

# Risk Management and Litigation Analysis

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# Agenda

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- Let's explore Title IX risk areas.
  - Incomplete Investigation
  - Unreasonable Delays
  - Imbalanced Investigation – Due Process
  - Failure to Communicate
  - Retaliation
- Best Practices to reduce those risks.
  - Policy
  - Procedure
  - Understanding Rights and Responsibilities – training and more!
  - Above all – communicate!
- Case Studies and Litigation Trends

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“If you don’t deal with sexual violence, you are going to get sued. If you deal with sexual violence, you are going to be sued.”

Peter Lake, Director of Stetson University’s Center for Excellence in Higher Education Law and Policy

# Title IX Risks

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- Failing to understand, follow, and enforce your Title IX Policy.
- Failing to understand the roles each individual plays in a Title IX matter.
  - Coordinator, Investigator, Decision Maker
- The goal of any investigation procedure should be **promptness, thoroughness, and impartiality**.
  - Anything less is a risk!
- Conduct a thorough investigation before reaching any conclusions.
- **DO NOT promise confidentiality but be mindful of restrictions!**

# Title IX Risks

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- Failure to honor due process or fairness in the process.
- RETALIATION, real or perceived.
- Not investigating when you had the chance.
- Failing to thoroughly and properly document the process.
- Going too far... crossing the line into invasion of privacy, intimidation, false imprisonment, etc.

# Best Practices to Minimize Risk

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- Familiarity with the Title IX Policy is key! Everyone in the process must commit to this. Enforcement and compliance with your policies and procedures is part of your obligation and best practice to avoid liability.
- Familiarity with any FERPA policy and confidentiality considerations that may prohibit you from sharing student's information.
- Be thorough and patient, while being as prompt as possible. Don't leave leads unchecked or make assumptions before seeing evidence or meeting witnesses.
- Communicate with parties about how long you expect the investigation to take and when you will get back to him or her so as to set reasonable expectations. And DO it!
- Make sure you ask all witnesses for any physical evidence that might exist, including texts, photos, documents, emails, or voicemail messages.

# Best Practices to Minimize Risk

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- Ask the parties regarding desired interim measures or remedies.
- Document any unsuccessful attempts to interview potential witnesses.
- Inform all parties and witnesses that retaliation directed at anyone who participates in the investigation should be reported immediately and appropriate action will be taken if retaliation is demonstrated.
- Don't prevent an interviewee from leaving the meeting if he or she chooses to leave.
- Avoid leading questions that suggest an answer to the witness or suggest impartiality.
- Avoid ask questions that call for a legal conclusion.
- Understand and honor due process or fairness rights of both parties.

# Title IX Statistics and Trends

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- OCR Cases: 2011 – present - 502 investigations, 197 cases resolved, 305 open.
- Litigation Trends: students are increasingly claiming flawed hearings or unfair disciplinary sanctions as a result of procedural failings at their universities.
- United Educators reported that sexual assault was the top liability for colleges and universities in 2018.
- “A lot of criminal defense lawyers are specifically advertising that they represent the accused in Title IX cases,” he said. “Pick any university in the country and go five miles from there, and you will find lawyers who advertise defending the accused. That wasn’t the case 10 years ago.”



# Title IX Statistics and Trends

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- Settling complaints from alleged victims in court cost colleges and universities an average of \$350,000 in the years following the Obama guidance, and some settlements reached \$1 million, United Educators reported in an analysis of Title IX claims from 2011 to 2015 at 1,600 institutions (not including defense costs).
- Litigation challenging new regulations – already several cases filed and a motion by attorneys general to block the regulations.
  - Asking for more time to restructure policies and procedures.
  - Argue they are discriminatory because they create a separate standard for sex discrimination than that for discrimination on the basis of race and national origin.
  - Take aim at what are seen as increased protections for those accused of sexual misconduct (live hearing, cross examination, and clear and convincing standard).

# Case Study: Due Process

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In cases under the prior guidance we have seen the following:

- Claims of violation of due process rights. Due process requires fair notice and an opportunity to be heard.
- Due process arguments come up in many Title IX cases.
  - Cross-examination – new regulations
  - Notice of charges and grounds
  - Adequate, in-person hearing
  - Public v. Private actors – what are students entitled to with respect to due process

# Case Study: Due Process / Unfair Treatment

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- *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), the Sixth Circuit held that the University of Michigan's process for adjudicating sexual misconduct allegations did not meet minimum standards of due process because, as an arm of the State of Michigan, the school must provide constitutional due process to students accused of sexual misconduct.
  - With its holding, the Sixth Circuit made a blanket finding that a student at a state institution accused of sexual misconduct is entitled to cross-examine his or her accuser, either directly or through an agent or representative.
- *Haidak v. University of Massachusetts-Amherst*, No. 18-1248 (1st Cir. Aug. 6, 2019), The First Circuit made it clear it was NOT holding Haidak's due process rights were violated and stated the Sixth Circuit went too far with its blanket rule.

# Case Study: Reverse Title IX - Gender Discrimination

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- Citing Obama-era guidance or pressures from #MeToo movement, male students argue the Title IX process is biased against men.
- *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019).
  - Title IX issue: whether Purdue discriminated against Doe on the basis of sex.
- *Doe v. Virginia Polytechnic Institute and State University*, 400 F.Supp.3d 479 (W.D.Va. 2019).
  - Title IX issue: whether the disciplinary process was an “erroneous outcome” motivated by gender bias in violation of Title IX.

# Case Study: Reverse Title IX - Gender Discrimination

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- *Doe v. Harvard University*, 2020 WL 2769945 (D. Mass. May 28, 2020).
  - An “erroneous outcome: claim under Title IX must allege 1) “particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding,” and 2) “particularized allegations relating to the causal connection between the flawed outcome and gender bias.” *Yusaf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994).
  - Gender bias must be a motivating factor.

# Other Claims In Title IX Cases

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## Breach of Contract

- Some states follow that the relationship between a university and student is contractual in nature and the entity is therefore bound to provide students with procedural safeguards promised in policies, etc.
- Does your policy say you will conduct follow-up interviews with parties? *Doe v. Harvard University*, 2020 WL 2769945 (D. Mass. May 28, 2020).

## Negligence

# Practical Takeaways

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- Review policy – make sure updates are incorporated and in line with the regulations, decide whether you want to go beyond the regulations in light of potential liabilities discussed.
- TRAIN on your policy – Title IX process participants – Coordinators, hearing board members, advisors, mandatory reporters, etc.
- Share the policy – complainants, respondents, witnesses, hearing board members, etc.
- FOLLOW the policy – in each case. Do not deviate from the policy and procedure!
- COMMUNICATE! Manage expectations, be clear, keep parties informed, but be mindful of restrictions.

# THANK YOU!!

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