

Higher Education Law: Title IX and the New Frontier of Sexual Assault Adjudication

By Emily Haigh, JD

In recent years, there has been a sea change within higher education's treatment of sexual assault. Educational institutions now investigate and adjudicate reports of sexual violence independently of law enforcement. How and why are our institutions doing this? The answer is Title IX of the Education Amendments of 1972 and the U.S. Department of Education's (DoE) expanded interpretation of Title IX. Although the DoE's goal to rid campuses of sexual violence may be laudable, the responsibility to investigate and adjudicate sexual assault has exposed our schools to civil liability.

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." Title IX's goal is to ensure equal access to our nation's educational resources and provide campuses free of sex discrimination. In 2011, the DoE made clear its position that sexual violence is a form of gender discrimination prohibited under Title IX. This interpretation widened the scope of Title IX's mandate and, with it, the DoE's oversight authority. It made sexual assault a civil rights violation, as well as a criminal and civil violation, and the DoE assumed the authority to govern institutional responses to sexual assault.

That year, the DoE published a 19-page Dear Colleague letter informing schools that they are responsible for adjudicating sexual assault independently of criminal law enforcement. The letter stated that there must be two parallel investigations and that even if the victim makes a criminal complaint, there must also be an ongoing investigation run by the school's Title IX office. Further, the letter provided adjudication guidance whereby Title IX hearings would not mirror criminal proceedings. For example, it stated that parties should not personally question or cross-examine each other during the hearing, offering the rationale that "[a]llowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment." While the right to cross-examine one's accuser is a centuries-old cornerstone of both civil and criminal law in this country, the DoE did not seek to replicate the protections of our judicial system, despite the criminal (let alone reputational and civil liability) implications of a sexual assault adjudication.

Perhaps the most contentious part of the 2011 Dear Colleague letter was its direction that schools must use the significantly lower preponderance of evidence standard when adjudicating sexual violence claims. Preponderance of evidence is a standard of proof used in civil cases that requires the moving

party to show only that the act more likely than not occurred. In contrast, in a criminal case, the government must show beyond a reasonable doubt that the act occurred. The lower burden of proof within Title IX again separates it from any parallel criminal adjudication of the same act of sexual violence.

In 2014, the DoE provided additional guidance on sexual assault adjudication through another Dear Colleague letter, and the White House published "The First Report of the White House Task Force to Protect Students from Sexual Assault." The White House advocated for what has come to be termed the "single investigator model." This model calls for a trained investigator to "interview the complainant and alleged perpetrator, gather any physical evidence, interview available witnesses—and then either render a

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finding, present a recommendation, or even work out an acceptance-of-responsibility agreement with the offender.” Again, Title IX showed itself as different and distinct from any parallel criminal proceeding occurring outside of campus.

Schools may not veer away from DoE guidance and simply maintain a policy that sexual violence must be adjudicated in a courtroom, especially because of the DoE’s enforcement mechanisms—the DoE’s Office of Civil Rights (OCR). The OCR has the authority to withhold federal funding from colleges and universities that fail to comply with Title IX and has the authority to publish school names on noncompliance lists. This, combined with a belief in the overall mission of extinguishing sexual assault, require schools to adjudicate sexual assault on campus.

Consequently, schools are now investigating, adjudicating, and resolving claims and crimes that are some of the most complex, and were traditionally exclusive responsibility of our criminal justice system. These cases require complicated tasks to be completed—collecting DNA evidence, determining participants’ state of mind and blood alcohol content at the time of the alleged act, ensuring due process—and more. As educational institutions are not manned by investigators, schools

have faced significant challenges since 2011 in implementing Title IX. They have been exposed to civil liability as they learn to properly investigate and adjudicate sexual assault while trying to comply with DoE guidance. This is not to deny that there are civil cases involving claims of rape. However, those, too, have been handled by the courts, in which there are significant due process protections.

Victims and accused students alike have identified the deficiencies in the DoE’s Title IX guidance and institutional implementation of that guidance, and have initiated lawsuits over alleged institutional mishandling of sexual assault. Students have brought claims alleging gender bias within investigations and adjudications; due process claims challenging processes as fundamentally unfair or lacking common protections such as the right to confront and examine witnesses; negligence claims alleging deficient investigations; infliction of emotional distress claims; and contract claims in which students allege breaches of internal policies and handbooks.

Schools have been and will remain strongly committed to creating safe academic environments free of violence and harassment even in the absence of Title IX. However, future lawsuits by students against universities over Title IX procedures seem inevitable. It remains to be seen whether the new administration will have a different interpretation of Title IX or whether the

courts will rein in Title IX’s expansion by holding that the DoE has done more than just interpret Title IX and has instead exceeded its authority and created new law. No matter what happens to Title IX, it is clear that universities are currently exposed to civil liability through the expansion of their responsibilities under Title IX. Schools need to find ways to pursue safety and implement Title IX’s mandates while protecting themselves from civil lawsuit and rely on outside counsel with experience in investigating such claims and handling litigation.

References

20 U.S.C. §§ 1682 et seq. (1972).

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