

# Defending Campus Sexual Assault Cases

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# Today's Goal

- ▶ Present “some” nuts and bolts for navigating campus disciplinary proceedings - while simultaneously laying a foundation for a potential lawsuit.

# Common Title IX Claims

- ▶ Erroneous outcome,
- ▶ Selective enforcement/hostile environments; and/or
- ▶ Retaliation.

# Title IX erroneous outcome claims

Plaintiff must present: "facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding" and a "particularized ... causal connection between the flawed outcome and gender bias."

*Doe v. Cummins*, 662 F. App'x 437 (6th Cir. 2016), citing *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994).

# Title IX selective enforcement

One district court in Ohio described selective enforcement claims as occurring when a plaintiff:

“....essentially assert[ ] that even if he or she did violate a university policy, the decision to initiate disciplinary proceedings or the severity of the penalty imposed was motivated by gender bias. To state such a claim, [plaintiff] must allege ‘that a female was in circumstances sufficiently similar to his won and was treated more favorably by [defendant university].’ Moreover, [plaintiff] must allege facts that would demonstrate that difference in treatment was because of his gender.” (emphasis added).

*Marshall v. Ohio Univ.*, No. 2:15-cv-775, 2015 U.S. Dist. LEXIS 155291 (S.D. Ohio Nov. 17, 2015)

# Title IX Retaliation

- The Seventh Circuit's *Milligan* decision states a plaintiff establishes a Title IX retaliation claim by showing:
  - ▶ (1) he/she engaged in a protected activity under Title IX;
  - ▶ (2) defendant took an adverse action against plaintiff; and
  - ▶ (3) there is a causal connection between plaintiff's protected activity and the adverse action.

# Title IX sexual harassment and Hostile Environment Claims

Gender biased application of Title IX policies / failure to discipline female students alleged to have engaged in sexual misconduct. Elements commonly found in such claims:

- (1) Plaintiff is student at an educational institution receiving federal funds, (2) he/she was subjected to harassment based on his/her sex, (3) the harassment was sufficiently severe or pervasive to create a hostile (or abusive) environment in an educational program or activity, and (4) basis for imputing liability to the institution.
- See e.g., *Klemencic v. The Ohio State University*. 263 F. 3d 505 (6<sup>th</sup> Cir. 2001); Jennings V. Univ. of N.C., 482 F.3d 686, (4<sup>th</sup> cir. 2007);

# Step One: in university level disciplinary proceeding

- REVIEW COLLEGE'S CODE(S);
- IDENTIFY HELPFUL LAW AND/OR REGULATIONS; AND
- IDENTIFY VIOLATIONS OF CODES AND/OR LAW;

# Keeping eye on litigation if things go south at university level

- ▶ Public v. Private University
  - ▶ Constitutional due process does not apply at private universities.
  - ▶ Public and Private universities can enjoy certain immunities which vary from state to state;
  - ▶ Contract, tort, and quasi-contract causes of action.
- ▶ Potential Defendants and claims
  - ▶ Defamation claims against Complainant & SLAPP statutes;
  - ▶ Contract and/or tort claims against third-party investigators.

## Step Two: evidence gathering

- BIG PICTURE EVIDENCE;
- FACT WITNESS AFFIDAVITS;
- INSTITUTIONAL AND KEY  
PLAYER GENDER BIAS  
EVIDENCE; AND
- GENDER BIAS WITNESS  
AFFIDAVITS.

# University and key player gender bias evidence .

- ▶ Check Chronicle of Higher Education website for information about OCR investigations and/or press coverage of Title IX issues;
- ▶ Review academic publications and/or CV search of key players;
- ▶ Research college's: (a) climate surveys (b) Clery Reports; (c) press releases regarding sexual misconduct issues; and
- ▶ Social media accounts of key college employees and/or adverse witnesses.

# Consent and Alcohol Consumption Evidence

- ▶ Consider polygraphs, toxicologist expert, and/or SANE nurse to review medical records,
- ▶ Third-party affidavits addressing code's "consent" definition, state law; and/or testimony evidencing complainant was not:
  - ▶ Stumbling and/or losing consciousness;
  - ▶ Displaying loss of equilibrium;
  - ▶ Exhibiting slurred speech or word confusion;
  - ▶ Evidencing bloodshot, glassy or unfocused eye;
  - ▶ Manifesting signs of alcohol poisoning such as vomiting - especially repeatedly; and/or
  - ▶ Disoriented or confused as to time, place, etc.,

# Third-party evidence of why false allegation was made

- ▶ See e.g., Reggie D. Yager, What's Missing From Sexual Assault Prevention and Response, (April 22, 2015)(discussing academic studies suggesting a substantial percentage of sexual assault allegations involve false allegations prompted by : (i) the need for a cover story or alibi; (ii) retribution for a real or perceived wrong, rejection or betrayal; and/or (iii) desire to gain sympathy or attention).
- ▶ When possible, gather third-party affidavit testimony to establish items i-iii above.

## Step Three: Communicating with College

- CRIMINAL CHARGE CONCERNS;
- DISCLOSE FACTS AFTER ALLEGATIONS PRESENTED;
- ACCOMMODATIONS REQUESTED AND/OR PROVIDED TO PARTIES;
- BIAS OR CONFLICT CHALLENGES;
- WRITTEN STATEMENTS AND APPEALS;
- QUESTIONING OF WITNESSES;
- EXCLUDING INAPPROPRIATE EVIDENCE; AND
- CREATING PAPER TRIAL.

# Employ helpful OCR directives

- ▶ “Public and state-supported schools must provide due process to the alleged perpetrator” *U.S. Dep’t Of Education Office of Civil Rights, Dear Colleague Letter*, (Apr. 4. 2011);  
<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>
- ▶ Colleges must employ “[p]rocedures that . . . will lead to sound and supportable decisions.” *U.S. Dep’t Of Education Office of Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties* (Jan. 2001);  
<http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>; and
- ▶ “Investigations must be adequate, reliable and impartial, including the opportunity for both parties to present witnesses and other evidence.” *Id.*

# Excluding inappropriate evidence

- ▶ Request the suppression of inappropriate and prejudicial testimony such as
  - ▶ Victim impact testimony prior to finding of responsibility;
  - ▶ Witnesses who had no contact with parties on day the misconduct was alleged to have occurred; and/or
  - ▶ Character evidence unless both parties are permitted to present such evidence.

# Odds and ends – part 1

- ▶ Goal: finding of innocence – or fall back position – discipline that College will agree to expunge at a later date.
- ▶ Develop strategy for how advisor will: (a) assist during interviews and/or hearings; (b) get documents into record.
- ▶ Support arguments with cites to code(s), law(s), and/or court decisions.
- ▶ Caution: If college refuses to correct major substantive and procedural errors, consider lawsuit seeking a restraining order stopping disciplinary procedure until errors are remedied.
- ▶ Drafting questions for investigators and/or hearing panel to ask complainant and witnesses.

## Odds and ends – part 2

- ▶ Police officers often have complainant call respondent in attempt to obtain audiotaped confession. conversation.
- ▶ Pitfalls of using text messages and social media;
- ▶ Weigh benefits of limited disclosures when complaint alleges incapacitation caused her not to remember what happened;
- ▶ Research college codes and state laws regarding recording meetings and phone calls between respondent and third-parties without notifying third-party of recording.

## Questions / and Contact Information

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