



Sexual Misconduct Cases: Hitting the Title IX Moving Target

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WHAT IS THE TARGET?

A. Statute

B. Prior Guidance from USDE OCR

1. 2001 Dear Colleague Letter

2. 2011 DCL and 2014 Q&A

C. Developing Case Law

D. Current Guidance from OCR: Sept. 22, 2017

1. Withdrawal of 2011 and 2014 Guidance

2. Reinforcement of 2001 DCL

3. New Q&A

4. Regulations forthcoming



A LITTLE MORE HISTORY

- In 2011, OCR issued a Dear Colleague Letter that elevated the attention given to how colleges and universities address allegations of sexual assault.
- There can be no doubt that it is critically important—for many reasons—that universities properly address allegations of sexual misconduct.

FIRST PRINCIPLES

We cannot overemphasize the importance of our universities:

- (1) taking allegations of sexual assault seriously;
- (2) being attentive and sensitive to complainants;
- (3) thoroughly investigating complaints;
- (4) pursuing discipline when the evidence shows sexual violence or misconduct has occurred; and
- (5) educating the campus about sexual assault.



Context for Recent Developments

Many of the current developments, however—including the case law and the new position of OCR—result from universities pursuing those interests at the expense of the rights of respondents accused of sexual misconduct.



Litigation by Respondents

- A. Hundreds of lawsuits nationwide
- B. Courts allowed many to move forward
- C. Many court decisions contain strong condemnations of universities' actions toward respondents
- D. These court decisions implicate all aspects of the disciplinary process
- E. They also have influenced the new guidance from OCR



Court Cases Affect How Your University Handles Sexual Assault Discipline Matters

- Investigations
- Hearing Process
- Appeal Process
- Personnel Who Participate



CASES - Due Process Generally

“If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision.”

- *Doe v. Brandeis University*, 177 F.Supp.3d 561, 572 (D.Mass. 2016)
- *Doe v. Colgate University*, 2016 WL 1448829 at *3 (N.D.N.Y., Apr. 12, 2016)
- *See also Neal v. Colo. St. Univ.-Pueblo*, 2017 WL 633045 (D. Colo., Feb. 16, 2017)



CASES: Key Aspects of Due Process

1. Notice
2. Hearing
3. Impartial Decisionmaker
4. Cross Examination
5. Fair Appeal Process
6. Written Rationale
7. Consent

DUE PROCESS: IMPARTIAL ARBITER

a. Terminology

“Whether someone is a ‘victim’ is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning. Each case must be decided on its own merits, according to its own facts.”

- *Brandeis University*, 177 F.Supp.3d at 572.

b. Internal Processes

Among the errors committed were “[d]eviations from GMU’s own established policies and procedures.”

- *George Mason University*, 149 F.Supp.3d at 620 .



c. Composition of the Panel

“[T]he District Court in the *Doe v. Washington and Lee University* case] ultimately denied the defendant’s motion to dismiss because the plaintiff alleged that one of the decision-makers had exhibited gender bias in an article she wrote that ‘posited that sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations that she did not outwardly express.’”

Doe v. Brown University, 166 F.Supp.3d 177, 187 (D.R.I. 2016), quoting *Doe v. Wash. & Lee University*, 2015 WL 4647996 (W.D. Va., Aug. 5, 2015)



d. Panel Training

Two cases involving Ohio State University that were decided in the last year address the panel training issue carefully.

Complaint contained several allegations that hearing panel members received biased training, including:

- statistics about the prevalence of sexual assault;
- “college men view verbal coercion...and alcohol as permissible means to obtain sex play or intercourse”;
- “Repeat perpetrators are aware of myths and how to present as empathic”;
- “Sex offenders are experts in rationalizing behavior.”
 - *Doe v. Ohio State Univ.*, 219 F.Supp.3d 645, 658 (S.D. Ohio 2016).



d. Panel Training

“If the training Doe alleges was the only training given to the panel members, it is plausible that OSU trained its panel members in a manner that produced actual bias.”

- *Doe v. Ohio State Univ.*, 219 F.Supp.3d at 658-59.



DUE PROCESS: CROSS EXAMINATION

- “Few procedures safeguard accuracy better than adversarial questioning. In the case of competing narratives, ‘cross-examination has always been considered a most effective way to ascertain truth.’”
- “Cross-examination is ‘not only beneficial, but essential to due process’ in a case that turns on credibility because it guarantees the finder of fact makes [the credibility] determination on both sides. When it does, the hearing’s result is most reliable.”
 - *Doe v. Univ. of Cincinnati*, ___ F.3d ___, 2017 WL 4228791 (6th Cir. Sept. 25, 2017).

DUE PROCESS: CROSS EXAMINATION

- “Here, there were essentially no third-party witnesses to any of the events in question, and there does not appear to have been any contemporary corroborating evidence. The entire investigation thus turned on the credibility of the accuser and the accused. Under the circumstances, the lack of an opportunity for cross-examination may have had a very substantial effect on the fairness of the proceeding.”

- *Brandeis Univ.*, 177 F.Supp.3d at 605.



DUE PROCESS: CROSS EXAMINATION

- “[T]o say that cross-examination is not generally required is quite different from saying that as a matter of law, it was not required here” where “Plaintiff plausibly alleges...that ‘large interests of liberty and property were at stake.’”

- *Neal*, 2017 WL 633045 at *25



DUE PROCESS: WRITTEN RATIONALE

- “Due process requires some kind of reasoning for the disciplinary action taken, as a number of courts have recognized.”
 - *Doe v. Alger*, 2016 WL 7429458 at *14 (W.D. Va., Dec. 23, 2016); *see also George Mason*, 149 F.Supp.3d at 621-22.

- New VAWA regulations recognize this emerging requirement as well. 34 C.F.R §668.46(k)(3)(iv) (“the result must also include the rationale for the result and sanctions”).

DUE PROCESS: ISSUES RE CONSENT

Courts have begun to question how universities determine consent in sexual assault matters.

a. “[T]he existence of a [long-term] relationship does not give someone the right to commit sexual assault. But neither is it meaningless and irrelevant when evaluating the question of consent.” – *Brandeis*, at 610.

DUE PROCESS: CONSENT

b. “The record reflects this ambivalence on the part of Ms. Roe [about engaging in sexual activity]. But Ms. Roe’s own mental reservations alone cannot be imputed to petitioner, particularly if she is indicating physically she wants to have sex.”

- *Doe v. Regents of Univ. of Cal. San Diego*, No. 37-2015-10549, at p.5 (Mar. 25, 2015)



DUE PROCESS: CONSENT

c. “The alleged failure to consider Ms. Doe’s post-incident consensual sex with Plaintiff also suggests bias.”

- *Neal*, 2017 WL 633045 at *11; *accord*
Washington & Lee, 2015 WL 4647996 at *10.



DUE PROCESS: CONSENT QUICK CASE SUMMARY

- “[Petitioner and complainant] began kissing”
- “After a while, the complainant took off both of their shirts”
- “Petitioner then removed the rest of their clothing and asked [her] if she had any condoms, to which she replied that she did not but that it was ‘fine’ and no reason to worry.”
- “The complainant then straddled petitioner from above while they had sex and, after it was over, asked petitioner if he had fun.”

- *Haug v. SUNY Potsdam*, 2017 WL 1255697 at *2.

DUE PROCESS: CONSENT

- Later, complainant alleged that the sexual encounter described above was non-consensual and petitioner was charged with—and found responsible for—sexual assault.
- The appeals court reversed: “The complainant indicated that she ‘froze up’ and ‘did not respond’ to petitioner’s advances, although the record does not reveal how this inner turmoil was manifested or whether petitioner was or should have been aware of it.”

- *Haug v. SUNY Potsdam*, 2017 WL 1255697 at *1-2.

DUE PROCESS: CONSENT

“Simply put, petitioner’s testimony seriously controverted the hearsay evidence indicating that complainant had not given affirmative consent to sexual relations and, as a result, that hearsay proof did not constitute substantial evidence to support the determination.”

- *Haug v. SUNY Potsdam*, 2017 WL 1255697 at *2



HITTING THE TARGET: The Role of the Office of Chief Counsel

- Actively managing this issue since the 2011 DCL
- Conducting and coordinating trainings for university executives and staff
- Constantly advising staff about policies and specific cases



OCC Activity Update

- Date:** September 2016 (all-day sessions)
- Locations:** Clarion / Lock Haven / West Chester
- Attendees:** Title IX Coordinators; chief student conduct officers; public safety officers; others
- Topics:** Background/Update on Title IX Guidance
Emerging Trends in Litigation (Title IX and Due Process)
Best Practices for Sexual Misconduct Investigations
Proper Framework for Adjudicative Decisions

OCC Activity Update

Date: April 2017 (two-hour briefing call)

Attendees: University Presidents

Topics: Background/Update on Title IX
Guidance

Emerging Trends in Litigation
(Due Process)

Proper Framework for Adjudicative
Decisions



OCC Activity Update

- Date:** September 2017 (all-day sessions)
- Locations:** Bloomsburg / Slippery Rock
- Attendees:** Title IX Coordinators; chief student conduct officers; adjudicative panel members
- Topics:** Drafting Adjudications in Sexual Misconduct Matters
Update on Litigation Trends
General Issues in Analyzing and Deciding Student Discipline Cases
Specifics on Handling Sexual Misconduct Hearings
Drafting Final Decisions



The “DO” List: Must offer opportunity for an in-person hearing

- Offering an evidentiary hearing is critical.
- Due process requires it.
- State System regulations—22 Pa. Code, Chapter 505 (BOG Policy No. 1984-13-A)—also require it.



The “DO” List: Ensure the hearing process is fair

- “Hearsay evidence may not be used to establish a fact necessary to establish guilt or innocence in a case.” 22 Pa. Code §505.6.
- Complainant must be prepared to testify, including some kind of cross examination.

The “DO” List: Ensure hearing is fair

- Be mindful of your terminology in referring to the parties
- Carefully consider disciplinary panel members
 - Are they properly trained in sexual assault cases? Is training balanced?
 - Do any have a record showing bias against either gender?



The “DO” List: Ensure hearing is fair

- Ensure there is opportunity for some kind of cross-examination
- Take great care before refusing to ask important questions of the complainant

The “DO” List – Issue a written decision with a clear rationale

- Determine the facts, including resolving key disputed facts.
- Explain why those facts constitute a violation of specific Code of Conduct provisions.



The “DO” List – Ensure that the appeal process is fair to both sides

- No private meetings between those hearing an appeal and either the complainant or the respondent.
- If one side is allowed to present new evidence....both sides must be allowed to.
- If one party presents new evidence, present it to the other and allow them sufficient time to respond fully.



The “DO” List – Correct mistakes before the final outcome

- Stop
- Assess the situation with your ULC
- Correct the procedural irregularity or violation
- Then proceed



REMINDER #1: Providing a fair process to the accused ADVANCES the cause of eliminating sexual assault.

“University sexual misconduct policies are losing legitimacy in the eyes of the courts. That is a disaster for Title IX enforcement.”

- Gary Pavela, Editor, Association of Student Conduct Administration's *Law and Policy Report* (April 14, 2016), www.insidehighered.com



REMINDER #2:

Invest in Quality Investigations

The best way to reduce disputes, and ensure quality results:

- (1) Have qualified investigators conduct thorough sexual misconduct investigations.
- (2) Require detailed, effective reports that are provided to complainant and respondent.



Current Status: OCR Sept 22nd Actions

- Issued new guidance and direction moving forward
- Withdrew two key guidance documents from 2011 and 2014
- Affirmed the original sexual harassment guidance from 2001
- Issued new Q&A document focusing on nine areas
- Announced intention to promulgate regulations on the subject



Current Status: OCR Sept 22nd Actions

- No requirement for immediate action by universities
- Best course is to await regulations
- Advise that they carefully re-examine their current sexual misconduct policy in light of the recent guidance
- ULC are prepared to assist in any revisions, now or after the regulations are in place



Questions?