violations for sexual harassment.

The court found the plaintiff had sufficiently pleaded a Title IX claim based on allegations that the University had substantial control over supervision and assignment based on prior communications, the administrator's supervisory role for the placement, administrator's ability to restrict contacts with the hospital, and the University's role in placement. In addition, there was sufficient evidence of deliberate indifference when the plaintiff was left "vulnerable to harassment" after her initial harassment complaints were ignored and the harassment continued. The Court also found the plaintiff plausibly alleged retaliation based on her expulsion which was a part of an "coordinated plan" that began after she complained about harassment the second time.

Intersections of Title IX and Title VII

Agbefe, v. Board of Edu. of the City of Chicago, No. 19 C 4397, 2021 WL 1885964 (N.D. Ill. May 11, 2021)

Plaintiff, a public school teacher in Chicago, brought action against the Board after she was retaliated against for complaining about sexual harassment from her students. While teaching in an alternative school located in the county jail, the plaintiff was subjected to sexual harassment from her students. The plaintiff reported the behavior to administration, who took no action. Following a report from the Inspector General, the Board fired the school's principal and conducted an investigation. The plaintiff provided comments as a part of that investigation due to her harassment and, despite being informed it would be anonymous, her complaints were revealed and the former principal took action against her in retaliation.

The Board argued that because her Title IX claims arose from her employment they were precluded by Title VII. The court held that the Title IX claims were precluded as they were solely employment discrimination claims, she did not assert any remedy under Title IX that was not available under Title VII, and her retaliation claim was against her due to opposition of an employment practice and not opposition of sex discrimination in education against her students.

Valencia v. Bd. of Regents of the University of New Mexico, et al., No. 20-2079, 2021 WL 1529748 (10th Cir. Apr. 19, 2021)

Plaintiff, an untenured assistant anthropology professor at the University of New Mexico, was terminated after an investigation revealed multiple instances of misconduct involving sexual harassment of students, drunken assault of two employees and other conduct issues. The plaintiff brought due process, discrimination and retaliation claims against the Board of Regents and several individuals alleging misconduct by the University and numerous individually-named institutional defendants.

The Court affirmed summary judgment for the University. The court disposed of procedural due process claim holding that the pre-termination proceedings satisfied due process requirements as he received adequate notice of the charges, was given an explanation of the University's evidence, and had an opportunity to present his side. The plaintiff took advantage of that opportunity by having an attorney and presenting exhibits during the meeting. The court further affirmed judgment for the University on plaintiff's Title VII claims, as the plaintiff failed to show pretext and failed to show a causal nexus between a protected activity and his termination.

Cavner v. Univ. of Arkansas Fort Smith, No. 2:21-CV-02034, 2021 WL 772240 (W.D. Ark. Feb. 26, 2021)

Plaintiff, an assistant professor at the University of Arkansas Fort Smith, alleged sex discrimination based on a hostile work environment and retaliation after she reported possible sexual harassment/discrimination by a physician against a student. Following her report, the plaintiff claimed she experienced harassing calls, was given an undesirable schedule, and was denied funding, a raise, promotion and transfer. After several complaints to the University

including human resources, the professor filed an EEOC charge and the lawsuit for violations of Title VII and Title IX.

The University argued the Title IX claim should be dismissed because Title VII provided a complete remedy and there was no implied private cause of action for employment discrimination damages under Title IX. The court dismissed the Title IX claim against the University holding Title VII provides a "comprehensive and carefully balanced remedial mechanism for redressing employment discrimination" and there is no implied private action for employment damages under Title IX.

Appendix B: Suggestions for Strategic Positioning in Title IX Litigation[54]

Each step of an institution's sexual harassment investigation is an opportunity for investigators and adjudicators to demonstrate impartiality, fairness and equitable treatment to all parties involved. In doing so, while you may not be able to eliminate the risk of a lawsuit being filed against your institution, you do support due process and mitigate your client's risk of liability. The following suggestions are intended to assist Title IX practitioners and legal counsel with advising their client institutions before an outcome of responsibility is reached. Preventing an erroneous outcome is going to be an institution's best defense if Title IX litigation ensues.

We would be remiss not to acknowledge the potential too for §1983 claims to potentially expose officials at public institutions to lability in Title IX related litigation.[55] Institutional actors will typically be immune from liability under §1983 so long as in carrying out their job responsibilities they are not violating the statutory or constitutional rights of the claimant.[56]

Suggestions for Legal Counsel

1. **Eliminate Opportunities for Bias Claims**
    a. Recall the 2017 OCR Q&A: "A person free of actual or reasonably perceived conflicts of interest and biases for or against any party must lead the investigation on behalf of the school. Schools should ensure that institutional interests do not interfere with the impartiality of the investigation."
    b. It is not unusual for victims' advocates and defense attorneys to work in this field. Just because someone has worked in an area in the past does not mean they cannot be objective. Review potential concerns about bias on a case-by-case basis—and document your justification.[57]

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[54] The following does not constitute legal advice. Rather, the suggestions and tips compiled here have been developed by the speakers through their experiences working with institutional counsel, investigators and adjudicators for the last ten years.

[55] §1983 claims serve as the basis for lawsuits against individuals employed by state or local governments – school officials and administrators such as Title IX coordinators, Student Affairs Administrators, Provosts, Governing Trustees, and the like. Title IX on the other hand permits only for claims against an institution. See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009).

[56] *See e.g., Doe v. Purdue University,* 928 F.3d 652 (7th Cir. 2019), *citing Figgs v. Dawson,* 829 F.3d 895, 905 (7th Cir. 2016) (characterizing qualified immunity as "a high standard", one that 'protects government officials from liability for civil damages as long as their actions do not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.').

[57]" [T]he Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complaints or respondents), bearing in mind that the very training required by § 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role." 34 C.F.R. Part 106, *supra* note 31, at 30252.

c. If you think an employee cannot be objective but still wants to be a part of prevention and support efforts, find roles that allow for that (i.e., survivor advocate, hearing support person).
d. Strive for a Title IX investigation and adjudication team with members from diverse backgrounds—race, gender, age, position at institution, etc.
e. Allow for parties to object to decision-makers based on perceived bias.
f. Do not permit ex parte communications with the Title IX team.
g. Look for and eliminate examples of bias within institutional training materials.

2. Legal Sufficiency Review

a. As counsel, understand the rubric required to assess Title IX claims.
b. Review draft reports for adherence to that rubric.
c. Maintain attorney-client privilege: emphasize to Title IX investigators/adjudicators to share draft reports only with counsel.
d. If key questions have not been asked of parties/witnesses, advise a return to the investigatory process.
e. Stay in your lane, but don't shy away from asking questions about the plausibility of a claim – if the analysis doesn't make sense now, it's not going to make sense to a judge.
f. If there's a way to fix a procedural error that's not set forth in your institution's procedures, consider implementing anyway if it enhances due process.
g. Attempt to understand what a complainant is looking for – consider whether there are other outcomes/processes that might be more palatable than seeing an investigation and adjudication to its conclusion (restorative justice methods).

3. Adjudication Decisions

a. In terms of evidence considered, advise your client to err on the side of admitting evidence even if slightly relevant (unless the evidence would be prejudicial to a party) – the weight in which it is considered can always be adjusted.
b. Courts may be more likely to find error with a layperson's omission/rejection of evidence.

4. Consistency

a. Ensure consistent application of procedures to all cases.
b. As counsel, keep track of sanctions and how they relate to the severity of all cases.

Suggestions for Institutional Investigators and Adjudicators

1. **Ensure Due Process at the Outset**

   Recall the 2017 OCR Q&A:

   Provide written notice to respondent prior to any initial interview once institution decides to open an investigation, with sufficient details and time for respondent to prepare a response prior to interview, that includes:

   a. Identity of parties involved;
   b. Date and location of alleged incident(s);
   c. General term that covers the alleged conduct (e.g., non-consensual intercourse, non-consensual contact, stalking, verbal harassment); and
   d. Specific section of conduct code allegedly violated.

   Practice tip: additional items to consider including

   a. Link to/copy of applicable policies and procedures;
   b. Acknowledge the right to bring an advisor;
   c. Notice of policy against retaliation; and/or
   d. Notice of any interim measures if applicable.

2. **Impartiality**
   a. Investigators and adjudicators should remain objective and impartial
      i. An investigator's role is that of a neutral fact finder, with the goal being to gather as much factual information as possible to reach a fair and balanced decision.
      ii. Maintain a balanced approach with parties and witnesses.
   b. Treat all parties with civility and respect (i.e., same tone, same approach to asking questions – mix of open ended and direct).
      i. Insure that all parties have an opportunity to identify witnesses with relevant information to the allegations at issue.
      ii. Create as comfortable interview/hearing environment as possible for all parties and witnesses.
      iii. Being sensitive and kind can and should be the approach – however, it is important not to validate a person's claims during an interview/hearing.
   c. Ask the tough/awkward questions
      i. Keep the elements of a claim at the focus of questioning.
      ii. It may be necessary to re-interview an interviewee in person, via phone or electronically.
   d. Understanding victimology is important, but investigators and adjudicators must recognize their limitations with respect to reaching conclusions that may be construed as medical.
      i. While memory gaps are understood to potentially be a sign of trauma, and so it may be reasonable to conclude as much about a complainant's account.

ii. A respondent may have memory gaps or inconsistencies in their account as well for legitimate reasons.
iii. Be cautious with how you weigh memory gaps and inconsistencies when assessing the credibility of either party.

3. Credibility

a. Check your own impressions of a party:
   i. Being likeable does not mean credible.
   ii. Being a jerk does not mean responsible.
b. Assess each interviewee's relationship to the parties and consider whether their bias is playing a role in their statements.
c. Ask: Is the account plausible and believable? Is there a possibility that secondary gain motivated a party to take a certain position? Are there past acts that are relevant?

4. Working with Counsel

a. Draft reports should only be shared with legal counsel so as to maintain attorney-client privilege...otherwise your drafts could be subject to production in litigation.
b. The role of legal counsel is to assist the institution with ensuring that your work product will stand up in court. That they may push back on your analysis is an opportunity to bolster your work product.

Appendix C:

Overview of 2020 Title IX Regulation Requirements for Sexual Harassment Proceedings[58]

The procedural requirements set forth in the 2020 Title IX regulations include the following:

1. An objective assessment of the evidence which includes credibility assessment;
2. Elimination of conflicts of interest or bias on the part of decision-makers;
3. Training institutional staff involved in sexual harassment grievances – which includes not just training on the substance of sexual harassment but the use of technology and how to navigate party/witness questioning in a live hearing;
4. Training materials that are devoid of sex stereotypes;
5. Respondents be presumed not responsible until a determination is made otherwise through a grievance process;
6. Revision of grievance timelines for good cause (*i.e.,* absence of a party advisor, or witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities);
7. Description of the range of possible sanctions/remedies that may be imposed following a determination of responsibility;
8. Application and explanation of an evidentiary standard that is used for all complaints against students, employees and faculty;
9. Supportive measures for complainants and respondents;
10. Notice to respondents of all allegations at the outset (as well as throughout a grievance process, should new allegations arise) of a sexual harassment grievance process;
11. Dismissal of a formal complaint for purposes of Title IX where it falls outside the regulation's jurisdiction;
12. Assignment of burden of gathering evidence, to the institution;
13. Permit equal opportunity for fact and expert witnesses, and other inculpatory or exculpatory evidence;
14. Not restrict parties from discussing allegations under investigation;
15. Permit both parties to have the same type of advisor (including an attorney), present throughout the grievance process;
16. Provide sufficient time for party to prepare for and attend grievance-related meetings/hearings;
17. Provide both parties equal opportunity to inspect and review any evidence obtained throughout the grievance process;
18. Provide ten days to parties to review and respond to an investigative report before the report is completed;
19. Create a summary of relevant evidence at least 10 days prior to a hearing
20. Provide for a live hearing where parties' advisors are permitted to ask the other party and witnesses relevant questions;
21. Permit cross-examination, but not by a party personally;

[58] *See* 34 C.F.R. § 106.45.

22. Exclude questions and evidence about a complainant's sexual history, unless the purpose is to demonstrate someone other than the respondent committed the sexual harassment at issue, or to prove prior acts evident consent;
23. Record live hearings;
24. Final decision-maker cannot be the same person as the decision-maker, and must issue a written determination regarding responsibility that includes a host of requirements (*i.e.,* allegations, procedural steps that occurred, findings of fact, application of code of conduct to facts, rationale for sanctions, explanation of appeal rights);
25. Appellate determinations must be fully explained;
26. Informal resolutions may not be required, and can only be allowed if a formal complaint has been filed;
27. Informal resolutions prohibited for use in allegations that an employee sexually harassed a student.