Title IX Hearings and Litigation: A Practitioner's Guide

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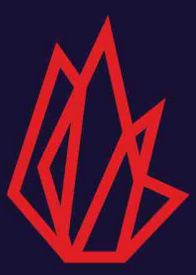

FIRE
Foundation for Individual Rights in Education

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INTRODUCTION

The Foundation for Individual Rights in Education, or FIRE, was founded in 1999 with the mission of defending the individual rights of students and faculty at America's colleges and universities. Among these individual rights is the right to due process and fair procedure. FIRE uses both terms because while the constitutional right to due process applies only to students at public universities, we believe that private universities should also conduct their disciplinary proceedings with basic fairness.

Countless students are tried in campus hearings each year, facing penalties that often include suspension or expulsion. Campus hearings often lack the kinds of basic fact-finding mechanisms and procedural safeguards that one would find in a court of law—protections that exist for very good reasons, which we will discuss in this *Guide*. As a result, these proceedings are shockingly error-prone, leading to hundreds of lawsuits and a (frequently deserved) reputation for lack of credibility. This situation benefits neither accusers, who deserve to have their accusations treated with appropriate gravity by the institution and the resulting findings with seriousness by the student body, nor the accused, who in an error-prone process obviously run a significant risk of being found responsible even if they are innocent. This risk is further heightened in the context of sexual misconduct cases because of the heavily politicized nature of the issue.

Having the assistance of a trusted advisor or attorney can make a world of difference to a student who might otherwise be denied a fundamentally fair hearing. Under the Violence Against Women Reauthorization Act signed by President Obama in 2014, students in campus sexual misconduct proceedings (both complainants and respondents) are entitled to have an "advisor of their choice" accompany them throughout the proceedings.[1] That law does not require universities to allow advisors to actively participate in the proceedings — and most universities did not do so in the wake of its passage, instead requiring advisors to remain silent during the proceedings themselves. (Title IX regulations issued in 2020 do allow students to have active advisors for some aspects of Title IX cases, though those regulations are still being litigated as this *Guide* is written—more on that later.) Regardless of the state of the law, however, advisors can provide invaluable guidance even behind the scenes that can have a significant impact on the outcome of a student's case. Therefore, given the high stakes and the fact that universities typically have lawyers and other trained professionals working on the institution's side, FIRE always recommends that students, if at all possible, select an attorney to be their advisor, preferably one familiar with campus discipline.

This *Guide* aims to help attorneys understand this emerging area of the law in order to better assist students accused of misconduct on campus, and covers both the campus disciplinary proceeding itself and the various legal claims that might arise from errors and bias in the campus process. It will emphasize, because of its seriousness, the fraught area of sexual misconduct, but should be helpful in any campus tribunal. Law in this area is rapidly evolving; as alluded to above, since 2011 more than 500 accused students have filed suit in

[1] 34 C.F.R. § 668.46(k)(2)(iii) (2014).

federal and state courts alleging that they were deprived of a fair process in campus sexual misconduct adjudications.[2]

Before delving into the details of how to represent a student in a campus sexual misconduct proceeding, this *Guide* will explain why campuses are adjudicating sexual assault claims at all — claims that many people, lawyers included, believe would be better handled by the criminal justice system.

The answer comes from Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, the federal law prohibiting sex discrimination at educational institutions receiving federal funding. (Because federal funding includes federal financial aid, Title IX covers all but a handful of colleges and universities nationwide.) While the operative text of Title IX itself is very brief, subsequent administrative regulations and judicial decisions have established that student-on-student sexual harassment and assault are forms of sex discrimination to which schools are required to respond under Title IX.

Pursuant to regulations and guidance from the Department of Education's Office for Civil Rights (OCR), schools are required to have grievance procedures in place to address claims of alleged sex discrimination (which includes sexual harassment and assault).[3] In 2011, responding to a groundswell of concern that colleges and universities were not doing enough to respond to a perceived epidemic of sexual assault on campus, OCR issued a guidance letter that radically altered the way that university administrations responded to sexual misconduct claims.[4]

Among other things, OCR's April 4, 2011, "Dear Colleague" letter mandated that in order to comply with Title IX, universities had to use the low "preponderance of the evidence" standard when adjudicating sexual misconduct claims. The letter also strongly discouraged universities from allowing parties to cross-examine each other in campus sexual misconduct cases, expressing concern that it "may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment." Since universities overwhelmingly require students to represent themselves in these proceedings without the active assistance of an advisor, this prompted many schools to allow cross-examination only through a hearing panel that had broad discretion to omit or reframe questions at their whim, or to eliminate cross-examination (and even hearings) altogether, if they had allowed cross-examination at all.

At the same time as it announced these new requirements, OCR also dramatically ramped up its investigations into colleges and universities for their handling of sexual misconduct claims. When OCR first went public with a list of colleges and universities under Title IX

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[2] Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 49 (2019).

[3] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106.8(c) (2020).

[4] U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague letter (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

investigation in May 2014, there were fifty-five institutions under investigation.[5] By January 2017, that figure had jumped to 223.[6]

FIRE has always advocated for due process in campus disciplinary proceedings. In 2003, we first published a *Guide to Due Process and Fair Procedure on Campus*, aimed at informing students and faculty about their due process rights and about the various deprivations of those rights they might encounter in campus disciplinary proceedings. But following the issuance of the April 4, 2011, Dear Colleague letter, we began to notice a dramatic uptick in the number of case submissions we received from students who were being suspended or expelled for sexual misconduct. The nature of these proceedings were often startling: life-altering decisions were being made by campus investigators without so much as a hearing at which the accused student had an opportunity to defend themselves.

Moreover, given this federal regulatory shift, the nature of the alleged misconduct, and fearful of losing their federal funds and of negative publicity, universities doubled down on these kangaroo courts even when called out about their disregard for students' rights. In this climate, it became more critical than ever that students and faculty facing Title IX investigations and hearings have attorneys who can guide them through the campus process and, if necessary, bring suit afterwards to remedy the injustices of the campus system.

Ever since OCR issued the 2011 Dear Colleague letter, FIRE has worked tirelessly to bring attention to the lack of due process in campus sexual misconduct proceedings. And in 2017, the government finally acknowledged the harms to all parties caused by fundamentally unfair proceedings. In September of that year, OCR officially withdrew the 2011 Dear Colleague letter and an accompanying 2014 guidance document, and announced that it would be undertaking a formal rulemaking process to replace them, including a public notice-and-comment process (something the Dear Colleague letter was widely criticized for its failure to do).[7] Victims' rights advocates accused the Department of rolling back protections for sexual assault victims,[8] and the Department received more than 100,000 comments through the notice-and-comment process.[9]

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[5] Press Release, U.S. Dep't of Educ., *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations* (May 1, 2014), https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i.

[6] Nick Anderson, *At First, 55 Schools Faced Sexual Violence Investigations. Now the List Has Quadrupled,* WASH. POST (Jan. 18, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/at-first-55-schools-facedsexual-violence-investigations-now-the-list-has-quadrupled.

[7] U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague letter (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

[8] Equal Rights Advocates, *DeVos Lawsuit Update: Groups Detail 'Chilling Effects' of Title IX Rollbacks* (May 20, 2019), https://www.equalrights.org/news/devos-lawsuit-update-groups-detail-chilling-effects-of-title-ix-rollbacks.

[9] Diana Stancy Correll, *Department of Education Receives More than 100,000 Public Comments on Title IX Overhaul*, WASH. EXAMINER (Jan. 31, 2019), https://www.washingtonexaminer.com/news/department-of-education-receives-more-than-100-000-public-comments-on-title-ix-overhaul.

In May 2020, the Department of Education officially released its new Title IX regulations. The regulations contain a number of critical procedural protections for students accused of sexual misconduct under Title IX, including:

- The right to adequate notice before any "initial interview," including "the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under [the regulations], and the date and location of the alleged incident, if known .";[10]
- The right to a live hearing at which advisors to the parties may cross-examine the other party and witnesses;[11]
- The right to "inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source . . . .";[12]
- That an institution may only impose an emergency removal on a respondent if the school conducts an individualized safety and risk analysis, finds an immediate threat to the health or safety of students or employees, and gives the respondent immediate notice and an opportunity to challenge the removal;[13]
- A requirement that officials be trained to conduct impartial proceedings, not to rely on sex stereotypes, and not to base credibility decisions on a party's status as a complainant or respondent.[14]
- Allowing (but not requiring) schools to offer informal resolution to the parties, rather than putting them through the formal complaint process.[15]

Yet while these regulations are in effect as of this writing, they are not set in stone. Advocacy groups and several state attorneys general have challenged the regulations in court. Although none of those lawsuits have succeeded at the time of this writing, they are not over. That may result in portions of the regulations being enjoined or blocked from implementation. Moreover, on March 8, 2021, President Joe Biden issued an executive order instructing the Secretary of Education to look into "suspending, revising, or rescinding" the regulations. While the ultimate outcome remains unknown, it's probable that his Education Department will be much less likely to enforce the new regulations' due

[10] 34 C.F.R. § 106.45(b)(2)(i)(B).
[11] *Id.* § 106.45(b)(6)(i).
[12] *Id.* § 106.45(b)(5)(vi).
[13] *Id.* § 106.44(c).
[14] *Id.* § 106.45(b)(1)(iii).
[15] *Id.* § 106.45(b)(3)(ii).

process guarantees as strictly (or perhaps at all). So while the regulations are a major leap forward for students' due process rights, their future is uncertain.

FIRE's goal with this publication is to create an evergreen guide that will serve as a valuable resource for attorneys whether or not the new regulations are in force. Therefore, we will note the impact of the regulations on various aspects of the campus process (such as notice, access to evidence, and the right to a hearing with cross-examination), but will also present information on the various situations you may encounter if the regulations are not in effect or schools are out of compliance.

The information in this *Guide* is drawn from the authors' extensive experience representing students in campus disciplinary proceedings as well as in litigation stemming from those proceedings. **(Please note: While this *Guide* discusses the law, legal rights, and legal precedent in detail, it is not intended to provide formal legal advice and should not be considered legal advice.)**

We note that this *Guide* is written with a focus on representing those accused of campus offenses. Due process, including the right to an advisor, is important for accusers as well. Campus proceedings must be designed to treat all students—both complainants and respondents—fairly. However, the authors' expertise, as well as most of FIRE's experience as an organization, is primarily on the defense side of campus disciplinary issues. While we are confident that some of what we write will also be of help to those representing accusers in campus tribunals, this *Guide* is primarily aimed at those whose work is similar to that of the authors. It is intended to clearly explain the rights accused students possess during campus proceedings, and explain how attorneys may ensure that their clients fully utilize those rights.

The *Guide* is divided into two sections. The first section explains how to represent a student in a campus disciplinary process, from the first client interview through the appeals process. The second section walks you through how to represent a student in a federal lawsuit against the student's college or university if his or her rights have been violated during a Title IX disciplinary proceeding.

To protect students' right to due process and fair procedure on campus, it is critical that as many attorneys as possible are versed in this area of the law. It is our hope that this *Guide* will enable more lawyers to do this critical work and help hold universities accountable and restore justice to our broken campus disciplinary system.

REPRESENTING STUDENTS IN CAMPUS DISCIPLINARY PROCEEDINGS

I. INTRODUCTION

Representing a client going through a Title IX proceeding on a college campus is probably unlike any other form of legal representation you've undertaken.

The procedural protections are weak and often vague. You may not get to speak in any substantive way for your client (especially if the new regulations are withdrawn); your client may have no right to demand evidence from the other party; they may have only a limited right even to pose questions to the other party; and the burden of proof is low.[16] The people implementing the procedures, furthermore, often have little training in anything resembling investigation or adjudication, and may simply be faculty or staff members at a school whose primary responsibilities lie elsewhere and who may want nothing to do with a Title IX proceeding. On top of all of that, these cases are being investigated and adjudicated in the context of a political climate at most schools that frequently treats accused students as guilty until proven innocent.

Despite those challenges, and despite having very few of your usual tools at your disposal, representing a student in a Title IX proceeding is incredibly rewarding and meaningful work. Your clients are likely scared and disoriented by what is going on, and they are young and often emotionally unequipped to deal with everything. Your mere presence is an extraordinary consolation to them. And you have the ability to dramatically change, or perhaps preserve, the course of their lives. The life of a student suspended or expelled from their school for sexual assault is much different from what it was going to be before any of that happened. The graduate schools to which they can get admitted, or the jobs—and even careers—that will be available to them will all become far more limited. You are having a direct and significant impact on someone at a formative time in his or her life.

Your job in all of this is to get for your client the fairest investigation and adjudication as possible, in large part by counteracting (1) the incompetence and/or apathy you may encounter in certain administrators, and (2) the pressure that all schools feel to act in their own interests in these cases, which often involves maintaining processes designed to appear tough on sexual assault but that achieve that end by denying a fair process to those who have been accused. To that end, we want to provide you with three principles that you should keep in mind at every stage of a campus Title IX proceeding:

1. Always be advocating. Your client faces an uphill battle, and the school's Title IX personnel (including the investigator) are almost always going to hear the complainant's story first. Many people involved are likely to come into the process expecting and even wanting to believe the complainant. This is prejudice, and while every lawyer knows that

[16] The current Title IX regulations include a number of important procedural protections for accused students, including the right to detailed notice of the accusation, the right to review evidence related to the allegations, and the right to a live hearing with cross-examination. However, because the legal status of the regulations is likely to remain uncertain in the near future, this *Guide* includes information both on the regulations and on the various types of procedures you may encounter if the regulations are wholly or partially enjoined or repealed.

prejudice is the enemy of justice when it is applied to individual cases, it is nevertheless rife in campus adjudications. It will take time to dislodge those prejudices from people's minds and convince them to consider your client as an individual rather than a symbol of a larger cultural problem. The more often you can present them with reasons to doubt their prejudices, the easier that will be.

Your client is going to have several opportunities to communicate with the school's Title IX personnel over the course of the investigation. Take every opportunity you reasonably can to make your client's case to the people who matter:

- If you have to ask for further investigation, explain how the evidence already undermines the allegations against your client and link that argument to why you need further investigation.

- If you are submitting questions to an adjudicator to be asked at a hearing, include questions that highlight important points that you want to emphasize (perhaps only to the adjudicator), even if you suspect they will not be asked.

- If a school allows you to respond to an investigative report (a synthesis usually compiled at the end of the investigative phase, before adjudication) in only limited ways (*e.g.*, simply by correcting factual inaccuracies), take the opportunity not just to make corrections but to explain *why* the inaccuracy is important to correct.

2. Always be documenting. At several points in any campus Title IX proceeding, decisions are likely to be made that are not fair to your client. Make sure to document all of those decisions in writing, either in an email to the administrator making the decision or in an email or formal letter to the school's legal counsel. Explain in that email or letter exactly what happened and why the decision is unfair. Your emails and letters may or may not change any of those decisions, but the cumulative effect as those decisions mount can become influential. Your shared documentation lets a school know that it potentially has legal exposure if procedural shortcomings lead to a result that goes against your client, and potentially motivates the school's general counsel's office to get involved behind the scenes. (The extent to which GCs' offices are willing to do so, and the extent to which they are listened to by school administrators when they do, varies widely by school.)

3. Never attribute to malice what you can explain by mistake. There are going to be times when you get incredibly frustrated going through this process. There will be delays, and mistakes, and illogical decisions being made by your client's school. Given the political climate that pervades the Title IX process, clients and their families are understandably quick to attribute bad motives to school administrators when any of those things happen. And there are certainly times when that is exactly what is going on. But often, these things are just the products of incompetence, inattention, or (hopefully) simple good-faith mistakes. Many Title IX personnel are not lawyers and are not even dedicated full-time to Title IX work. They may be professors or administrative staff, or they may be full-time Title IX personnel who are simply overworked or overmatched by the situation.

None of this means that you should not complain when delays, mistakes, or poorly reasoned decisions affect your client. It does mean that your level of indignation should be tempered when you complain about those things, until you are sure that a stronger tone is warranted.

With that, let's walk through what you should be doing and thinking about at each stage in a campus Title IX proceeding.

II. THE RULES: SCHOOL DISCIPLINARY POLICIES AND PROCEDURES

The first thing to do after you've been hired by a campus client is to get your head around the rules. They are your Bible. And they will be different at every school. They typically are found in two types of documents—schools' sexual misconduct policies and procedures, and their broader codes of conduct. You also should look to certain school websites for information to round out those documents.

A. Sexual Misconduct Policy and Procedures

The primary (and often exclusive) source of schools' rules governing sexual misconduct proceedings are documents that are often titled "Sexual Misconduct Policy" and/or "Sexual Misconduct Procedures." This is true even under the new regulations—you should start with the schools' policies and procedures first when approaching any case (then double-check them against the regulations). Policies contain the substantive rules that specify and define prohibited conduct and related terms (*e.g.*, sexual assault, stalking, consent, incapacitation). Procedures generally specify two things: (1) the steps that the school will take to investigate and resolve a claim (*e.g.*, who will investigate, what kinds of evidence will or will not be admitted, who the ultimate decision-maker will be) and (2) the procedural rights that both parties have at each stage of the process.

While many schools use straightforward titles like "Sexual Misconduct Policy" or "Sexual Misconduct Procedures," others do not (Columbia University, for example, calls it the "Gender-Based Misconduct Policy and Procedures for Students; Cornell University uses the title "Prohibited Bias, Discrimination, Harassment, and Sexual and Related Misconduct"). The names of the documents containing a school's policies and procedures can vary widely, and some schools even have separate policies and procedures for various subsets of prohibited conduct (*e.g.*, one policy for sexual assault, another for relationship violence, and perhaps still another for things like stalking and voyeurism). Schools that subdivide prohibited conduct may apply distinct sets of procedures to each subset as well. Other schools go the opposite route and use a single document to define all prohibited conduct and to specify all relevant procedures. Be sure to understand the full scope of the policies and procedures at your client's institution on the front end, to ensure that you are applying the correct set based on the allegations against your client.

In most states, the common law treats these documents as supplying terms in a contractual relationship between students and their schools, and those contracts must be interpreted as a reasonable student would expect them to be understood. *See, e.g.*, *Mangla v. Brown Univ.*, 135 F.3d 80, 83 (1st Cir. 1998). That principle is a natural extension of the principle common in most states requiring that ambiguous terms in a contract be construed against the drafter. You should demand that a school strictly adhere to its policies and procedures, and document any deviations from them to the school's Title IX Coordinator and general counsel, not only in the hopes that a school will reverse course in such situations, but also to build a record for litigation, whether actual or threatened, and if necessary.

B. Student Handbooks and Codes of Conduct

Besides specifically designated sexual misconduct policies and procedures, relevant substantive and procedural rules might also be found in documents designated "student handbook," "code of conduct," or similarly named documents. Oftentimes these documents are administered by an office other than the Title IX office, such as a "Student Conduct" or "Judicial Affairs" or similarly designated office. Typically, they designate the procedures meant to govern non-sexual-misconduct proceedings, but it is not uncommon for schools to incorporate procedures from these documents into their sexual misconduct policies by reference. In those cases, you will need to refer to these documents in conjunction with your school's sexual misconduct policies in order to capture the full set of procedures that will govern your client's case. It is imperative to understand from the very beginning whether any of the procedures governing your client's proceeding will be derived from these kinds of documents.

Most schools have a clearly delineated set of rules and procedures for sexual misconduct proceedings. However, there will be times when ambiguity exists regarding which set of procedures is meant to govern, and the set of procedures promised in non-sexual misconduct may be more favorable to respondents than what's promised in sexual misconduct proceedings. (And sometimes, in the era of the new regulations, a school may attempt to route a sexual misconduct case through a less protective student conduct process. This may be particularly problematic with harassment allegations, where many institutions responded to the new regulations by adopting "a second, broader definition of harassment, with which schools intend to punish 'non-Title IX' harassment." Susan Kruth, *Colleges and universities' Title IX policy revisions inconsistent and disappointing*, FIRE Newsdesk (Sept. 9, 2020), https://www.thefire.org/colleges-and-universities-title-ix-policy-revisions-inconsistent-and-disappointing.) Whenever such ambiguity exists, consider sending a letter to the Title IX Coordinator or designated administrator overseeing the case asking for the more protective set of procedures promised in the Student Handbook to be applied. The school will likely refuse your request and may insist that the more limited procedures promised are what the school always applies in similar cases, and that is probably true.

But courts have shown themselves willing to hold schools to the letter of their policies even if the consistent practice of the school has been otherwise. *See, e.g.*, *Doe v. George*

Washington Univ., 321 F. Supp. 3d 118, 125–26 (D.D.C. 2018) (granting accused student summary judgment on breach of contract claim based on plain meaning of school's appellate procedures, despite consistent contrary practice of school over prior six-year period). By requesting the better set of procedures, you are building a record that not only will be useful if you need to sue the school, but that can motivate the school to act fairly throughout the proceeding, knowing that they face legal exposure if your client is found responsible without evidence to support that finding.

C. Title IX Office's Website

A final place you should look is the website of the office that administers the school's sexual misconduct policies. These websites often will explain key terms in the school's policies in plainer language than the policies do, or they may provide examples meant to illustrate the meaning of those terms. This is especially true of terms like "incapacitation," which are inherently hard to define with precision. They are also, under the new regulations, required to post the materials used to train people involved in the Title IX office. We have seen, however, that this promise is often honored in the breach.

At a school attended by one of our clients, for instance, the school's sexual misconduct policy defined "incapacitation" in conceptual language that could be read to mean *any* impairment in decision-making, no matter how slight. Its Title IX website, however, specifically described incapacitation more accurately as a state of severe intoxication, and gave examples so extreme as to refute any idea that it covered scenarios involving only minor impairment.

Schools are (rightfully) hard-pressed to deny that they are bound by the statements of their own Title IX office as to the meaning of the policies it administers, and schools also know that courts are likely to rely on such statements in any litigation, either as express terms of the contractual relationship or as persuasive evidence of the meaning of ambiguous contractual terms. Be sure to spend time reviewing your school's Title IX website for additional information about the school's understanding of key policy terms.

III. PRELIMINARY MATTERS: LITIGATION HOLD LETTERS, JURISDICTION, INTERIM MEASURES, AND EVIDENCE GATHERING

Once you have grasped your school's rules, you will want to take certain immediate steps. For some of these, you may even want to take them before you have fully grasped the rules that the school will apply.

A. Send a Litigation Hold Letter

One of the first things to consider doing is sending the school a litigation hold letter, as you might in any civil litigation matter. The letter should usually be sent to the general counsel's office soon after your involvement as your client's advisor becomes known to the school. (If the school has no general counsel's office, send it to someone authorized to

accept legal service and ask to whom it should be directed.) Sometimes it makes sense to announce your representation as soon as you begin representing your client, and indeed many schools require students to identify their advisors at an early stage. But many do not, and there may be reasons that favor waiting to "surface."

In 2014, when federal law first required schools to permit students to retain attorneys as their advisors in sexual misconduct proceedings,[17] many Title IX administrators were not used to dealing with attorneys. Attorney-advisors were thus often treated with suspicion and hostility. By now, most Title IX administrators at large schools are used to dealing with attorneys—even though they still don't like doing so—but some administrators still are not. This is especially true at smaller schools that do not process as many cases and where Title IX duties are often performed by administrators whose first duties at the school are elsewhere (*e.g.*, faculty, or staff from other departments). In those situations, to avoid this prejudice it is often helpful to advise your client behind the scenes for a time in order to allow the school's Title IX staff to develop a working rapport with the student before introducing yourself.

Whenever you choose to surface, you should decide whether to send the litigation hold letter immediately, or instead to wait until some later point in the proceeding. Sending it right away maximizes the chances that relevant documents will in fact be properly preserved by the school, which of course is helpful in any ensuing litigation. It also lets the school know, from the very beginning, that it may be held accountable, in the form of litigation, for any missteps.

There are two reasons to consider waiting to send the litigation hold letter: (1) If you sense that your involvement in the case is perceived as hostile by the administrators with whom you first interact, you may want to wait. Sending the letter could otherwise be seen as an act of escalation in that instance. (2) Precisely for that very reason, you might consider waiting to send the letter until you have your first big spat with the school over whether it is acting fairly or conducting an adequate investigation. Sending the letter at that time signals that you mean it when you say that the school is doing something wrong, and lets the school know that there may be consequences.

The litigation hold letter serves two purposes in the school misconduct context: its stated (and primary) purpose of ensuring that all relevant information is preserved as the process unfolds, and a secondary purpose of implicitly putting the school on notice that any unfairness in its process may subject it to litigation. Categories of information you should ask the school to preserve include:

- Any documents related to the allegations against your client, remembering to specifically include any handwritten notes taken by investigators or adjudicators

[17] Violence Against Women Act, 34 CFR 668.46(k)(2)(iii) (2014).

(these are the documents generated in a Title IX proceeding that are most commonly lost/not preserved).

- The student email accounts of the parties and any key witnesses.
- The materials used to train the administrators involved in the process (a key source of evidence of bias).
- The academic records of the accusing student (to determine whether academic accommodations may have played a role in their desire to bring charges—see Section III.C.2, below).
- Documents sufficient to show the gender breakdown of parties, and the number of findings of "responsible," in the school's sexual misconduct proceedings stretching back five years.
- Documents reflecting contemplated or actual changes to the school's sexual misconduct policies or procedures.
- Documents reflecting the school's reaction and response to the new regulations—which can often be quite hostile and provide useful fodder for a lawsuit down the road.

Beyond these, you may know at an early stage that a certain fact or event may play a key role in the proceeding or in any eventual litigation. Include in your letter a request that the school preserve documents related to any such facts or events as well, to let the school know that you are aware of them and will be monitoring their impact.

B. Jurisdiction: Make Sure the School Has It

Once you have determined the set of rules that govern your client's proceeding, the first thing to do is to make sure that the school actually has jurisdiction over the claims. Under the new Title IX regulations, an institution's jurisdiction under Title IX is limited in scope to conduct that occurs "in an education program or activity of the recipient." The regulations further provide that

> For the purposes of this section, §§ 106.30, and 106.45, "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.[18]

[18] 34 C.F.R. § 106.44(a). *See also Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 644 (1999) (Title IX's "plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs.").

As a practical matter, this means that if alleged sexual misconduct took place off campus—even just a block off campus—a school might declare it not covered by the new regulations and thus force your client through the typically less protective student conduct process. Under their non-Title IX student conduct codes, public and private schools have broad authority to discipline students for off-campus behavior that has a nexus to on-campus life – even behavior that may also fall under a school's Title IX policy. So before your client makes any kind of written or verbal statement to the school in response to the allegations against them, be sure that the school's policies actually assert jurisdiction over the alleged offending conduct—and know which policy it is going to apply.

C. Expect Interim Measures

At the beginning of every Title IX proceeding, schools will generally impose one or more interim measures on the parties. These measures, when imposed even-handedly, are designed to ensure, as much as possible, that the ensuing investigation is orderly and results in as little disruption to the parties' education as possible. In our experience, some of these measures, such as no-contact orders (NCOs) and academic accommodations, are entirely routine and normally do not suggest anything about a school's bias in favor of or against either party. Others, such as interim housing changes affecting the respondent and interim suspensions, are less common and more extreme. Each type of measure implicates different concerns you should be aware of as you advise your client. Moreover, the new regulations require schools to give some amount of due process to students before they may remove them from campus on an emergency basis.[19]

1. No Contact Orders

Every school, in almost every case, will issue NCOs to all parties in a sexual misconduct proceeding, no matter how strong or weak the allegations and supporting evidence. They tend to be given out like candy, and they should be mutual. (If they aren't made mutual, ask for that.) NCOs bar the parties from communicating with each other directly or indirectly (*i.e.*, through mutual friends, social media posts, or any other indirect means), and sometimes also bar the parties from communicating with another party's friends. NCOs typically require parties who run into one another on or off campus to take reasonable steps to leave one another's presence or to minimize contact with one another if that is not possible.

At most schools, violating an NCO is a separate conduct violation of its own. It will be investigated like any other alleged conduct violation and punished if found to have occurred. But just as importantly, violating an NCO will reflect very poorly on a party in a proceeding where the parties' credibility is often the key question, given that sexual conduct tends to happen behind closed doors. An accused student who violates an NCO risks looking like they are stalking, harassing, or otherwise acting aggressively towards their accuser—precisely the kind of behavior that might make the accused student look like

[19] *Id.* at § 106.44(c).

someone capable of committing an assault. Similarly, an accusing student who violates an NCO risks appearing vindictive towards the accused student, which could make their allegations appear to likewise be motivated by malice or vengefulness rather than the fact of an assault.

It is therefore imperative to impress upon your client the importance of adhering to the NCO, even when doing so might be embarrassing (such as by requiring him or her to suddenly leave a party without being able to explain why to friends). Your client should also be told to *immediately* document any encounter with another party by sending you an email explaining, in as much detail as possible, how the encounter came to be, how long it lasted, what steps they took to remove themselves from the situation, and the names of those who (if anyone) might be able to verify what happened.

2. Academic Accommodations

Schools commonly offer academic accommodations to the parties involved in a sexual misconduct proceeding. These can range from extra time to complete assignments to approved withdrawals or "incompletes" in classes past the normal deadlines. The Title IX office typically does not have the authority to directly grant accommodations to students, but it will communicate with professors on the parties' behalf to seek any requested accommodations. Authority to grant the accommodations rests with the professor or administrator responsible for the program, but in our experience, such accommodations are typically granted.

A school's grant of academic accommodations to either or both parties is extremely common and should not be taken as a sign of bias towards either party absent unusual circumstances. One thing to look for, however, is whether an accusing student seems to be leveling their allegations in part because they are doing poorly in school or otherwise need an academic accommodation. Although such events are rare in our experience, we have encountered cases where allegations of years-old conduct appear to have been motivated, at least in part, by a student's sudden need for academic accommodations. A school is highly unlikely to give you access to an accusing student's academic records in a sexual misconduct proceeding, so this is likely the kind of thing you will be unable to fully explore unless and until you proceed to litigation. But in the rare case where there is evidence that this may have motivated a complaint, it may be worth mentioning to the decision-maker.

3. Interim Housing Measures

In appropriate situations, such as when the parties live in the same building, schools may grant an accusing student the ability to move to another building, or even may allow an accusing student to stay where they are and force an accused student to move to a new building. The latter is less common than it once was – and is less likely still under the new Title IX regulations, which require that supportive measures not "unreasonably burden"

the other party[20] – but it remains a possibility in cases where the initial evidence provided by an accusing student appears strong. In such cases, it can be difficult to challenge forced housing relocation decisions.

At private schools, a student's only recourse (besides the new regulations) will be the text of the school's housing policies and the terms of any housing contract signed by the student. Schools are unlikely to force housing relocations when their policies or housing contracts forbid them from doing so. Schools are careful to retain that option for themselves.

Challenges are difficult at public schools as well, because due process violations require the deprivation of a protected property right or liberty interest. Although most courts generally find that *complete* separation from a school (*i.e.*, suspension or expulsion) qualifies as that kind of deprivation, housing relocation — though highly inconvenient, embarrassing, and demoralizing — does not amount to a separation from the school. It will be an uphill battle to convince a court that it amounts to the kind of deprivation that can support a due process challenge and therefore must be preceded by some form of hearing.

That does not mean that you should not complain about it. Depending on the facts of your case (what the allegations are, how soon after the event they were filed, and how close you and the complainant live to each other), you should consider objecting to the school's legal counsel about the fairness of any forced relocation to let the school know that it will feature prominently in any litigation, where it may combine with other evidence of wrongdoing in the ensuing process to state a claim. If all they're doing is moving you from one floor of the dorm to another, this may not be worth it. But if they're kicking you out of campus housing entirely, or moving you all the way across campus, that is another matter.

4. Interim Suspension

In rare circumstances, a school may also seek to remove an accused student from school pending its investigation and resolution of the charges against him or her.[21] As with a forced housing relocation, a student's recourse at a private school is limited to whatever protections from interim suspension might be found in the school's policies. At public schools, however, there is a developed body of case of law holding that interim suspensions must be preceded by at least some form of hearing to comply with due process.[22] It need not be a full-blown hearing, but it must at least inform an accused student of the charges

[20] *Id.* § 106.30(a).

[21] Under the new Title IX regulations, 34 C.F.R. § 106.44(c), an interim suspension requires that the institution "undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal."

[22] *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (noting that "[t]he Federal District Courts have held the Due Process Clause applicable to an interim suspension pending expulsion proceedings in *Stricklin v. Regents of University of Wisconsin*, [297 F. Supp. 416 (W.D. Wis. 1969)], and *Buck v. Carter*, [308 F. Supp. 1246 (W.D. Wis. 1970)] . . . .").

against them and give them an opportunity to respond to them before a suspension is imposed.[23] If exigent circumstances prevent a school from giving a student that chance to respond before the suspension is imposed, that chance must be given at the earliest opportunity.[24]

If all of your arguments fail, and the school seems determined to remove your client from campus, you might argue for a narrowly tailored removal that would permit them to come on campus only for classes and to leave when they're done. If you offered something that strong, and the school still denied it, such unfairness might raise a suspicious judicial eyebrow if you wind up in litigation.

D. Begin to Preserve and Gather Evidence

While you are confirming that your client's school has jurisdiction over an accuser's claims, your client should begin preserving and collecting any potentially relevant evidence to which they have access. That evidence will primarily consist of electronic evidence, witness testimony, and your client's own testimony.

1. Electronic Data

Electronic evidence is often critical evidence in Title IX cases. There typically aren't eyewitnesses, and alcohol is often involved, making memories fuzzy and unreliable. It's often true that the parties themselves communicated with each other or their friends via text or other means in the lead-up to or aftermath of the encounter. Gathering electronic evidence not only memorializes those communications but also helps to establish critical timelines that often can support or undermine one side's version of events. If you've worked with high school or college students before, you will know just how much they use texting and social media to communicate.

Collecting evidence can be much simpler than it is in criminal or civil proceedings. You don't need to worry so much about establishing chain of custody or the reliability of the collection methods. It will be enough, for instance, to simply take screenshots of text messages and email them to the investigators. If your client has deleted texts or pictures from their phone that are relevant, as often happens when parties end long-term

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[23] *Marin v. Univ. of P.R.*, 377 F. Supp. 613, 623–24 (D.P.R. 1973) ("when the state interests are so urgent that they cannot abide retention of the status quo pending [a] full hearing" on allegations of misconduct, "there must, absent unusual circumstances, . . . be a preliminary hearing at which that reasonable cause is established"); *cf. Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545–46 (1985) (pre-termination "notice and opportunity to respond" "should be . . . a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.").

[24] *Dunkel v. Elkins*, 325 F. Supp. 1235, 1245–46 (D. Md. 1971); *Stricklin*, 297 F. Supp. at 420 (13-day suspension with no notice and opportunity to be heard violated due process; "even when it is impossible or unreasonably difficult to accord the student a preliminary hearing prior to an interim suspension, procedural due process requires that he be provided such a preliminary hearing at the earliest practical time.").

relationships, there are apps (even some free ones) that your client can use to try to recover that data. Recovery will not be as thorough or as forensically defensible as sending the phone to a professional forensics company, but it will more than suffice at most schools, if not all of them.

Here are common types of electronic evidence you should obtain from your client, and, when relevant, ask the investigator to obtain from others:

- *Text messages and other direct messages.* In addition to actual text messages, apps like Facebook, Snapchat, WhatsApp, and GroupMe allow people to directly message each other. Get a thorough list from your client of all of the ways they communicate with others electronically.

- *Call logs.* Your client's phone logs can be important in establishing a timeline of relevant communications and of events.

- *Photos and social media posts.* Photos and social media posts from the time of the incident can be important evidence, especially in cases involving claims of incapacitation. Photos and social media posts from soon before and soon after the incident can also be important as evidence that might confirm or deny a party's account of the parties' relationship at those times. Photos may even contain location data that can confirm a person's whereabouts.

- *Surveillance video.* Most schools have cameras pointed at the entrance and in the lobby of major buildings such as residence halls. Surveillance video can help establish a timeline of events and provide other important evidence (*e.g.*, a party's gait in cases involving claims of incapacitation). Be sure to request surveillance video quickly, because it is not always kept for a long period of time.

- *Card swipe data.* Many schools electronically log students' comings and goings from buildings that are accessed electronically, by fobs or card swipes. This evidence, too, can help establish a timeline. It is also evidence to make sure that your client is aware of as they give their own timeline of events, to ensure that they are as honest with you as possible in recounting what happened and when.

2. Witness Testimony

The second category of evidence you should begin collecting is third-party witness testimony. But first, check your school's policy: In the past, schools have often tried to forbid or discourage students, and by extension their advisors, from communicating with witnesses. If that is the case, you should raise the issue with your school's legal counsel, explaining that your client must have the right to put together their own defense. Indeed, the new regulations provide that schools may "[n]ot restrict the ability of either party to

discuss the allegations under investigation or to gather and present relevant evidence." 34 C.F.R. § 106.45(b)(5)(iii). If your school seems not to know about this aspect of the new regulations, remind them.

It is incredibly helpful to talk to friendly witnesses before your client goes in for their initial interview. Having even a rough idea of what other witnesses are going to say is useful for shaping the nuance of your client's own testimony and for knowing what issues they should be prepared to address. Do not risk reaching out to potentially hostile witnesses, or even witnesses who are mutual friends of both parties. Not only do you risk a violation (real or imagined) of the no-contact order, you also leave yourself open to a dishonest account of your interaction with that student.

Your client should not be the one to directly communicate with potential witnesses. That is something that schools will view suspiciously. It is better for you to obtain that evidence yourself, or to hire a private investigator to do it.

You need to be careful, however, about how you go about collecting this evidence. Many Title IX administrators are highly suspicious of lawyers simply *because* they are lawyers, and they may view your interactions with witnesses as problematic. It's important, therefore, to emphasize to any witnesses to whom you talk that you want nothing more than their pure recollection of events, and that if they are asked about their own interactions with you, they should be completely transparent about it. You may even consider summarizing what they have told you in a written document and emailing it to them asking them to correct anything that is wrong, so that you have a paper trail documenting your good faith.

Beyond evidence about the actual events, you should also talk to witnesses about submitting character evidence on behalf of your client. Many schools forbid character evidence outright, so check your school's rules first. But when it is not forbidden, it may be helpful to submit favorable character evidence to an investigator or adjudicator, and to otherwise be creative about providing testimony that may have the same impact as character evidence. Even the best-run campus procedure will depend far more on the decision-makers' impressions and attitudes than would a formal trial, and even if they do not formally consider such evidence, they are still likely to read it. Just be sure not to overwhelm the investigator, and keep in mind that submitting too much evidence risks minimizing or deflating your strongest evidence.

Character evidence, in any event, is evidence that you can collect when an investigation is already well underway. Focus your efforts at this early stage on obtaining as much evidence as you can about what actually happened.

3. <u>Your Client's Own Testimony</u>

Finally, soon after you begin working with your client—and certainly before their first interview—consider having them put together a written statement detailing their account

of what they say happened.[25] This serves three purposes. First, it forces your client to begin thinking through what happened and organizing their thoughts systematically, in the way they will inevitably be asked to do in their initial interview (see below). Second, it will provide you with an organized introduction to what your client says happened that you can refer back to. And third, it can serve as the basis for a statement to submit to the school ahead of your client's first interview, which we discuss further below.

IV. GUIDELINES FOR INTERACTING WITH ADMINISTRATORS

Talking to school administrators is not like talking to lawyers. Most of the people you interact with will not be lawyers, and they may not even be comfortable *interacting with* lawyers. Title IX work, or school disciplinary work, may not even be their primary job at the school; especially at smaller schools, faculty and staff get pulled into these roles on some sort of rotating basis. So the people you are dealing with may not be used to having a role in an adversarial process.
Below are some principles to guide you in interacting with them.

A. Who Should Talk

Whether directly or indirectly, you should speak on behalf of your client as much as possible throughout this process and help them to craft communications to the university. In general, anything with your letterhead on it should go only to the General Counsel's office; anything your client wants to say to the school, they should send, but you should help the student craft it. Do not make the common mistake of sending, for example, your client's response to an investigation report on your letterhead, in your voice. The Title IX office wants to hear from your client, not from you. So you will often play a behind-the-scenes role in helping your client draft the most effective communications, but it will ultimately come from them.

If you are not communicating directly with the school on their behalf, you should be carefully reviewing and editing their emails, for several reasons. Your clients may or may not be good writers. They may or may not know how to strike the right tone in different situations. They may be incredibly emotional and prone to bursts of anger or despair. They may not speak as precisely as they should and might thereby leave their words open to misinterpretation. Whether you're speaking to school administrators directly or instead carefully reviewing all of your client's communications for them, you should control as much of their communication with the school as you can.

Schools take different approaches about the extent to which you can directly engage in the process. The only area where they are nearly uniform, however, regards your ability to speak for your client in an interview or at a hearing. *Very* few schools allow advisors to do

[25] Those of us who represent students in these matters may have differing opinions on whether or not to ask clients to prepare such statements, but if you believe your client should do so, it should be at your direction in order to maximize the chances it can be protected by privilege if that is to your client's advantage. Though many Title IX matters do not involve parallel criminal prosecutions, they may.

that. (But check your state's law. At the time of this writing, state statutes provide students with the right to active assistance of counsel in certain public university campus hearings in Arizona, North Carolina, and North Dakota, and students in Arkansas may have their attorneys participate in appeals of expulsions or suspensions of ten days or more. In Tennessee and Oregon, students may enjoy the active assistance of counsel in state administrative proceedings challenging public university discipline.) Your role in an interview or hearing will be to privately advise your client as needed, either by whispering to them or asking the school administrator for a break so that you can step out of the room to speak privately. It is likely that the only exception to this will be to conduct cross-examination of parties and witnesses, as discussed in greater detail below.

The variety comes in how schools treat the more mundane communications between the school and your client as the process unfolds—communications involving scheduling, the provision of evidence, and any questions or objections regarding how the process is unfolding. Some schools, especially those that hire outside professional investigators or have employees fully dedicated to Title IX work, are more comfortable having you directly communicate with school administrators on these types of matters. They understand that you are going to be controlling the client's communications anyway, and they are happy to have all that done in a straightforward manner.

Other schools, however, demand that any communications whatsoever come from the student. They will entirely disregard, for example, an email from you, cc'ing your client, providing times at which you and the client are available for an interview. This is silly and it's hard to see who this benefits, but it happens. When a school takes that approach, do what you can to ease your client's burden in drafting these kinds of administrative emails, perhaps by sending drafts of such emails to the client to review, approve, and ultimately send.

One final point to consider: When a school has an internal general counsel's office, you should think of school administrators as represented parties. When your involvement becomes known, consider discussing with the school's legal counsel what preferences they have regarding your communication with school administrators. Some will want you to copy someone from their office every time you communicate with a school administrator. Others will allow you to communicate freely with administrators about logistical or procedural issues but will insist that questions touching on legal issues be addressed only with their office.

This mainly becomes important if you sense that a school administrator is uncomfortable interacting with you and you fear that your words or actions may be twisted or misrepresented.

B. How You Should Talk

How you speak to school administrators is important. They have a lot of power and discretion in these processes. And, remember, they are usually balancing the interests of

two students – your client's and the complaining student's. They rarely *have* to do anything for you. You will get much farther with a friendly and cooperative tone than with an angry, demanding, or coldly clinical one. As a wise man once said, "Be nice... until it's time to not be nice." Taking an aggressive or angry tone is only likely to confirm whatever preconceptions they may have about lawyers; it will give them no reason to work with you in the many areas where they will have discretion. It also runs the risk that they will transfer that aggression and anger to your client. Don't create a situation where school administrators resolve issues against your client because of their distaste for you, or—even worse—where they come to view your client's temperament a certain way because of your own.

Tone is especially important when your client is communicating directly with the school. You must keep in mind at all times the impression that your client will be giving to the school. Especially because there are so few safeguards against bias compared to a court of law, that impression absolutely matters. It is very important that they come across as friendly and cooperative, yet serious and fully engaged in the process. Anytime that you are not able, or think it unwise, to directly communicate with the school yourself about an issue, you should be ensuring that all of your client's communications reflect positively upon them.

C. FERPA Waivers

In order to advise your client and be privy to the school's communications with them, most schools will ask your client to first waive their privacy rights with respect to you under an education law called FERPA (Federal Educational Rights and Privacy Act). This is common and is not a sign of hostility on the part of the school.

V. INVESTIGATION

A. Summary of the Allegations Against Your Client

Once the investigation is underway, your first goal should be to obtain a summary of the allegations against your client. Proper notice of the charges benefits the interests of justice, as credible proceedings must start with an effort to get to the truth of the allegations made, not a "gotcha" interview of an unprepared target. Yet many schools try to release only a minimal amount of information about the allegations against an accused student before that student is interviewed—often just the name of the accuser, the date on which the misconduct is alleged to have occurred, and the category of code violation that the allegations fall under. These initial disclosures often lack any specific information about the actual alleged misconduct. At both public and private schools, you have means at your disposal to demand that a school give your client more specific information about the allegations against them before they sit for an initial interview.

1. <u>All Schools: Notice and "Timely and Equal Access" to Information</u>

The 2020 federal regulations implementing Title IX give you a powerful tool at both public and private schools for insisting that they disclose specifics of the allegations against your client before any interview.

34 C.F.R. § 106.45(b)(2)(i)(B) requires that schools provide students with "notice of the allegations potentially constituting sexual harassment" with "sufficient time to prepare a response before any initial interview." This notice must include "the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment . . . , and the date and location of the alleged incident, if known." *Id.*

34 C.F.R. § 668.46(k)(3)(i)(B)(3) also requires that schools governed by Title IX (*i.e.*, those receiving federal funds) "[p]rovide timely and equal access to the accuser, the accused, and appropriate officials ***to any information that will be used during informal and formal disciplinary meetings***") (emphasis added). It specifically applies to both "informal and formal" meetings, and it requires disclosure of "any information" that will be used in such meetings. A school that intends to interview your client about the allegations against them will be hard-pressed to say with a straight face that the allegations provided by a complaining student are not "information that will be used" in the interview, given that it will undoubtedly shape the interviewer's questions.

That, of course, does not mean that the school will actually give you the information it should. But if it doesn't, it will know that it is incurring legal exposure.

At a minimum, you should at least ask for the written complaint in a matter that is proceeding formally under the new regulations. You may or may not get it, but at least you are creating a record. You can also try to get the investigator to elaborate at the interview before your client opens their mouth. And give your client a script to ask the right questions — not just "can you tell me more." For example, if it's unclear whether a lack of consent charge is based on force, incapacitation, or coercion, your client can and should ask specific questions to elicit the basis for the alleged lack of consent.

The Department of Education's Office for Civil Rights investigates schools that allegedly fail to meet their obligations under Title IX, and schools are eager to avoid OCR investigations. A school should know that its failure to comply with its disclosure obligations before this initial meeting with your client may result in your client filing a complaint with OCR should the decision at the end of the proceeding go against them.

Schools may try to get around that obligation by insisting that your client submit a statement in response to the barebones information about the allegations that it is willing to release before hearing from your client. In that circumstance, consider having your client submit a generic statement that denies the allegations and says little more. The more information you provide, of course, the less room the school has to complain, but providing too much detail before knowing the allegations carries its own obvious risks. Deciding how much information to provide before more specific allegations against your client are disclosed is a judgment call that turns on all of the circumstances in each particular case.

2. Public Schools: Due Process

At public schools, the U.S. Constitution's Due Process Clause[26] provides you with an additional argument for obtaining a summary of the allegations against your client before they are forced to respond to the university. Due process fundamentally requires notice of the charges against the accused and an opportunity to respond to them, *see Goss*, 419 U.S. 565. To be sufficient, notice must include enough specific information about the allegations to make any response meaningful. *See, e.g.*, *Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 618 (E.D. Va. 2016).

Schools, however, may simply argue that your client *will* get access to the allegations against them and be given a chance to respond fully respond later in the process, before any actual decision on guilt or innocence is made. Your due process argument, then, if raised at this early stage, needs to be that denying your client access to the specific allegations against them before an *initial* interview will so poison the well as to make it impossible for any future hearing to be meaningful.

Even if the proverbial well has been poisoned by insufficient notice, whether you can successfully demonstrate that will vary widely from case to case. It is likely to be something that you are able to demonstrate only after the full set of allegations against your client is revealed. That is the value, in most situations, of raising the due process argument on the front end—it sets up any later argument that the inadequate notice before the initial interview has in fact poisoned the entire process, just as you predicted. And as with many of the other issues discussed here, it puts the school on notice of an issue that will be revisited in any litigation, and which may combine with other evidence to a level that will convince a court that this violated due process.

Whether to let your client sit for an interview without knowledge of the actual allegations against them is, at the end of the day, a judgment call. But even if you are sure that your client's school will provide them with no further information before you must make that determination, it is worth raising and documenting this issue.

B. Written Statement Responding to the Allegations

Before your client sits for their initial interview, you should consider expanding, clarifying, and/or otherwise polishing the written statement they have put together for you detailing what happened and submitting it to the school's investigator. In our experience, even when a school's procedures do not expressly provide for the submission of a written statement of events from the accused student (most will not), virtually every school will accept it. The benefit of submitting a written statement in advance of an interview is that it gives your client a touchstone to refer back to as they are answering questions about the allegations. They can reference the statement as needed in what is often an emotional and disorienting initial interview. It also primes the interviewer, who has so far only heard the accuser's side

[26] U.S. Const., Amendment XIV.

of the story, to begin considering that they may not have gotten the whole story, and therefore to come into any interview with your client with a more neutral disposition than they might naturally have having heard only one side.

The authors of this Guide do not have a consensus on whether written statements should generally be provided in advance of an interview. It is possible that providing a written statement and then using it as a touchstone for your client throughout an interview can make them seem less credible, more rehearsed, and may sometimes lead them to give an oral statement that is inadvertently inconsistent with their written statement. To state the obvious, clients are not lawyers who are used to speaking from prepared remarks, sticking to a script while not appearing to be scripted, etc. We have also found that some clients are "absolutely certain" something happened a particular way, only to get into an interview and have questions or documents presented that prompt their memory in a different direction. Lack of a written statement, then, can allow clients more flexibility to answer such questions, something they would have been denied with a written statement boxing them in.

We do think an explanatory written statement for some submitted evidence usually does make sense. For instance, written statements are especially helpful in complex cases that involve multiple alleged incidents, as often occurs in cases where the parties had been in a long-term relationship. They may also be helpful to explain text message exchanges, or to provide a timeline of events. Expecting your client to go into an interview having memorized all that needs to be said regarding multiple incidents, in an interview that can stretch for several hours, is a lot to ask. A written statement summarizing all of that information in one place helps to ensure they will say all that they want to say, and may help them not to become flustered or nervous in the process. That initial interview will be the investigator's first impression of your client; like any attorney, you want to do everything that you can to ensure it is favorable so that facts, not prejudice, will be the determining factor.

All of this illustrates that no one size fits all, and each client and situation should be analyzed for what makes the most sense in a particular matter.

C. Initial Interview

Before your client agrees to any interview, you should think about whether it makes sense for them to talk at all if you think they may have criminal liability. You may already know that the complainant has reported the alleged incident to law enforcement. This does not mean that law enforcement will go forward and charge your client, but they may. For that reason, think carefully before you allow your client to be interviewed. If your client already has criminal counsel, consult with their counsel, or suggest that they consult with a criminal defense attorney. It is rare—but not unknown—for prosecutors to criminally pursue drunken hookup cases, and rarer still for them to pursue "relationship" cases, where one party claims to have been assaulted at some point in a long relationship. So don't reflexively assume that criminal charges are a reasonable possibility. Instead, think hard

about the facts of your case. If you can, ask a local criminal defense lawyer how often he or she has seen campus sexual assault cases prosecuted criminally. Our outline below assumes that people will talk to the school, because the vast majority of our clients do so.

Also, you should find out before the interview if the school will make and give you a transcript or recording of it, or allow you to record it. If not, make sure you take as close to verbatim notes as you can and dictate them immediately after the interview. You will be surprised at how often investigators leave out things your client has said that they shouldn't have left out, provide an incomplete summary that disfavors your client, or "quote" something that your client never actually said. This is particularly important on core elements; you don't want it to look like your client is changing his story or adding facts when in fact he or she is not.

1. <u>"Tell me what happened"</u>

Nine times out of 10, your client's initial interview will begin with some sort of open-ended question asking your client to simply walk through the incident or incidents in question and to explain what actually happened. That will be true whether or not you have submitted a written statement responding to the allegations. The investigators will want to see your client speak about the allegations in person, in his or her own words. They may or may not interject with questions along the way, but they will almost certainly ask your client to go chronologically through the incident or incidents alleged before asking a majority of their questions, in part to avoid indirectly disclosing any more specifics of the allegations against your client than they have decided to disclose before the interview. Make sure your client is comfortable speaking about the allegations against them from start to finish without interruption.

Also, prepare your client for the possibility that he or she will need to start somewhere other than the night of the incident. For example:

> Q: "Tell me what happened that night?"
> A: "Well, before I get to that night, I need to tell you more about how I came to know complaining student and interactions we had before that night."

You'd be amazed at how many investigators believe that nothing that happened before or after the night in question is relevant—when, of course, it is. Often enormously so.

If your client's school didn't give them much information about the allegation against them, and you haven't succeeded in prying more information out of the school through the means outlined above, think carefully about the level of detail your client should commit to in telling this story for the first time. Except in rare cases (such as where there is an active criminal investigation or a very real threat of one), we do not recommend avoiding the interview altogether; investigators and adjudicators are often looking for *any* reason to doubt an accused student, and failing to participate risks doing just that.

When prepping your client, clarify the details about which they are absolutely sure as compared with those of which they are less certain. (This is particularly important in the campus context, as alcohol is so often a complicating factor in reconstructing events from memory.) We recommend limiting your client's testimony to those details about which they are most certain. The goal is to tell as complete a story as possible without risking that your client will want to walk back details of their testimony later on if their memory is jogged upon hearing someone else's account of the incident. Deciding where to draw the line in terms of detail, or whether to recommend that your client avoid the interview altogether, are ultimately questions of judgment that you will have to make based on the totality of the circumstances. And if you have criminal-defense co-counsel, make sure to consult with them before your client says anything.

2. Specific follow-up questions

After your client has given their account of the incident or incidents, they will be asked specific follow-up questions, based both on their testimony and on the specific allegations that have been made. As you would before any interview, you should try to anticipate what questions your client may be asked and to prepare them to answer. In our experience, there are three questions in particular that (1) your client is likely to be asked, and (2) require nuanced, and sometimes counterintuitive, answers.

a. *What were your expectations?*

The question of what your client was expecting would happen in the lead-up to the allegedly nonconsensual act ("What were your expectations when you went back to her room?" "What were you expecting when you left the party together?") is a tricky question for accused students to answer. The answer that is most likely to be true—that your client was expecting sexual activity to take place—appears also to be a good answer, because that expectation would seem to confirm that there had been signs from the accuser (perhaps verbal, perhaps nonverbal) that created a belief that sexual activity was wanted by him or her. In our experience, however, many Title IX investigators and adjudicators have been trained to believe that "expectations" are signs of predatory behavior. Expectation, they are taught, is associated with entitlement—a belief that one has a right to engage in sexual activity with the other person because of how they have been acting. In short, these individuals have been trained to view such an answer with unwarranted prejudice. This is destructive to a just outcome, but is nevertheless the reality in too many cases.

Your client, however, cannot simply say that they had no expectation that sexual activity was likely to take place before it actually happened. Not only will that be untrue in the vast majority of cases, it will also ring hollow, especially to those administrators who have *not* been trained to equate expectation and entitlement.

The key is to ensure your client is aware of these potential pitfalls as you prepare them, so that they can answer the question in a way that is honest but that also ensures they do not inadvertently create the impression that they felt entitled to a certain outcome.

b. *How did you know that you had consent?*

That last point flows naturally into your client's answer to a second question they are likely to be asked: How did you know that you had consent? **The nuance to prepare your client to convey here is even if no *single* act conveyed consent, *everything* leading up to the activity—both words and actions—combined to convey the accuser's consent.** This not only reflects the complicated reality of sexual interactions, but also avoids the pitfall of placing all of your client's eggs in one basket on this most critical question. Remember, also, that in a campus proceeding, no one act is so unambiguous on its own terms that it can be relied on by itself to irrefutably convey consent. Even an admitted verbal "yes" by an accuser may be discounted as the product of pressure, past abuse, or mental health conditions—all of which we have seen. That does not mean that a particular act (such as an explicit "yes") should not be given more emphasis than others in your client's explanation. It just means that you should be sure that your client describes how the entire interaction leading up to the incident conveyed consent.

c. *Why would they say this if it isn't true?*

Probably the hardest question your client will be asked is why their accuser would say something that isn't true. That is also the question that torments every wrongly accused student more than any other, and it is often impossible to answer with any certainty. Your client cannot read their accuser's mind, and it's not fair to expect them to do so. It is nevertheless likely that they will be asked.

So, how to prepare your client to answer the unanswerable? The heart of the answer should almost always contain some form of "I don't know" as, in the end, they don't. Even when your client is very convinced as to why the accusation was made, they should still admit to, and maintain, some level of uncertainty. People often do things for strange or counterintuitive reasons. Acting certain of the reason for a wrongful allegation risks tying the client's defense too closely to that reason, and may make the accuser appear more credible if that reason is later disproven.

In every case, though, your client should offer *some* potential explanation for why they have been wrongly (or even just mistakenly) accused, even when it's little more than speculation. As much as possible, try to frame that explanation in a way that avoids calling the accuser a liar. That is something you should try to avoid as much as possible throughout the process, even if you are convinced it is true. If an investigator or hearing panel thinks that a finding against the accuser will make it appear that they are calling the accuser a liar (because that is what you have been doing), it will make it harder for them to rule for your client.

D. Providing Your Evidence

As the investigation gets under way, your client will be asked to provide any evidence they have. Typically, you will want to do this soon after your client's initial interview as opposed

to before it. The initial interview is likely to be a stressful and grueling affair for your client, and dumping a lot of evidence on the investigator beforehand is likely to make this worse by increasing the length of the interview and the amount of information your client must be prepared to speak about right off the bat (some of which may end up being irrelevant). That said, if you have evidence that you really want the investigator to see before your client's first interview (*e.g.*, text messages that unambiguously disprove some part of the allegations), by all means send it in before the interview, even if the school's procedures don't provide for it. The investigator is very likely to review the evidence before meeting with your client, especially if the evidence is likely to make the interview more efficient or meaningful. At worst they will simply ignore it.

Make sure your evidence is clearly labeled and easy to navigate. Investigators are not judges and typically are not lawyers, either. You will likely be submitting more evidence than they receive in a proceeding where the parties are not represented by lawyers. You will likely be asked to submit your evidence via email, or through a file sharing system like Box. If the former, list in the body of the email what each attachment is. If the latter, we recommend writing that list on a separate document and submitting it with the evidence.

Your list should do more than just identify the evidence. You should also use it as an opportunity to explain your client's case to the investigator or decision-maker, as much as that is possible. If, for instance, you are submitting text messages that undercut an accuser's timeline of events, include in the body of the email an explanation of how the texts do that. ("The first attachment contains texts with [accuser] from that night. They show that I arrived at her place at 10 p.m., three hours sooner than she claimed in her complaint.")

E. Submitting Questions for Your Accuser

As early as you meaningfully can, you should submit questions for the investigator to ask the accuser. Many schools' procedures now provide for this and specify when it is appropriate. When they do not, you should still submit questions to the investigator to be asked of the accuser. Even if you will have the opportunity to question the accuser at a live hearing (as required by the new regulations), submitting questions to be asked during the investigation is important because the accuser will have to answer at least some questions before the hearing. This is an excellent chance to test the accuser's credibility, confront them with any evidence undermining the allegations, and perhaps head off further proceedings if the accusation proves not to be credible.

Submitting questions does not guarantee that an investigator will actually ask them. More likely than not, the investigator will ask some of the questions but not others. Any failure by the investigator to ask questions submitted by your client is another potential instance of unfairness that you can raise at the appropriate time with the school's legal counsel or in an appeal of an adverse finding (see Section X, below). But even if the questions aren't asked, they can still point the investigator to problems with the accuser's story or

credibility issues that they may not otherwise see. Always try to make the investigator's job easier to arrive at your client's perspective on the accusation.

F. Reviewing and Responding to an Investigative Report and Evidence

One of the most critical points in the proceeding comes when the school's investigator releases to you the evidence and testimony that they have collected. The new Title IX regulations require universities — prior to completing the investigative report — to share with the parties any relevant evidence they have collected, including evidence that they have chosen not to rely on in reaching a decision. (This ensures that the university cannot simply sit on evidence that is exculpatory for your client.) The university must share that evidence in an electronic format and give the parties at least 10 days to submit a written response.[27]

If the regulations are not in effect or applicable, however, the timing and means of delivery of the evidence may vary dramatically depending on the institution. At some schools, you will get all of the evidence and testimony in its raw form—copies of all documentary evidence and transcripts of all witness interviews. At others, you will get only summaries of the witness interviews. (Always *ask* for all backup information (recordings, transcripts, notes, etc.), whatever the school's policy is, because even if you don't get it, you're making your record.) In both scenarios, the investigator is likely to prepare an investigative report that synthesizes the evidence that has been collected.

It is critical that your client be able to respond to the evidence and testimony, and the investigative report that will likely accompany it, before those materials are sent to the decision-maker. If the school's procedures do not give you an opportunity to actually respond to the evidence before an investigative report is finalized, you should absolutely ask the investigator for a chance to do that, and raise any denial of that opportunity with the school's legal counsel.

Your response to the evidence and any investigative report should look to do three things.

1. Respond to the Evidence on Its Merits

The most important part of your response will be to address the evidence that has been collected and summarized in the report and to explain why it shows that your client is innocent. If the report contains any analysis of the evidence, and especially if it reaches some finding on the allegations (even if tentative), you will also want to address any analysis or findings. In cases where the investigator is the actual decision-maker as well,

[27] Section 106.45(b)(5)(vi) requires that universities "[p]rovide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation."

this is your only chance (besides an appeal, which is always an uphill battle, as we discuss further below) to argue why your client is innocent and why the evidence shows it.

But even in proceedings where the ultimate decision will be made by a hearing board that considers the report along with live testimony, it is critical to take this opportunity to show why the evidence that has been collected shows that your client is innocent. In our experience, most hearing boards come to hearings expecting that they will find the accuser credible.[28] If the investigative report suggests your client is not credible, you will have a (perhaps firmly) settled expectation to dislodge at the hearing. Even if the report is neutral, you face an uphill battle if the first time that the panel hears your argument about the evidence is when you arrive at the hearing, given the prejudices likely to be at play. At some schools, your response to the report will actually be attached to the report, such that your arguments about the evidence will be reviewed by any hearing board ahead of time and can begin to dislodge whatever initial tentative conclusion its members may have reached. You should be prepared to invest significant time responding to the evidence collected in the investigative report no matter what model of adjudication your client's school uses.

Be clear and well organized, but don't use legalese, and stay true to the student. You want your submission to sound like it is in the very best version of his or her voice, rather than something a lawyer wrote.

2. Request Revisions to the Report

Most of the time, you will want to request changes to the investigative report. Reports may contain false information. They may summarize witness interviews in ways that are not neutral or that leave out information you believe is important. They may characterize your client's testimony in ways that are unfair or inconsistent with the tone or attitude with which it was given. They may even include information that the school's policy or procedures say are not permitted (*e.g.*, information about your client's past conduct issues, past sexual history with other students, or character evidence where the school forbids it). Any information that you believe is unfairly prejudicial to your client is information you should ask the investigator to remove from any report. And, as with other issues you will be raising, if the school refuses to act fairly, this becomes an issue for litigation, or threatened litigation, if the need for it arises.

3. Request Further Investigation

Finally, there may be times where, in your view, the testimony and evidence reflected in the report merits some additional investigation (*e.g.*, further documentary evidence to be sought, another witness to be interviewed). Do not hesitate to request additional investigative steps after reading the report, submit additional evidence that has become

[28] While the Department of Education's new Title IX regulations require that trainings used by universities be unbiased and free of sex stereotypes, it will likely take a long time to dislodge the presumptions about complainants (often women) and respondents (often men) that have been built into so many schools' training materials for years.

apparently relevant after you see what the other party or witnesses are saying, and identify those steps for the investigator with as much specificity as you can.

VI. ADJUDICATION

When the investigation phase is complete, the proceeding will shift to its adjudication phase. Most of the time, the same office at the school that conducted the investigation will also oversee adjudication. Sometimes, investigation is handled by a Title IX Office and adjudication by a separate student conduct office. The school's procedures should specify which office is responsible for each phase of the proceeding.

If you have any questions about the procedures, next steps, etc., do not hesitate to ask the Title IX coordinator for a meeting or phone call. Prepare your client with a script to ask the questions if need be, but you will usually be able to speak at these meetings because the focus is on procedure, not substantive facts.

Section 106.45(b)(6)(i) of the 2020 Title IX regulations requires schools to adjudicate claims of sexual misconduct through a live hearing at which the parties, through their advisors, are permitted to cross-examine one another. However, you should be aware of the various models of adjudication employed by schools, as you may still encounter them if the regulations are not in effect, not applicable, or simply not being followed.

A. Models of Adjudication

Traditionally, schools generally employed one of three models of adjudication: a full hearing, a single-investigator model, or a hybrid model with elements of both. The new regulations now require a full hearing, but we will discuss all three models here. The kind of model employed by your school will affect how you should interact with administrators at each stage of the proceeding.

1. Traditional Hearing Model

In a traditional hearing model, the investigation typically consists of the collection of evidence by an investigator. When complete, this is followed by a process in which one or more adjudicators review the evidence and any investigative report and then hold a hearing.

The new regulations constitute a sea change in how live hearings are handled—now, the lawyers can talk.

Although the regulations do not require (for example) opening or closing statements, they do dictate that both parties and witnesses are subject to cross-examination by a party's advisor. If a party cannot afford an advisor, the school must

provide one free of charge for the purpose of cross-examination (whether or not that person is a lawyer).[29]

Parties and witnesses do not have to subject themselves to cross-examination. They can refuse to participate. But if they do that, the new regulations state that the decision maker cannot rely on "any statement" given by the refusing party or witness. This would necessarily include any original written complaint, any interviews given during the investigation process, and anything at all submitted by the party, other than objective evidence such as video footage.

It will be interesting to see what a school will do if, for example, a complainant decides at the last minute not to show up for the hearing. If a panel has already read all of the complainant's statements before she tells them that she will not submit to cross-examination, what happens? Logic suggests that a new panel should be put together that has not read the testimony that can no longer be relied upon, and that the complainant should not be able to go back on their decision. Although it seems unlikely that a school would do this, you should strongly consider making the request.

The regulations also state that complainants and respondents do not have to be in the same room, so a complainant could presumably be cross-examined over video. Although that is not ideal, objecting to it would probably be fruitless.

Finally, the new regulations require the school to record or transcribe the hearing and make it available to both of the parties. Though it is absurd that this was not always done already, such a record will be incredibly useful for both your appeal and during any litigation.

2. Single Investigator Model

In the last few years, before the new regulations took effect, many schools started moving away from a traditional hearing model to what is called a "single investigator model." In this model, the same person both investigates the claims and makes the ultimate finding of "responsible" or "not responsible."[30] If the new regulations are repealed, this model could come back. You need to tread more carefully in the investigation phase under this model than you would in a traditional hearing model, because from the beginning, you will be dealing with the person who will be deciding your client's fate, and your client's fate will be directly subject to the investigator's prejudices. You should, of course, advocate for your client, and push back on any decisions that are unfair, but your tone, at a minimum, should be dialed down.

[29] 34 C.F.R. § 106.45(b)(6)(i).

[30] The new regulations prohibit the single-investigator model, not only by requiring a live hearing, but also by providing, in Section 106.45(b)(7)(i), that the decision-maker "cannot be the same person(s) as the Title IX Coordinator or the investigator(s))."

Because there will be no hearing, it is especially important that you submit a thorough list of questions that you wish the investigator to ask the other party and any witnesses.

At public schools, you should also insist to the school's legal counsel that a single investigator model does not comport with due process even if the 2020 Title IX regulations are not in force, because it does not allow for a live hearing with proper cross-examination. A growing body of case law is concluding that due process requires a live hearing in front of the decision-maker(s), especially where the credibility of testimony is at issue. *See, e.g.*, *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

3. Hybrid Model

Finally, some schools have employed a hybrid model that uses elements of both the single investigator model and the traditional hearing model. (Again, this would not be permitted under the new regulations.) In this model, the investigator makes a preliminary finding of "responsible" or "not responsible" that either party can challenge at what is often called a "review hearing." A review hearing typically consists of opening and closing statements by the parties in front of a separate adjudicator, who is also likely to pose questions to the parties. Review hearings are less likely than traditional hearings to allow for testimony from third-party witnesses, but you should not hesitate to ask that the adjudicator hear from any critical third-party witnesses.

Because the investigator in a hybrid model renders a preliminary finding on the question of responsibility, you have to be more sensitive in your dealings with them than under the traditional hearing model. But you have more leeway than you do under the single investigator model given the presence of the review panel.

B. Rights at a Private School

At a private school, your client's rights in a disciplinary proceeding stem from two sources: federal regulations and the school's own policies and procedures. First, as discussed above, the new Title IX regulations (which apply to private and public institutions) include a number of procedural protections for accused students, including the right to a live hearing and the ability, through an advisor, to cross-examine the complainant. Moreover, federal regulations require both parties to have "an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation."[31]

[31] 34 C.F.R. § 106.45.

Your client, therefore, has a right to hear and respond to any information that the hearing panel hears, meaning that the panel cannot accept secret testimony from one party that the other party is not permitted to hear. It is common for schools to conduct hearings where the parties give and listen to testimony from separate rooms, but they must be permitted to actually see and hear each other testify.

Second, your client is entitled to any procedural rights that the school's policies and procedures promise students during the disciplinary process. Private schools currently have incredible leeway regarding the kinds of hearing procedures that they may provide to students (as long as they don't violate the new regulations). They are generally bound to provide whatever they *do* choose to promise in their written policies, however, under principles of contract law discussed above and in the litigation section of this manual.

C. Rights at a Public School

Students at public schools have the same rights under federal regulations that apply at private schools. In some states, they also may be able to argue that schools are contractually bound by the processes promised in their policies and procedures, though issues concerning sovereign immunity complicate that question. Public school students do, however, have the following additional rights provided to them by the Constitution's Due Process Clause (no matter what happens with the new regulations):

1. Adequate Notice

Public school students must be given notice of the specific charges against them. In *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), the U.S. Court of Appeals for the Fifth Circuit held — in a decision widely cited and accepted by courts around the country — that public university students may not be expelled for misconduct without notice. The question of what constitutes adequate notice has been further fleshed out in numerous decisions stemming from the wave of litigation that followed the 2011 Dear Colleague letter. *See, e.g.*, *Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d at 615 ("as *Dixon* makes clear, a public university student accused of misconduct is entitled to a statement of the *specific* charges against him") (citation omitted, emphasis in original). Certainly by the time of the hearing, your client must have been informed of the testimony and evidence to be offered against him or her.

2. To Hear and Respond to All of the Evidence

Relatedly, hearings must be "meaningful" in order to comply with due process. *See Rector & George Mason Univ.*, 149 F. Supp. 3d at 619; *see also Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (hearing must be "meaningful" to comport with due process). No hearing is meaningful when the accused is not told the evidence against them and given a chance to

respond to it.[32] Any consideration by (and especially any reliance on) information that your client has not been told implicates due process.

3. Some Form of Cross-Examination

Courts generally (and increasingly) hold that due process requires some form of cross-examination, particularly when the allegations are serious enough to result in the accused student's suspension or expulsion.[33] Most schools allow students to submit questions to the adjudicator or a neutral chairperson to be asked of the other party, and leave it in that person's discretion whether to ask or reword those questions. Most schools allow students to submit questions to the adjudicator or a neutral chairperson to be asked of the other party, and leave it to that person's discretion whether to ask or reword those questions. The First Circuit has concluded that such a procedure satisfies due process requirements if the questioning is meaningful. *See Haidak v. Univ. of Mass. Amherst*, 933 F.3d 56, 70 (1st Cir. 2019) ("When a school reserves to itself the right to examine the witnesses, it also assumes for itself the responsibility to conduct reasonably adequate questioning. A school cannot both tell the student to forgo direct inquiry and then fail to reasonably probe the testimony tendered against that student."). However, the Sixth Circuit in *Baum* concluded that due process requires a hearing with "live cross-examination." *Baum*, 903 F.3d at 583. If an institution uses the *Haidak* approach, you should insist that the proposed question and the rationale for declining to ask it be placed on the record for a potential appeal or litigation.

4. An Unbiased Adjudicator

Due process fundamentally requires that adjudicators be neutral. Many schools give students an opportunity to object to potential adjudicators as biased or as possessing conflicts of interest. If you are advising a client at a public school that does not promise students that right, be sure to ask for it.

VII. PREPARING FOR A HEARING

A. Demeanor and Dress

Your client should dress and act in a manner appropriate to the seriousness of the occasion, but not in a way that looks forced or unnatural. Especially when they're being advised by a lawyer, it's important that students look natural. Some students may be comfortable in a

[32] *Donohue v. Baker,* 976 F. Supp. 136, 147 (N.D.N.Y. 1997) ("At the very least, in light of the disputed nature of the facts and the importance of witness credibility in this case, due process required that the panel permit the plaintiff to hear all evidence against him and to direct questions to his accuser through the panel.").
[33] *See, e.g.*, *Baum*, 903 F.3d at 581; *Haidak v. Univ. of Mass. Amherst*, 933 F.3d 56 (1st Cir. 2019) ("due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel'"); *Furey v. Temple Univ.*, 884 F. Supp. 223, 252 (E.D. Pa. 2012) ("Given the importance of credibility in this hearing . . . due process required that plaintiff be able to cross-examine witnesses."); *Baker*, 976 F. Supp. at 147 (cross-examination required because sexual misconduct proceeding was "a test of the credibility of plaintiff's testimony versus" the defendant's).

full suit, but most of the time we recommend that they wear something like a button-down shirt and slacks, and perhaps a tie; and for women, something similarly formal. More than that is not expected of students and often makes the student feel stiff. Hearings are often long, and they are always emotional; it is important that your client feels comfortable and looks natural as they talk about what happened.

The way that your client speaks to the panel is equally important. Your client is going to feel attacked, afraid, and perhaps distrustful of the people deciding his or her fate. You want the client to be seen as sincere, thoughtful, and respectful of the gravity of the situation and the emotions that are involved on both sides. Tell them to presume that the questioners are acting in good faith and are people who simply have a lot of questions because they've been told two very different stories about what has happened. You want your client to think of the factfinders as sincere but skeptical individuals who are asking genuine questions to which they need answers. Your client is there to give those answers in a calm, respectful, yet persistent and authoritative manner. Striking the right balance always requires practice.

B. Opening and Closing Statements

Your client's opening and closing statements should usually be no longer than 10–15 minutes, especially if your response to the investigative report is in front of the panel. More than that risks losing the attention of the adjudicators and drowning your most important evidence. If the case is complex and you haven't been able to get your arguments about the evidence in front of them yet, a long opening statement might be warranted. But ideally, the opening will hit hard and quick with the most powerful facts in your client's favor. The emotive force of both statements is as powerful as the information they will convey.

We recommend that you and your client write out both statements word for word, unless they are especially good public speakers. Even then, it's probably best to write it all out, because hearings are incredibly emotional. It will not look staged or unusual at all for your client to be reading their opening and closing statements. Both parties in these types of hearings usually do exactly that. It will almost always be better to write it out word-for-word, in plain language that sounds like a college student, and to have them practice reading it at an even pace, ideally looking up from the page from time to time.

Think of ways to humanize your client without having it sound forced or stilted. Also, be prepared to change the closing on the fly depending on what happens at the hearing. You might even prepare a number of different closings to cover certain possibilities. Remember, it's hard enough for an attorney to change things on the fly; students are usually not going to be able to do that and will need explicit instruction.

The opening and closing statements should do two things: explain the evidence, and explain the impact that the allegations and everything that has followed have had on your

client. We recommend that the opening focus primarily on the evidence and that the closing focus primarily on the impact, but both statements should address both points.

Just as with any trial, you also need to decide if you will discuss certain facts in an opening, lest you tip off the complaining student about a particular angle of questioning that will be best left un-highlighted for maximum effect, which your student can then emphasize in the closing.

It is difficult to overstate the importance of conveying to the adjudicator how hard this process is for an accused student. Most people know intuitively that it is horrible to endure a sexual assault and to have to go through a hearing about it. It is far less common for people to naturally put themselves in the shoes of someone who has been falsely accused and to understand the fear, alienation, health problems, and mental health issues that often come with it. Adjudicators need to understand that there is strong emotional pain on both sides so that they will focus not on the understandable emotions of the situation, but squarely on the evidence.

C. Preparing Your Client for Questioning

Preparing your client to testify at the hearing will largely resemble the preparation you did to get them ready for the initial interview. At the hearing, the client will likely be asked to recount their narrative about what happened at the time of the alleged incident and then will be asked targeted follow-up questions, including the three we identified above as likely questions at the initial interview. Your main task is to ensure that your client's testimony is consistent with what they said in the investigation and to anticipate as much as possible the lines of questioning they are likely to get.

One thing in particular should be emphasized to your client, particularly if the client is male: The hearing is not the time to refrain from showing emotion. If talking about the allegations, the effect they have had upon the client, or the effect they have had upon the client's family causes the client to become emotional or to cry, the client should know that this is acceptable. They should not manufacture any kind of emotion, but if tears come, let them come. Conversely, if you have a buttoned-up client who will not cry because they simply will not show that kind of vulnerability to strangers, you may want to add something into an opening or closing that explains why they are reserved. The adjudicator needs to see, and to feel, that the complainant is not the only one who may be suffering, and that a decision against your client is going to be devastating for them. Ideally, that will focus the adjudicator squarely on the evidence, without regard to whether either side will be happy with the outcome.

D. Preparing Questions for the Accuser and for Witnesses

As you would in any litigation setting, you should prepare questions to be asked of the accuser and any third-party witnesses who will testify. Your client will very likely not be asking these questions directly, especially to the accuser; you will either ask them (under

the provisions of the new Title IX regulations) or they will be read (and perhaps reworded) by the adjudicator or chairperson.

For that reason, you should have two goals in mind in crafting any questions: (1) listing things you genuinely want asked of the accuser and other witnesses, and (2) arguing your client's case to the panel. Include questions that point out inconsistencies in the accuser's testimony or that otherwise bolster your client's defense, even if you think the adjudicator is unlikely to ask them. You'll want to strike a balance, of course—if you submit 100 questions, there's a chance that the questions you *really* want them to ask will be drowned out. But as you decide which questions to ask, and as you draft the wording of the questions themselves, think of them both as questions to be asked *by* the adjudicator and as arguments that you get to make *to* the adjudicator.

Some schools ask you to submit questions ahead of time, while some not; do what is best for your client but assume even if you have submitted questions ahead of time, more will come up as a result of testimony and reserve the right in whatever list of questions you submit in advance to submit additional questions at the hearing. Be prepared to draft questions on the fly. Or, you may have some alternative questions that you may ask depending on the testimony; hold those back to be submitted later if need be. Also, if your questions relate to some specific piece of evidence or something in the report, give specific page or exhibit references in the question. Assume that no one will know the record like you do—sometimes, the panelists will have barely even read it.

E. Character Witnesses

As with the investigative phase, your school's policies and procedures will likely spell out whether character evidence is admissible. When a school forbids such evidence, a hearing panel is less likely than an investigator to read any written character evidence that you submit, if only because you would probably be submitting it at the hearing itself. Submitting forbidden character evidence to an adjudicator also risks making your client look dishonest in front of the very body that will be deciding their fate—especially if you have already tried to submit that kind of evidence to an investigator and been told that it's improper. For all of those reasons, we recommend that you not try to submit character evidence at such hearings.

VIII. THE HEARING ITSELF

Your role at the hearing will depend upon whether the Title IX regulations apply. If the regulations are in effect, you will have the opportunity to cross-examine both the complainant and any witnesses. If not, your job at the hearing will be primarily to do three things:

A. Keep an Eye on Your Client

Your client may very well get overwhelmed, unnerved, or simply tired. If you sense that happening, ask the adjudicator if you can take a quick break. Breaks are relatively common in these kinds of proceedings. All other things being equal, it would of course be better to ask for no breaks at all, and one break is better than two, which is better than three, etc. Don't ask for breaks at simply the merest sign of discomfort. But don't hesitate to ask for a break if your client becomes unsettled and it is affecting their ability to answer questions. Breaks are common enough in these proceedings that the optics of requesting the break often do not outweigh the risk of a bad answer on an important question.

B. Draft Follow-Up Questions

Follow-up questions to submit to the accuser or other witnesses during the hearing will undoubtedly occur to you as different people testify. Begin drafting those questions, or at least write down the topics you will want to address, as testimony is being given. In our experience, most schools will give you a short break in the proceedings to draft the actual questions when the time comes.

C. Look Out for Legal Issues and Speak to the School's Legal Counsel If Problems Arise

Most schools will have a member of their general counsel's office (or outside legal counsel) present at hearings where the accused student is being advised by a lawyer. If the hearing starts to go off the rails, either because the school is blatantly ignoring its stated procedures or because it is otherwise denying your client a fair hearing, ask for a break so that you can speak to the school's legal counsel about the issue outside the adjudicator's presence. Even if that doesn't suffice to correct the problem, it puts the school on notice of a serious issue and of your efforts to immediately correct it. You should also write to the school's general counsel immediately after the hearing to document any such problems and to explain how they have denied your client a fair hearing. Not only does that set things up for an appeal or for litigation if that becomes necessary, it may motivate the general counsel to get involved behind the scenes if they are inclined to do so.

IX. SANCTIONS

In our experience, if your client is found responsible, most schools will provide them with a separate mechanism to argue what the appropriate sanction should be (or, more specifically, to explain what factors should mitigate the sanction). Anything at all that might favorably dispose your client to the sanctioner should be considered for inclusion—an otherwise clean disciplinary record, any good character evidence that can be admitted, the importance of college (and that school in particular) to them (especially, for example, if they have come from challenging circumstances).

Perhaps the most helpful thing to include is anything your client can say about how they have grown or learned from the incident in question and the ensuing Title IX process. However, your client must do so in a way that avoids the impression that they are accepting

responsibility for the conduct in question (unless, of course, your client wishes to do so). Not only would that frustrate any appeal, it would significantly weaken any threatened or actual litigation. If, for instance, a client believes that his former girlfriend has characterized arguments they had in the relationship as verbal abuse or as threats to harm her, he can talk about how he has come to appreciate the need to treat people with respect even when his emotions are high. He can talk about the need to discuss contentious issues productively rather than letting them fester and explode. He can talk, in short, about the process of growing up and learning to be in a relationship and apologizing for the ways he did not act as he should—ways that are not what he has been accused of, but which nevertheless are things he should not have done.

The goal of your sanctioning statement, at the end of the day, is to show not only why your client deserves mercy, but also why the school can be sure that the conduct found to have occurred will not happen again. The more you can show that your client is introspective about what is happening and willing to learn from it, the more favorably disposed a sanctioner is likely to be.

A. The Range of Possibilities

Sanctions for sexual misconduct can range from educational sanctions and probation on one end to permanent expulsion on the other. Although there tend to be "typical" punishments that develop for different categories of misconduct, your client needs to know that any sanction is possible no matter the type of misconduct that they are accused of. That said, certain sanctions are likely to be seen in certain cases more than others. Expulsion tends to be reserved for acts of non-consensual sexual intercourse, especially those involving physical force, the threatened use of physical force, and cases where a victim's incapacitation is clear and extreme. Suspension tends to be the more common sanction in situations where a victim's incapacity is more ambiguous or where the accused student was similarly incapacitated, and in cases involving non-consensual sexual contact (typically defined as sexual contact not involving penetration). But even in those cases, expulsion is always a possibility.

As to "lesser" forms of sexual misconduct, such as stalking, voyeurism, and harassment, suspension and disciplinary probation become more common sanctions. The sanctions for these types of misconduct vary more widely depending on the severity of the behavior.

The bottom line for your client is that sanctioning can vary widely depending upon the school, and upon the person at the school doing the sanctioning. We have seen cases where findings of forcible intercourse have been punished by comparatively short suspensions (perhaps because the evidence was highly ambiguous), and conversely where the thinnest evidence of incapacity resulted not just in an accused student being found responsible, but in his permanent expulsion from his school. Anything up to and including expulsion is possible, even if there tend to be more or less typical sanctions developing within and even across schools.

B. Transcript Notation

One issue to be aware of related to sanctioning is whether and when your client's school notates disciplinary sanctions on student transcripts, and for how long. This practice varies widely among schools, and it can dramatically increase the practical effect of a sanction because of the lasting impact it will have on your client. A notation on a transcript will more greatly hinder your client's ability to go to graduate school or to obtain the kind of employment for which they would otherwise be competitive.

Sanctions that may not differ that much in themselves, therefore, can in fact be dramatically different if one requires a transcript notation and the other does not. In arguing for why any particular client of yours should be sanctioned one way or another, make sure to emphasize to the sanctioner the lasting and significant effect that a transcript notation will have, in the hopes that the sanctioner will properly account for it in determining how severely to sanction your client. A one-year suspension that gets noted on a transcript for three years after graduation is a far different sanction than a one-year suspension that is never disclosed there.

Before you proceed to any hearing, make sure to understand whether your school notes disciplinary sanctions on its transcripts, and the circumstances under which it does so. Be aware, too, that in some states — New York, Texas, and Virginia, for example — transcript notations are dictated by law.

But the transcript notation can be a red herring: you can still have a problem without one. A disciplinary finding and sanction are usually part of a student's educational record about which he or she may be asked if they try to transfer or go to graduate school. The university will disclose the finding of responsibility and sanction when the student signs a waiver permitting it (and if the student does not sign a waiver, the other institution will be tipped off that there is likely a discipline finding the student wishes not to disclose). Finally, even if there is no transcript notation, and no one asked the student to sign a waiver, he or she could still be asked if they have ever been subjected to discipline.

X. APPEAL

The vast majority of schools will allow either party to a sexual misconduct proceeding to file an appeal, either of the finding itself or the sanction. And if the 2020 Title IX regulations are in effect, both parties *must* be permitted to appeal on at least three grounds: "[p]rocedural irregularity that affected the outcome of the matter," "[n]ew evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter," and "[t]he Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or

respondent that affected the outcome of the matter."[34] Schools may include additional grounds for appeal at their discretion, such as insufficient evidence or excessive sanction.

In our experience, appeals are almost always purely paper submissions, but very occasionally schools will allow for witness testimony in front of the appeal body.

A. Procedural Error

The most common ground for appeal, and the one you'll probably use the most, is that procedural error during the investigation or the hearing, or both, led to an erroneous outcome. Many schools require the errors to have "substantially" affected the outcome, but at all schools, the question the appeal body will be looking at is whether the errors can be said to have led to the wrong outcome.

The cleanest kind of appeal based on this ground is an appeal where the school has violated one of the clear, unambiguous, and specific procedural rules required by law or contained in its policies or procedures — rules such as the ability to question witnesses, or to submit a response to the evidence, or things of that nature. We saw more errors of that type before the wave of litigation by accused students forced schools to more strictly adhere to their procedures. Schools now know they face consequences when they deviate from those procedures, and as a result, schools commit clear procedural errors less frequently. But when they do, they provide the cleanest and most powerful grounds for an appeal.

In the absence of that kind of error, your best bet is to argue from the broader promises contained in the school's policies and procedures—promises that the school will conduct a thorough and fair investigation, or that it will find an accused student responsible only if a preponderance of the evidence shows it. Because these promises are broader and more nebulous, however, appeals on such grounds typically succeed only when the underlying unfairness, or the weight of the evidence in the case, very clearly weigh in favor of granting the appeal. So temper your expectations appropriately when you base an appeal on either of these broader grounds, but by all means rely on them when you have no more specific procedural violations of which to complain.

B. New Evidence

The second typical appeal ground at almost every school (and one required by the new regulations) is the existence of evidence that was not presented at the time of the investigation or hearing. Make sure to read the language of this appellate ground carefully. Most schools limit this ground to evidence that was not presented at the hearing and furthermore was *unknown*—and not reasonably discoverable—before the hearing. Other

[34] 34 C.F.R. § 106.45 (b)(8). Note that even if the regulations are no longer in effect, the federal Violence Against Women Reauthorization Act of 2013 requires institutions to provide both parties simultaneous notice of "institution's procedures for the accused and the victim to appeal the result of the institutional disciplinary proceeding, if such procedures are available," when issuing findings. 34 C.F.R. § 668.46 (k) (2) (v) (B).

schools, however, state that appeals may be based on new evidence that was not presented at the hearing, full stop, without reference to whether the information was known or knowable at the time of the hearing, and at least one court has held a school to the literal wording of that kind of provision, contrary to the school's actual practice. *See George Washington Univ.*, 321 F. Supp. at 125–26 (holding school to language of its policy allowing appeals to be based on any new evidence, despite school's practice of limiting it to evidence not discoverable before the hearing).

Even at schools that allow for appeals to be based on evidence that was known at the time of the hearing and simply was not presented, do not try to be clever by deliberately withholding any evidence from the investigation or hearing in order to manufacture a ground for appeal. The school may very well tell you that, in practice, it limits that appeal ground to evidence that was not previously knowable, as occurred in the case cited above. While you *might* eventually win that battle in court, it is going to take a lot of time and money for your client to get to that point. It is far better to marshal any evidence you have that has any chance of swaying an adjudicator and presenting it at a hearing.

In short, this is usually the least important ground for any appeal.

C. Bias or Conflict of Interest

Like new evidence, this is one of those grounds—the last of the three required by the new regulations—that sound good at first glance but which you will win on sparingly. Put simply, most schools don't like to admit that their decision makers were biased.

The two most common ways to prove bias—which will usually be gender bias, not bias against your client personally—will be by researching the panelists on Google or combing their behavior at the hearing for bias. Twitter, of course, can be a goldmine—people often say unwise things without thinking on Twitter. But Facebook and YouTube can also be helpful. So can a panelist's public writing or advocacy. Have they been involved in gender issues mostly on one side? If so, you might be able to cite that.

Behavior at the hearing can also suggest bias. Did a panelist challenge only one side and not the other side? Did they ask questions that suggest gender bias? (We once had a case in which a male investigator asked a male student, who had complained that a female student had groped him without his consent, "Were you aroused?"—something no one would ever ask if the genders were reversed.) Perhaps there was simply a difference in tone—which will be hard to prove without a recording but may still be worth pursuing if it sufficiently obvious.

D. Disproportionate Sanction

This appeal ground allows you to argue that your client's sanction was too severe given (1) the nature of the conduct for which they were found responsible, in conjunction with (2) any other factors that should mitigate the sanction. Much of what you argue here will be

the same things that you said in offering reasons, pre-sanctioning, as to why the sanction should be mitigated. But you should also take this as a chance to relitigate the evidence. The reality is that when sanctions are reduced on appeal, it very likely is because the appeal body disagreed with the sanctioner's (and perhaps even the adjudicator's) view of the evidence. Part of your argument, in other words, should be that the adjudicator could not have found that the evidence of your client's guilt *strongly* outweighed the evidence of innocence, and that the closeness of the evidence should factor into what constitutes an appropriate sanction.

E. Weight of the Evidence

At some schools, your client will have the option of appealing on a fifth ground— that the hearing panel simply weighed the evidence incorrectly. This is a less common ground for appeal than those previously discussed, but it allows you to directly argue the evidence as you were able to do at the hearing stage. As suggested above, you normally can and should make this same kind of argument under the first appeal ground, by maintaining that school failed to actually apply the evidentiary standard as it promised it would. But when "weight of the evidence" exists as a separate appeal ground, you should make that argument under this ground instead.

XI. IMPORTANT RECURRING ISSUES

Having walked you through the Title IX process, we want to touch on a few important issues that recur in campus cases and require delicate treatment.

A. Intoxication and Incapacitation

A large number of campus cases involve one or more parties who were intoxicated. Most schools prohibit intoxicated sex only when (1) intoxication rises to the level of incapacitation, which typically means that a person's ability to understand and reason is severely impaired; and (2) when it was known, or would have been known to a reasonable, sober person in the accused student's shoes, that the accuser was in that extreme state.

In most cases where an accuser claims assault due to incapacitation, it will be far easier to argue that there were no objective external *signs* of incapacitation than to argue that the accuser simply was not incapacitated at all. There is no reason not to argue both if the evidence supports it, but the great virtue of focusing on the lack of signs of incapacitation is that it allows a decision-maker to find in your client's favor while still crediting the accuser's testimony that they were in fact extremely intoxicated and may have done something that they would not have otherwise done, and might be suffering emotionally as a result.

Two things to be aware of as you navigate cases involving alleged incapacitation:

1. College students use the word "drunk" to refer to a very wide range of states. It is used to refer to everything from being slightly buzzed to being passed out. Older generations tend to reserve the word for more serious states of intoxication, which can create confusion when witnesses tell adjudicators that a complainant "was clearly drunk" without saying more. It is critical to consistently focus witnesses and decision-makers on the objective external markers of intoxication: the ability to talk without slurring, to walk without help, to coherently engage in conversation, to process things and interact in real time, and to act in a goal-oriented fashion.

2. "Blackouts" are not the same thing as passing out. They do not refer to an actual state of intoxication at all. Blackout is simply a condition of memory, or more precisely the lack thereof. Blackouts occur when memories fail to be transferred from short-term to long-term memory.[35] They can and do occur at low levels of intoxication that do not incapacitate someone, let alone make them appear externally to be incapacitated. Because someone in a blackout state still has short-term memory, they can appear as coherent, as goal-oriented, and as in control of themselves as they do when they are not experiencing a memory blackout.[36] The key, again, is to focus on how the person appeared externally to those around them—were there any objective signs that should have alerted others that the person was extremely intoxicated, if, in fact, they were?

B. Counter-Complaints and Retaliation

One of the most difficult questions to decide is whether, in cases where both parties have engaged in the same behavior (such as alcohol consumption), your client should file a counter-complaint against their accuser. The great advantage to filing a counter-complaint is that it motivates the school to treat your client fairly, especially when your client's allegations against the accuser mirror the accuser's allegations against the client. In that situation, schools know that they have to treat your client fairly, because whatever standards of conduct they apply to your client should also be applied to the accuser. A counter-complaint can also motivate the accuser to withdraw frivolous claims, to be open to informal resolution, or to walk away from the process at some later stage, knowing that accountability will not be a one-way street. Filing a counter-complaint also may be

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[35] Reagan R. Wetherill and Kim Fromme, *Alcohol-induced blackouts: A review of recent clinical research with practical implications and recommendations for future studies,* 40(5) Alcoholism: Clinical and Experimental Res. 922, 922 (2016) (available online from National Institutes of Health (NIH) at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4844761) ("During a blackout, a person is able to actively engage and respond to their environment; however, the brain is not creating memories for the events. . . . [S]hort-term memory remains intact during an alcohol-induced blackout, and as such, an intoxicated person is able to engage in a variety of behaviors, . . . but information about these behaviors is not transferred from short-term to long-term memory . . . .").

[36] *Shining a Light on Alcohol Blackouts, NIAAA Spectrum,* Vol. 6, Issue 2 June 2014, at 4 (available at https://www.spectrum.niaaa.nih.gov/archives/V6I2Jun2014/features/light.html)("Outside observers typically are unaware that an individual is in a blackout. . . . [A] person in the midst of a blackout could appear incredibly drunk—or not overly intoxicated at all.").

something that your client feels very strongly about doing simply as a matter of justice or fairness, if — as is often the case — both students behaved in the same way towards one another in similar states of intoxication.

The risks to your client in filing a counter-complaint, however, are very real and can be significant. The chief risk is that filing a counter-complaint might make your client appear vindictive or aggressive in the eyes of the decision-maker, and might confirm in the decision-maker's mind that your client is the kind of person who could assault someone. It might (wrongly) confirm, in other words, exactly what you are trying to disprove about your client. An investigator or adjudicator might ask your client, or at least think to himself or herself, "If the conduct in the counter-complaint truly happened, or if it truly upset the accused student, why wasn't it brought forth sooner? Why wait until now?" This is prejudicial, but in college hearing processes where so few safeguards are in place against such prejudice (and where it may in fact be encouraged), it is a serious risk that must be considered.

Deciding whether and when to file a counter-complaint therefore requires a good amount of judgment. It will necessarily depend on the totality of the circumstances in your client's case, including how long ago the conduct occurred, how long the complainant waited to come forward with their own complaint, and how closely the misconduct alleged by your client mirrors the misconduct alleged against them.

One way to get the accuser's misconduct in front of the school while mitigating those risks is for the client to first disclose that conduct in his own initial interview, without yet filing a counter-complaint. Many schools state in their sexual misconduct policies or procedures that they will investigate allegations of sexual misconduct no matter how the school comes to learn about them. Even if no formal complaint is filed, or even if the information comes to them through a third-party source, many schools obligate themselves to investigate the alleged misconduct. By disclosing misconduct in an interview, your client puts that information in front of the school through their own proceeding, and they can hope that the school will take it upon itself to actually investigate the alleged misconduct as it has promised.

Keep in mind, however, that disclosing that conduct in your client's own interview is easier to do when the misconduct of the accuser closely mirrors what the accuser is saying your client did; it may appear gratuitous if it is a different kind of misconduct altogether, where it arguably bears less relation to the actual allegations against your client.

The easier it is for your client to get their accuser's misconduct in front of the school without appearing retaliatory, the easier the decision is whether to convey that information and/or to file an actual counter-complaint. When the conduct does not so closely mirror the conduct of which your client is being accused, you probably want to set a higher threshold in terms of whether your client should file a counter-complaint.

C. Actual or Potential Criminal Charges

Finally, and as we discussed above, you must decide how to advise your client if the complainant has gone to the police and the police have opened an investigation (or, at least, have not said that they won't). If you practice criminal law, your immediate instinct is probably to say that under no circumstances should your client be speaking to anyone involved in the Title IX process, since those statements can eventually be shared with the police and admitted against them in criminal proceedings. That is certainly one school of thought among those who regularly handle Title IX cases.

At times, however, we think the balance favors participating in the Title IX process. If the evidence against your client appears especially strong, that probably favors staying away both from the police and the Title IX process, at least for as long as the criminal investigation is pending. But if the evidence is more ambiguous, your client stands to lose a lot by not participating in the Title IX process. Refusing to participate all but guarantees that your client will be found responsible and will be subjected to the potentially life-altering consequences that come with being branded a sex offender by their school. That certainty should be weighed against the likelihood, in such cases, that a criminal prosecution will be initiated. Again, there are different schools of thought on this, but we recommend evaluating, on a case-by-case basis, whether your client should participate in a Title IX process when there are likely criminal charges.

XII. DEALING WITH PARENTS

Since most of your campus clients will be students, you will almost always have some level of interaction with their parents as well. Parents almost always serve as third-party payers for their children, but beyond that, the level of involvement that a client's parents will want to have in the process can span a very wide spectrum. Some will want to be completely hands-off and will almost never ask for updates. Others will want constant updates, will want to weigh in on strategic decisions, and will otherwise want to be very involved in the process. The range of parental involvement truly runs the gamut. The investigation process is extremely difficult for parents as well. We do our very best to accommodate whatever level of involvement a given client's parents wish to have. We typically set just two hard and fast rules for ourselves with respect to parents:

1. We let them, and their child, know that it is the *student* who is the client and who ultimately calls the shots. (On that front, note that including parents in meetings may jeopardize attorney-client privilege.) We make very clear to the client that, if there are things they tell us that they do *not* want us to tell their parents, we absolutely will respect that. For logistical ease, we tell the client that the default is that we assume we have permission to tell their parents anything the client tell us unless the client instructs us otherwise. But the parents and their child all need to know that it is the student who is the client and ultimately is in charge.

2. Relatedly, we keep an eye out for whether parents may be pressuring their child to make decisions that the child does not want to make. Thankfully, this has rarely happened in our experience. But it is important to be sensitive to the possibility that a parent might

push a client to go in a direction that the client does not want to go, and to set clear boundaries whenever that is the case.

XIII. EMOTIONS AND MENTAL HEALTH

Finally, a word about your client's mental and emotional health: Your client will be going through an extremely difficult time, and you will be going through it with them. You may, in fact, be one of only a few people who can *fully* go through it with them, because they will feel in many ways that they can't talk openly with others about what is going on. Your campus clients may be younger than most of your other clients; they are usually not fully emotionally mature, and for many of them this process will be the hardest thing they have yet had to go through in life. They may come to rely on you for more than just pure legal advice.

Taking on that kind of role can be difficult, and, frankly, is not something our legal training equips us to do. We recommend, therefore, that you suggest to your clients the idea of seeking professional counseling as they go through this process. We have seen that benefit many of our clients. Many of them continue with it even after they have won their case. Going to counseling also has the added benefit of demonstrating very concretely to an investigator or adjudicator that your client is truly suffering because of the allegations and the process that has ensued. Those things, as we discussed above, are not things that school administrators intuitively grasp with regard to accused students in the way that they do for complainants.

If your client cannot afford private counseling, most schools have on-campus counseling services available for students, especially at larger schools. One thing to be wary of, though, is the privacy policy that governs your client's communications with a school counselor and any records generated by the process. At most schools, these policies are pretty robust, but you should make *absolutely sure* that your client's counseling records cannot be used by the school. It is highly unlikely that would happen during the on-campus proceeding, but schools might take a different approach in litigation. Even that is unlikely, but it's the kind of thing you need to run down for sure before you disclose (in an opening or closing statement, for instance, or in a statement regarding the sanction) that your client is receiving counseling at the school.

LITIGATING CAMPUS DISCIPLINARY CASES

I. INTRODUCTION

This litigation guide is intended for the legal practitioner who represents a student in a lawsuit in federal court against the student's college or university for a wrongful finding of sexual misconduct in a Title IX disciplinary proceeding.

The guide walks the practitioner through this specialized area of the law — Title IX of the Education Amendments of 1972 — including its implementing regulations, guidance issued by the Department of Education's Office for Civil Rights, and federal circuit and district court cases that have ruled in favor of and against male students who have sought redress in the courts for their schools' actions against them. In addition to outlining the legal framework for this type of representation, the guide attempts to assist the practitioner in identifying and gathering key facts, documents, and other information relevant to the lawsuit, including (but not limited to) the sexual misconduct policies and procedures that the school used in the disciplinary proceedings against the student, and particular circumstances suggesting that gender bias was a motivating factor behind the adverse outcome.

The guide starts at the beginning of the representation with client interviews and fact collection. It identifies potential claims and sets forth in detail the legal framework for the three causes of action that have received the most attention from the courts: Title IX, due process, and breach of contract. The guide outlines potential remedies and discusses pre-suit communications with the school to attempt an early resolution. The guide next proceeds to litigation, including preliminary injunctions, complaints, and pseudonym motions. The guide moves through motion practice (motions to dismiss and for summary judgment), discovery, trial, and post-suit settlement discussions. Many of these steps are familiar to practitioners from their work in commercial and general litigation cases, but some steps are unique to student-school sexual misconduct cases.

DISCLAIMER: AS IN THE PREVIOUS SECTION, THIS GUIDE DOES NOT CONTAIN OR PURPORT TO GIVE LEGAL ADVICE. IT IS INTENDED SOLELY AS A GUIDE FOR THE LEGAL PRACTITIONER'S CONSIDERATION AND EVALUATION. IT IS NOT INTENDED TO, AND DOES NOT, TELL THE PRACTITIONER WHAT THEY SHOULD OR MUST DO IN THIS TYPE OF REPRESENTATION. THE LAW IN TITLE IX DISCIPLINARY CASES IS CONSTANTLY EVOLVING. THE PRACTITIONER WILL NEED TO RESEARCH AND UPDATE THE RELEVANT LAWS AND CASE DECISIONS IN THE APPLICABLE JURISDICTION, INCLUDING THE HISTORY OF THE CASE LAW CITED IN THIS GUIDE, AS SOME OF THE CASES CITED WILL HAVE SUBSEQUENT HISTORY OR MAY LONGER BE GOOD LAW.

II. CLIENT INTERVIEWS AND FACT COLLECTION

A. Conduct Client Interviews and Discussions

As in any case, the representation begins with interviewing the client to get a basic understanding of the facts, timeline of events, persons involved, and evidence in order to evaluate the potential defendants, claims, and relief in the case.[37]

B. Obtain Key Documents from Client and Publicly Available Sources

The key documents in school disciplinary proceedings generally include (but are not limited to) the following:

1. School's Policies and Procedures on Sexual Misconduct and/or Sexual Harassment

(a) Identifying and Finding the School's Policies and Procedures

These policies and procedures may be set forth in the Student Handbook, Student Code of Conduct, or in different or additional document(s) which may be located on the school's Title IX or sexual misconduct webpages. Sexual misconduct policies and procedures have different titles depending on the school, *e.g.*, they may be titled Sexual Violence Policies and Procedures, Sexual Assault and Sexual Harassment Policies and Procedures, Gender-Based Misconduct Policies and Procedures, or a variation on these terms and concepts. As a result, a variety of search terms may be needed to locate all relevant policies and procedures used by the school in the disciplinary proceedings.

Note: Consider downloading and saving any relevant policies and procedures as soon as they are located, as the links and public access to these documents on the school's webpages may change or lapse over time.

(b) Student Handbook(s)

University student handbooks may include definitions of sexual misconduct and the school's sexual misconduct policies and procedures. There may be more than one academic year handbook involved in the case. For example, a school may use the handbook for the 2018–2019 academic year for relevant definitions of what constitutes sexual misconduct if the misconduct allegedly occurred in the 2018–2019 academic year. But the school may use the 2019–2020 handbook to determine the procedures to be used in the disciplinary proceedings if the investigation and adjudication of the alleged sexual misconduct occurred in the 2019–2020 academic year.

[37] The guide assumes the practitioner did not represent the student in the disciplinary proceedings.

(c) Other Relevant Policies and Procedures Located on School Webpages

Searches should be conducted to locate other possibly relevant information about an institution's policies and procedures, *e.g.*, the school's Title IX Information Resources web pages, etc.

2. Common Documents in School Disciplinary Proceedings

The following types of documents are typically created by the school in the course of disciplinary proceedings:

(a) Notice of allegation, investigation, and/or charges (which may be compiled in several documents)

(b) Notice of no contact order(s) and/or interim measures

(c) Summaries, recordings or transcripts of interviews of parties and witnesses

(d) Investigation report(s) — drafts and final — as well as exhibits to investigation report(s)

(e) The complainant's and respondent's comments on or responses to investigation report(s)

(f) Notice of hearing (if applicable) and identification of panel members/decision-makers

(g) Hearing outcome decision

(h) Respondent's and/or complainant's appeal(s) from decision and responses to same

(i) Appeal decision

During the disciplinary proceedings, in most instances, the school will permit the respondent to review these documents in a supervised setting, but many schools will not permit the respondent to retain a copy of the documents. In some instances, schools will not even allow the respondent to take notes on the documents. In that case, the only source of information regarding the content of these documents will be the client's recollection.

Once the disciplinary proceedings are over, the respondent may not be able to access the documents. In that case, the respondent may submit a written request to the school to provide these documents for review pursuant to the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, a federal law applicable to all schools that receive federal funds, which protects the privacy of student education records and gives students (or their parents) the right to inspect and review their own education records. The school is required to make education records ready for review within 45 days after a request has been made.[38]

The right to inspect and review education records only covers the information in the student's education records that is about that student, and not information on other students.[39] Accordingly, in response to the request, the school may redact the names of other students involved in the disciplinary proceedings. The school may continue to restrict the respondent's ability to make a copy of the records. In any event, the respondent's FERPA review may afford him a more detailed and accurate recollection of the information in the documents. Do not be surprised if the school denies access to the record.

3. Client-School Communications Regarding the Disciplinary Proceedings

Obtain from the client all email, text messages, and other communications between the school and the client that occurred during the disciplinary proceedings. Email or text messages typically deal with the school's efforts to notify the respondent of scheduling issues (*e.g.*, scheduling a date and time for the respondent's interview with the investigator, informing the respondent of the date and time for the hearing, or notifying the respondent of when an appeal must be filed). Also inquire if the school communicated with the client about the need for and role of an advisor, the ability to communicate with potential witnesses, the investigator's efforts to gather evidence and contact witnesses, and the review of and revisions to his interview summary.

4. Documentation That May Demonstrate the School's Bias in Favor of Complainants

Conduct searches for articles, school web site information, school web pages, messages from the school's president or Title IX coordinator, student newspaper coverage, and other public sources to ascertain whether the school has fostered a "culture" of bias in favor of complainants and against their alleged perpetrators—either because of their sex or because of their status as a complainant or a respondent. Determine if the school responded to actions and pressures from various federal agencies, particularly after issuance of the

[38] *Id.* at 1232g(a)(1)(A), (B).
[39] *Id.* at 1232g(a)(1)(A).

Department of Education's 2011 Dear Colleague Letter, in a way that reduced or eliminated fundamental due process protections for accused students.

In particular, did the school begin to respond in an unfair and adverse way to accused students after the Department of Education's Office for Civil Rights issued its 2011 Dear Colleague letter; after OCR issued its April 2014 guidance, titled *Questions and Answers on Title IX and Sexual Violence*; or after May 1, 2014, when OCR first published its then ever-growing list of higher education institutions nationwide that were under OCR investigation for possible Title IX violations in the schools' handling of sexual assault reports?

In addition, did the school adopt "trauma-informed training" for its Title IX administrators, investigators, and adjudicators after April 2014, when the White House Task Force to Protect Students from Sexual Assault and the Justice Department stated that "one in five women is sexually assaulted in college"?[40] Did the school begin to use "survivor" and "victim" terminology in describing students who report an alleged sexual assault (before any such offense is proven)? Did the school promote organizations that use sex stereotypes to characterize males as prone to sexual violence?

5. Research on OCR Investigation Web Site

Determine if OCR opened an investigation(s) into the school's alleged mishandling of female complainants' sexual assault reports. That information can be obtained in school publications and articles and is also available on OCR's investigation website.[41] The website can be searched by institution, institution type, state, type of discrimination, and date the investigation was opened. That is important information in building the case for a Title IX claim that the school was pressured by OCR into treating accused male students less favorably than their female accusers.

6. Other Online Resources About OCR and Title IX, and Nationwide Reporting on School Title IX Investigations

(a) Foundation for Individual Rights in Education (FIRE) website

FIRE's website includes a great deal of information about OCR's Title IX regulatory efforts and about the lawsuits that have arisen from schools' handling of these cases. *See* https://www.thefire.org and https://www.thefire.org/research/campus-due-process-litigation-tracker.

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[40] *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault*, The White House (Apr. 2014), https://www.justice.gov/archives/ovw/page/file/905942/download.
[41] *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools*, U.S. Dep't of Edu., https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tix.html (last visited April 16, 2021).

(b) Freedom of Information Act / Right to Know Requests

The Freedom of Information Act (FOIA) gives the public the right to request access to records from any federal agency. Federal agencies are required to disclose any information requested under FOIA unless it falls under one of nine exemptions, which protect interests such as personal privacy, national security, and law enforcement. *See* https://www.foia.gov/how-to.html.

(c) Families Advocating for Campus Equality (FACE) website

FACE's mission is to support and advocate for equal treatment and due process for those affected by inequitable Title IX campus disciplinary processes, and to attempt to influence campus culture through outreach and education. Among other things, FACE maintains an online library with information on topics including trauma-informed training and OCR investigations. *See* https://www.facecampusequality.org.

(d) The Chronicle of Higher Education's Articles and Title IX Tracker

The Chronicle of Higher Education publishes articles regarding colleges and universities, some of which can be accessed without a subscription. *See* https://www.chronicle.com.

The Chronicle of Higher Education's Title IX Tracker project tracks federal investigations of colleges for possible violations of Title IX involving alleged sexual violence. It includes all investigations opened since April 4, 2011, when the Department of Education's Office for Civil Rights issued its Dear Colleague letter exhorting colleges to resolve students' reports of sexual assault, as well as data on resolution of investigations until approximately March 2018, when OCR stopped publishing that information. The database allows searches of OCR investigations by institution, state, keyword, date the investigations were opened, and other factors, and includes the option of signing up for weekly alerts. *See* http://projects.chronicle.com/titleix/#overview.

(e) Inside Higher Ed

Inside Higher Ed is a free daily news website about higher education. It offers news, opinion, career information, and resources for the higher education community. *See* https://www.insiderhighered.com.

(f) Title IX For All

Title IX For All is an organization that advocates gender equity in education. Its main activities are database development, writing, counseling, publishing, research, public speaking, and networking. The Title IX For All database is a comprehensive collection of past and ongoing Title IX cases filed against colleges and universities. The database is

searchable by, among other criteria, schools, attorneys, courts and judges, and lawsuit. *See* http://www.titleixforall.com.

(g) KC Johnson Twitter Feed and Other Resources

KC Johnson, Professor at Brooklyn College and the City University of New York Graduate Center, and author, along with Stuart Taylor, Jr., of Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case and The Campus Rape Frenzy: The Attack on Due Process at America's Universities, follows closely issues relating to Title IX litigation and related issues. His twitter feed (@kcjohnson9) is an excellent resource for real time updates on Title IX litigation developments, including case filings, summaries of important oral arguments, court decisions, and settlements. He is also the author, along with Samantha Harris, Esquire, of an in-depth analysis of Title IX litigation brought by accused students since 2011's Dear Colleague Letter. *See* Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 49 (2019).

C. Prepare Timeline of Events in the Disciplinary Proceedings

Typically, the events leading up to a finding of responsibility in a school's disciplinary proceedings will begin with the complainant's report against the respondent, followed by the school's investigation of the complaint, a hearing (if offered), an appeal, and the imposition of a sanction or sanctions. In the single investigator disciplinary model, there typically is not a hearing. Instead, the disciplinary proceedings may be limited to the investigation, the finding of responsibility by the investigator, a review of the finding by a school administrator(s) or review panel, and the sanction. While the Department of Education's 2020 Title IX regulations prohibit schools from using the single investigator model in sexual misconduct cases, this *Guide* still includes information about the model because the future status of the regulations is uncertain as of this writing.

Creating a written timeline of events in the disciplinary proceedings is helpful to the representation for two reasons:

(1) The events in the disciplinary proceedings will determine when the statutes of limitations periods for potential claims in a lawsuit began to run and when they will expire. For example, Title IX claims, which are a staple of accused-student lawsuits, typically (but not uniformly) have the same statute of limitations period as the personal injury statute in the state where the school is located. The personal injury statute often (but not always) is a two-year statute of limitations that typically (but not in all states) begins to run when the respondent knows or reasonably should know of the harm the school has caused him to suffer. Given the relatively short statute of limitations period on Title IX claims, it will be important to determine as early as possible in the representation when such claims will need to be filed. By way of further

example, breach of contract claims, which are also frequently asserted in accused-student lawsuits, typically (but not always) have a four-year limitations period; negligence and other tort claims typically (but not always) have one- or two-year limitations period; and due process claims against public schools sometimes have one- or two-year limitations periods.

(2) The events in the disciplinary proceedings are the foundation for the lawsuit against the school. From the events, you will ascertain the possible parties to name as defendants; whether there is a viable Title IX claim, possible state law claims, and in the case of a public college or university, potential due process claims; the harm caused to the client; and the relief sought.

D. Determine the Parties to Name as Defendants in the Lawsuit

The potential parties to a lawsuit can depend on whether the school is a private or a public institution, and on the claim(s) being asserted. For example, Title IX allows private individuals to bring sex discrimination claims against educational institutions receiving federal funds, including both private and public schools. Sovereign immunity is not an issue with respect to Title IX claims, because Congress has explicitly abrogated states' Eleventh Amendment immunity from suit under any "Federal statute prohibiting discrimination by recipients of Federal financial assistance," *see* 42 U.S.C. § 2000d-7. **However, Title IX claims cannot be asserted against individual parties.**

By contrast, public school employees can be sued in their individual and official capacities for due process violations under the Fourteenth Amendment and 42 U.S.C. § 1983, but such individuals can be protected from due process claims by state sovereign immunity laws as well as by qualified immunity. When filing a § 1983 claim, it is essential to name the correct parties, as a failure to do so can prove fatal to an otherwise viable claim. Generally speaking, the Eleventh Amendment bars § 1983 claims against a university itself, as well as its board of trustees, because they are considered arms of the state.[42] Therefore, courts will dismiss § 1983 cases that have been brought against the university or its board of trustees alone.

State officials sued in their *official* capacity are similarly immune from suit for money damages, but under the doctrine of *Ex Parte Young* may be sued for injunctive relief to prevent future civil rights violation — provided that they are an individual who could actually provide that relief. So, for example, if you are requesting injunctive relief under § 1983 asking a court to allow your client to register for classes, you will need to name an individual defendant (such as the university president) who can effectuate that relief. You can sue state officials in their *individual* capacities both for injunctive relief and for

[42] *See, e.g., Dvorak v. Wright State Univ.*, No. C-3-96-109, 1997 WL 1764779, *8 (S.D. Ohio Sept. 2, 1997) ("[S]ince WSU and its Board of Trustees are arms or alter egos of the State of Ohio, the Court concludes that the Constitutional claims asserted against them, brought pursuant to 42 U.S.C. § 1983, are barred by the Eleventh Amendment to the United States Constitution.").

monetary damages under § 1983, although your ability to recover monetary damages will be subject to the officials' claim of qualified immunity.

The common law in most states allows a private or public school to be sued under contract principles based on the school's alleged breach of its own disciplinary procedures set forth in the school's student handbook or sexual misconduct policy. There are exceptions to this general rule. For example, federal courts in Virginia and North Carolina do not recognize breach of contract claims based on alleged breaches of procedures or promises in the student handbook or sexual misconduct policy.

A respondent might also bring a defamation or an emotional distress claim against the complainant in the underlying disciplinary proceedings.

E. Determine the Client's Harm

The harm suffered by the respondent/client will determine the forms of relief that might be sought in a lawsuit. The harm will depend, in substantial part, on the finding against the client and the sanction imposed by the school. In student sexual misconduct cases, a typical finding would be that the respondent is responsible for sexual assault or some variation on sexual assault, *e.g.*, non-consensual sexual penetration, or non-consensual sexual contact. The sanction can be severe — expulsion or suspension lasting from one semester to multiple years — resulting in the client's permanent separation from the school or a significant separation that results in a gap in the client's academic record or transcript that will forever need to be explained.

In some states, schools are required to include a permanent notation on the respondent's academic transcript that they were found responsible for a violation of the school's sexual misconduct policy and suspended or expelled. For example, in Virginia, certain private schools and all public higher education institutions "shall include a prominent notation on the academic transcript of each student who has been suspended for, has been permanently dismissed for, or withdraws from the institution while under investigation for an offense involving sexual violence under the institution's code, rules, or set of standards governing student conduct stating that such student was suspended for, was permanently dismissed for, or withdrew from the institution while under investigation for an offense involving sexual violence . . . ."[43] Under the statute, "sexual violence" means "physical sexual acts perpetrated against a person's will or against a person incapable of giving consent." *Id.* Regardless of state statutory requirements, many private and public schools may include some form of adverse permanent notation on the respondent's academic transcript, *e.g.*, permanent dismissal.

[43] Va. Code Ann. § 23.1-900. See also N.Y. Educ. Law § 6444(6) ("For crimes of violence, including, but not limited to sexual violence . . . , institutions shall make a notation on the transcript of students found responsible after a conduct process that they were 'suspended after a finding of responsibility for a code of conduct violation' or 'expelled after a finding of responsibility for a code of conduct violation.'").

In addition, schools may maintain the documents and records from the respondent's disciplinary proceeding indefinitely. Those education records are subject to student privacy rights under FERPA, but schools are permitted to release those records *without* the student's consent to specific entities or under certain conditions, including (but not limited to) the Secretary of the Department of Education and state educational authorities, or to comply with lawfully issued subpoenas or judicial orders.[44] The school may also release education records to officials of other schools at which the student seeks or intends to enroll, upon condition that the student be notified and given an opportunity for a hearing to challenge the content of the record.[45] There are additional exceptions to FERPA privacy and consent rules, including disclosure of the final results of any disciplinary proceeding against a student who is found responsible by the institution for any crime of violence (as that term is defined in section 16 of Title 18).[46]

Furthermore, if the client seeks to transfer to another school to complete their education, applies to a graduate or law school, or applies to certain types of prospective government jobs, the client will be required to disclose the finding and sanction if the application asks whether they have ever been subjected to or found responsible in a school disciplinary proceeding.

These consequences of the finding and sanction can have immediate as well as lasting, long-term consequences to the client's educational, employment, and economic prospects. The client may be denied admission to other institutions, but even when a client has been accepted at another school, the gap and the notations in their educational record are formidable obstacles to future opportunities. The client may have lost scholarship or employment offers or may have suffered economic losses from delayed entry into the workforce.[47]

In addition to these educational and economic harms, a finding of responsibility for sexual misconduct may cause irreparable damage to the client's good name and reputation. Some courts have found that a finding of sexual misconduct and sanction of expulsion is a "per se" economic and reputational injury that by its nature is immediate, irreparable, and irreversible.[48]

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[44] 20 U.S.C. § 1232g(b)(1)(A-L); (b)(2)(A-B).
[45] *Id.* § 1232g(b)(1)(B).
[46] *Id.* § 1232g(b)(6)(B). Even though FERPA does technically allow the release of such information, schools generally take a conservative approach to release of records and will generally require a student to sign a FERPA waiver before the school will release such records containing student identifying information.
[47] *See, e.g.,* Veronica J. Finkelstein, *Giving Credit Where Credit Isn't Due (Process): The Risks of Overemphasizing Academic Misconduct and Campus Hearings in Character and Fitness Evaluations*, 38 J. LEGAL PROF. 25 (2013) ("Given the paucity of due process protections provided in the academic setting, it is alarming that the outcome of campus hearings may result in a denial of admission to the bar for failure to demonstrate good moral character.").
[48] *See, e.g., Elmore v. Bellarmine Univ.*, No. 3:18CV-00053-JHM, 2018 WL 1542140, at *7 (W.D. Ky. Mar. 29, 2018) (granting preliminary injunction finding that one-year probation "would damage [plaintiff's] academic and professional reputations and may affect his ability to enroll at other institutions of higher education or

Clients also may have suffered (and may continue to suffer) from psychological and emotional distress, including such symptoms as anxiety, social isolation, loss of sleep, and suicidal ideation.

These harms collectively or individually may give rise to a variety of remedies, including (but not limited to) preliminary or permanent injunctive relief, reversal or remand of the finding, compensatory damages, and damages for emotional distress. (The types of potential remedies are addressed in detail in Section IV of this guide.)

III. EVALUATE POTENTIAL CAUSES OF ACTION: THE LEGAL FRAMEWORK

From 2011 (the year in which OCR issued its now-rescinded Dear Colleague letter) through 2019, more than 500 students had filed lawsuits in federal courts nationwide alleging they were grievously harmed as a result of their schools' mishandling of Title IX sexual misconduct disciplinary proceedings against them. In addition to asserting claims under Title IX itself, these students have asserted an array of state law causes of action, including (but not limited to) breach of contract, breach of implied contract or promissory estoppel, negligence, defamation, and intentional or negligent infliction of emotional distress. Students who have sued public colleges and universities also have asserted constitutional due process claims.[49] In addition to these types of claims in federal court, some students have filed claims in state courts, including (but not limited to) claims pursuant to state law following an adverse determination by a public school in a disciplinary or administrative hearing, *e.g.*, an Article 78 proceeding in New York[50], or a Section 1094.5 proceeding in California.[51]

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medical school and to pursue a career . . . . The record reflects that Plaintiff would have to disclose his probationary status in both undergraduate transfer and medical school applications."); *Painter v. Adams,* No. 3:15-cv-00369-MOC-DCK, 2017 WL 4678231, at *6–7 (W.D.N.C. Oct. 17, 2017) (in context of summary judgment, court noted "the adverse disciplinary decision impugns [plaintiff's] reputation and his ability to gain entry into graduate schools . . . . [O]ne's ability to access or continue with post-secondary educational opportunities may well implicate protected liberty interests."); *Doe v. Rector & Visitors of George Mason Univ.*, 179 F. Supp. 3d at 587 ("[T]here can be no doubt that plaintiff has suffered an irreparable injury and that he has no adequate remedy at law . . . . Defendants' unconstitutional conduct deprived plaintiff of three semesters of education . . . thereby delaying plaintiff's graduation from that institution. The clock cannot be turned back . . . ."); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 601 (D. Mass 2016) ("A finding of responsibility for sexual misconduct can also have significant consequences off-campus. Post-graduate educational and employment opportunities may require disclosure of disciplinary actions taken by a student's former educational institution.").

[49] FIRE has compiled a summary of opinions from approximately 117 federal courts, as well as a number of state courts, that have expressed concerns about the lack of meaningful procedural protections in campus adjudications since 2011. *See* Tyler Coward, *Mountain of evidence shows the Department of Education's prior approach to campus sexual assault was 'widely criticized' and 'failing'*, FIRE (Nov. 15, 2018), https://www.thefire.org/mountain-of-evidence-shows-the-department-of-educations-prior-approach-to-campus-sexual-assault-was-widely-criticized-and-failing.

[50] N.Y. C.P.L.R. §§ 7801–7806.

[51] Cal. C.C.P., Ch. 2, Writ of Mandate, § 1094.5.

The focus in this guide is on the three causes of action that have received the most attention from the courts: Title IX, due process, and breach of contract. The following is an overview of the legal framework for each of these causes of action in the context of student sexual misconduct disciplinary proceedings.

A. Title IX (Private and Public Schools)

1. Title IX Claims in the Courts: 4 Theories of Liability

In the context of university disciplinary proceedings, courts have interpreted Title IX to prohibit "the imposition of university discipline where gender is a motivating factor in the decision to discipline."[52]

Traditionally, courts have found that students — male or female — who have been subject to disciplinary proceedings can bring Title IX lawsuits for unlawful gender discrimination under four possible theories or standards of liability: erroneous outcome, deliberate indifference, selective enforcement, and archaic assumptions. Of these, erroneous outcome and selective enforcement are the most commonly alleged — and most successful — theories in cases arising from campus Title IX adjudications. This framework was established in the 1994 Second Circuit decision, *Yusuf v. Vassar College*, 35 F.3d at 715, and was the primary (rather rigid) framework courts used to analyze Title IX claims brought by accused students until a recent Seventh Circuit decision, *Doe v. Purdue University*, 928 F.3d 652 (7th Cir. 2019), discussed below, which took a more holistic and flexible approach. While the Seventh Circuit decision in *Purdue* has created a trend in some circuits away from the rigid *Yusuf* framework, it is not a uniform trend and many courts still look to *Yusuf* so we begin our discussion focusing on the *Yusuf* framework.

(a) Erroneous Outcome

(i) Articulable Doubt on the Accuracy of the Outcome

In an "erroneous outcome" claim, the plaintiff alleges that he or she "was innocent and wrongly found to have committed an offense."[53] A plaintiff who claims an erroneous outcome was reached "must allege particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding."[54] For example, a plaintiff may allege "particular evidentiary weaknesses behind the finding of an offense such as a motive to lie on the part of the complainant or witnesses, particularized strengths of the

[52] *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994).
[53] *Id.*
[54] *Id.*

defense, or other reason to doubt the veracity of the charge."[55] A plaintiff "may also allege particular procedural flaws affecting the proof."[56]

(ii) Gender Bias as a Motivating Factor Behind the Erroneous Finding

In addition to allegations demonstrating an erroneous outcome, a plaintiff must allege "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding" or that the punishment imposed on the plaintiff was a result of gender bias.[57] Gender bias may be shown by evidence such as "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender."[58] Statistical evidence may be used to show a pattern of discriminatory conduct — for example, statistics showing that "males invariably lose" when charged with sexual misconduct by the university.[59] "Title IX, like other anti-discrimination schemes, permits an inference that a significant gender-based statistical disparity may indicate the existence of discrimination."[60]

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[55] *Id.*

[56] *Id.* Courts have found "articulable doubt" in the outcome of disciplinary proceedings in a wide variety of factual circumstances. *See, e.g.*, *Norris v. Univ. of Colo., Boulder*, 362 F. Supp. 3d 1001, 1011–12 (D. Colo. 2019) (alleged procedural flaws in the disciplinary process that cast articulable doubt included allegations university withheld notice of investigation until plaintiff was interviewed by police, unreasonably denied him access to the investigation file, denied him a hearing and the right to cross-examine his accuser, and precluded him from questioning witnesses); *Doe v. Univ. of Miss.*, 361 F. Supp. 3d 597, 607 (S.D. Miss. 2019) (allegations that investigator excluded exculpatory evidence, failed to interview key witnesses, and failed to consider medical records that made clear complainant did not think she was raped sufficiently cast articulable doubt); *Doe v. Miami Univ.*, 882 F.3d 579, 592–93 (6th Cir. 2018) ("the unresolved inconsistency in [the complainant's] statement, the unexplained discrepancy in the hearing panel's finding of fact, and the alleged use of an erroneous definition of consent create[d] 'some articulable doubt' . . . ."); *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573, 584–85 (E.D. Va. 2018) (allegations that male student was deprived of the opportunity to identify and interview potential witnesses, gather exculpatory evidence, meet with the single adjudicator in person, or cross-examine Roe, coupled with an investigatory report that omitted or never investigated exculpatory material and witness statements that Roe was "happy and giddy" following the allegedly violent assault, undermined the accuracy of the adjudicator's decision and raised articulable doubt).

[57] *Yusuf* at 715–16.

[58] *Id.* at 715.

[59] *Id.* at 716.

[60] *Cohen v. Brown Univ.*, 101 F.3d 155, 170–71 (1st Cir. 1996). Federal courts across the country have found evidence of gender bias in a variety of factual circumstances. *See, e.g.*, *Norris,* 362 F. Supp. 3d at 1008–09, 1012–16 (denying motion to dismiss erroneous outcome claim, finding sufficient causal connection between flawed outcome and gender bias where male student alleged university was under "federal, local, and campus pressure to comply with Title IX," coupled with allegations of "biases and conflicts of interest from relevant employees of the University" and "specific decisions the Investigators made throughout the process . . . bolstering the inference of bias"); *Doe v. Univ. of Miss.*, 361 F. Supp. 3d at 607–08 (denying motion to dismiss erroneous outcome claim in Second Amended Complaint, finding sufficient allegations of gender bias where male student alleged a member of the panel that handled his hearing "had previously mocked the defenses raised by men accused of sexual assault," and "Defendants treated him less favorably than Roe for engaging in the same conduct: 'proceed[ing] with sexual activity . . . while [both are] under the influence of alcohol . . . .'");

One of the biggest challenges to this type of claim is the fact that a number of federal district courts have distinguished between *gender* bias and bias in favor of alleged victims of sexual assault and against their alleged perpetrators. Schools have argued, and a number of courts have held, that Title IX does not preclude "pro-victim" bias or bias against accused students.[61] Thus, it is critically important, when presenting school-specific evidence of gender bias, to clearly present any connections between administrators' biased statements and behaviors and gender, rather than just respondent status.

In *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. 2016), the Second Circuit found that a male plaintiff sufficiently pleaded evidence of gender bias by alleging that university decision-makers were motivated to favor the female complainant over the male respondent in response to "criticism of the University, both in the student body and in the public media, accusing the University of not taking seriously complaints of female students alleging sexual assault by male students."[62] The Second Circuit observed that Columbia's actions in response to that "substantial criticism," coupled with allegations that the investigator and panel "declined to seek out potential witnesses Plaintiff had identified as sources of information favorable to him" and "failed to act in accordance with University procedures designed to protect accused students," made it "entirely plausible that the University's decision-makers and its investigators were motivated to favor the accusing female over the accused male, so as to protect themselves and the University from accusations that they failed to protect female students from sexual assault."[63] The Second Circuit also held that a complaint under Title IX survives a Rule 12(b)(6) motion to dismiss with respect to the element of discriminatory intent "if it pleads specific facts that support a minimal plausible inference" of gender bias.[64]

Doe v. Rider Univ., No. 3-16-cv-04882-BRM-TJB, 2020 WL 634172, *10–11 (D.N.J. Oct. 31, 2018) (plausible inference of gender bias was created by male student's allegations that the university's policies and procedures were "deliberately designed to subject male students as a group to less favorable treatment than female students" and that the university accepted "inconsistent female testimony"; statements by university officials that the university is working "collaboratively" with "victim advocacy" and "victim-centered" organizations, and that "men are the perpetrators"; and Rider's launch of "the Rider's Men's Project," whose aim was to prevent violence and abuse); *Doe v. Trs. of Univ. of Pa.*, 270 F. Supp. 3d 799, 823–24 (E.D. Pa. 2017) (denying motion to dismiss on basis that "training materials for university employees who are involved in disciplinary proceedings encourage employees to believe the accuser and presume the accused's guilt," combined with "possible pro-complainant bias on the part of University officials, set forth sufficient circumstances suggesting inherent and impermissible gender bias to support a plausible claim . . . under an erroneous outcome theory.").

[61] *See, e.g.*, *Doe v. Univ. of Denver*, No. 17-cv-01962-PAB-KMT, 2019 WL 3943858, at *6 (D. Colo. Aug. 20, 2019) ("[E]ven if [the Title IX Coordinator's] emails demonstrate a bias in favor of complainants of sexual assault, they do not demonstrate a bias in favor of women over men."); *Does v. Regents of the Univ. of Minn.*, No. 18-1596 (DWF/HB), 2019 WL 2601801, at *5 (D. Minn. June 25, 2019) ("a bias in favor of alleged victims and against alleged perpetrators is not the equivalent of bias against male students").

[62] *Id.* at 57.

[63] *Id.* at 56–57.

[64] *Id.* at 56.

Decisions by the Sixth and Seventh Circuits have found that a male student's allegations of pressure on the university, combined with specific facts relating to gender bias in the disciplinary proceeding, were sufficient to establish gender bias at the pleading stage.[65]

Many district courts likewise have found that male students sufficiently plead the element of gender bias by alleging facts showing their schools favored female complainants and disfavored male respondents in response to student, governmental, or public media pressure accusing the school of failing to adequately address complaints of sexual assault by female students, coupled with factual allegations of particular instances of gender bias in the student's disciplinary proceeding.[66]

On a cautionary note, courts have ruled that gender bias allegations were insufficient where the student relied on "conclusory" allegations of nationwide pressure on universities generally but failed to allege "specific" criticisms or pressure against the university or to identify particular instances of bias in the student's disciplinary proceeding.[67]

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[65] *See Doe v. Purdue Univ.*, 928 F.3d 652; *Baum*, 903 F.3d at 586 (explaining that the pressure of a Department of Education investigation and the resulting negative publicity "provides a backdrop that, when combined with other circumstantial evidence of bias in Doe's specific proceeding, gives rise to a plausible claim" of gender bias); *Doe v. Miami Univ.*, 882 F.3d at 594 (allegation that government pressure, combined with other allegations including statistics showing all recently accused men were found responsible, "support a reasonable inference of gender discrimination.").

[66] *See, e.g., Doe v. Syracuse Univ.*, No. 5:18-CV-377, 2019 WL 2021026, at *7–8 (N.D.N.Y. May 8, 2019) (finding gender bias was adequately pleaded based on allegations the investigator "exhibited gender bias due to his prior professional experience advocating for victims of sexual assault" and "assisted Jane in developing her story and accepted, without question, major changes in that story," coupled with allegations that defendants were "influenced by biased sexual assault trauma training they received" and that the university "faced pressure internally and externally from the federal government which resulted in defendants' gender bias."); *Norris*, 362 F. Supp. 3d at 1012–13 (finding gender bias was adequately pleaded based on allegations regarding unequal treatment of the parties throughout the investigation and disciplinary process, the investigator's alleged conflicts of interest, and alleged inconsistencies and misstatements of fact in the investigators' findings, together with allegations pointing to OCR, media, and campus pressure to "aggressively pursue sexual assault cases . . . in a manner biased against males."); *Doe v. George Washington Univ.*, 366 F. Supp. 3d 1, 11–13 (D.D.C. 2018) (finding allegations of gender bias were sufficient to avoid dismissal, when allegations included "two OCR investigations targeting GW's disciplinary practices," "unwanted public attention, including two other ongoing federal lawsuits brought by female students against GW for its recent handling of their sexual assault claims," and an official "GW statement" noting that 10-out-of-10 alleged cases of sexual violence that went before a hearing board resulted in a finding of responsibility).

[67] *See, e.g.*, *Doe v. Columbia Coll. Chi.*, 933 F.3d 849, 855 (7th Cir. 2019) (affirming dismissal of male student's Title IX claim based on insufficient allegations of gender bias, stating plaintiff cannot rely on "generalized allegations alone" but "must combine them with facts particular to his case," finding plaintiff's factual allegations lacked "the particularized 'something more' that is required to survive a motion to dismiss."); *Doe v. Univ. of Dayton*, 766 Fed. Appx. 275, 281–82 (6th Cir. 2019) (dismissing erroneous outcome claim based on inadequate gender bias allegations: "the fact that sexual assault proceedings have been brought only against male students is not in and of itself sufficient to infer gender bias," finding plaintiff failed to draw any "particularized causal connection" between gender bias and Doe's own disciplinary proceeding and suspension); *Doe v. Va. Polytechnic Inst. and State Univ.*, Nos. 7:18-cv-170, 7:18-cv-320, 7:18-cv-492, 7:18-cv-523, 2019 WL 3848794, at *18 (W.D. Va. Aug. 15, 2019) (dismissing erroneous outcome claim based on "conclusory" allegations of gender bias, including that "universities in general were under scrutiny for the

These cases indicate that gender bias is a fact-specific element of a Title IX erroneous outcome claim, and that courts determine whether the complaint sufficiently alleges gender bias based on the particular facts alleged in each case.

(b) Selective Enforcement

In a selective enforcement claim, the plaintiff alleges that, "regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender."[68] "To support a claim of selective enforcement, [a male plaintiff] must demonstrate that a female was in circumstances sufficiently similar to his own and was treated more favorably by the University."[69] The male plaintiff must show that "the University's actions against [the male plaintiff] were motivated by his gender and that a similarly situated woman would not have been subjected to the same disciplinary proceedings." *Doe v. Univ. of the South*, 687 F. Supp. 2d 744, 757 (E.D. Tenn. 2009). Some courts have limited the selective enforcement theory to a situation where the accused male student has accused the female student of sexual misconduct, but the school failed to investigate or prosecute the male student's complaint, or treated his complaint differently and less favorably than the female student's complaint.[70]

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allegedly pervasive nature of sexual assault" and that "there had been several [OCR] investigations into universities' handling of such assaults"; complaint "makes no effort . . . to tie those allegations to Virginia Tech specifically . . . ."); *Doe v. Univ. of the Scis.*, No. 19-358, 2019 WL 3413821, at *5–6 (E.D. Pa. July 29, 2019) (dismissing erroneous outcome claim, finding plaintiff failed to adequately allege gender bias based on vague averments that "there has been substantial criticism of universities," and that "on information and belief, the University's administration was cognizant of, and sensitive to, these criticisms.").

[68] *Yusuf*, 35 F.3d at 715.

[69] *Mallory v. Ohio Univ.*, 76 Fed. Appx. 634, 641 (6th Cir. 2003).

[70] *See, e.g.*, *Austin v. Univ. of Or.*, 925 F.3d 1133, 1138 (9th Cir. 2019) (dismissing selective enforcement claim on grounds "the complaint does not claim that any female University students have been accused of comparable sexual misconduct, and thus fails to allege that similarly situated students — those accused of sexual misconduct — are disciplined unequally."); *Doe v. Univ. of Dayton*, 766 Fed. Appx. at 284 (dismissing selective enforcement claim because "Doe has not identified any woman accused of sexual assault at Dayton University who was not referred to disciplinary proceedings."); *Doe v. Univ. of the Scis.*, 2019 WL 3413821, at *6–7 (dismissing selective enforcement claim because "Doe never accused Roe 2 of sexual misconduct . . . ."). *Cf. Doe v. Univ. of Scis.*, 961 F.3d 203, 210–11 (3d Cir. 2020) (after adopting Seventh Circuit's pleading standard, held plaintiff pled a plausible discrimination claim based on allegations that University investigated and expelled him but chose not to investigate three female students for potential violation of policy provisions on sexual misconduct and confidentiality); *Doe v. Quinnipiac Univ.*, 404 F.Supp.3d 643, 661 (D. Conn. 2019) (court denied summary judgment on selective enforcement claim where the record reflected a genuine dispute of material fact as to whether university applied "materially disparate standards" to the respective claims of "intimate partner violence" made by the male student and Jane Roe); *Doe v. Brown Univ.*, 327 F. Supp. 3d 397, 412–13 (D.R.I. 2018) (allowing male student to proceed with selective enforcement claim based on allegation the university "decided to investigate John when Jane made a complaint of sexual assault against him," but "when John claimed that Jane sexually assaulted him, Brown took no action . . . .").

Selective enforcement claims can be particularly relevant in cases of mutual intoxication. Courts have allowed a number of selective enforcement claims by accused male students to proceed, at least beyond the motion to dismiss stage, on these grounds.[71]

(c) Deliberate Indifference and Archaic Assumptions

In a "deliberate indifference" claim, a plaintiff must "demonstrate that an official of the institution who had authority to institute corrective measures had actual notice of, and was deliberately indifferent to, the [university's] misconduct."[72]

Schools have argued (and a few courts have found) that the Supreme Court's decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 649–50 (1999), limits deliberate indifference claims to cases where the plaintiff was subjected to sexual harassment and school officials were deliberately indifferent to the harassment, as opposed to cases alleging that school officials were deliberately indifferent to a biased disciplinary process.[73] In at least two published cases, however, district courts rejected this restrictive interpretation of the deliberate indifference standard.[74]

The archaic assumptions standard "finds discriminatory intent in actions resulting from classifications based on archaic assumptions."[75] Courts have found that the archaic assumptions standard applies "when a plaintiff seeking equal athletic opportunities demonstrates discriminatory intent in actions taken because of classifications based upon

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[71] *See, e.g.*, *Doe v. Rollins Coll.*, 352 F. Supp. 3d 1205, 1211 (M.D. Fl. 2019) ("At the motion to dismiss stage, the Court finds that Plaintiff's allegations plausibly make out a selective enforcement claim against Rollins. As Plaintiff alleges, the information Rollins collected during the investigation could have equally supported disciplinary proceedings against Jane Roe for also violating the Sexual Misconduct Policy. Yet Rollins treated Jane Roe—a female student—differently."); *Rossley v. Drake Univ.*, 342 F. Supp. 3d 904, 931 (S.D. Iowa 2019) ("There are factual questions as to whether Defendants' decision to initiate disciplinary proceedings against Plaintiff but not Jane Doe—even though they were both accused of sexual misconduct—was motivated by gender. These factual questions make it impossible for the Court to grant Defendants' motion for summary judgment on Plaintiff's selective enforcement claim.").

[72] *Mallory*, 76 Fed. Appx. at 638.

[73] *See, e.g.*, *Doe v. Univ. of Dayton*, 766 Fed. Appx. at 283–84; *Baum*, 903 F.3d at 588; *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 190–91 (D.R.I. 2016).

[74] *See Doe v. Amherst Coll.*, 238 F. Supp. 3d 195, 223–24 (D. Mass. 2017) (refusing to dismiss male student's deliberate indifference claim, finding that the college knew the female complainant may have engaged in sexual activity with Doe while he was "blacked out" and thus incapable of consenting, but "did not take even minimal steps to determine whether Doe should have been viewed as a victim" under the terms of its sexual misconduct policy); *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 752, 751 n.2 (S.D. Ohio 2014) (finding that a deliberate indifference claim can apply to a plaintiff's "challenge of disciplinary proceedings," on grounds that "he was subjected to unfounded allegations and an unfair process due in part [to] . . . his status as a male student accused of assault"); *see also Doe v. Rider Univ.*, 2020 WL 634172, at *13 (allowing male student found responsible for sexual assault and expelled to proceed with deliberate indifference claim, finding "Plaintiff has plead enough facts to plausibly infer that Defendant's actions were motivated by his sex," and that "Defendant pursued disciplinary proceedings to combat the federal pressures occurring prior to and at the time of the disciplinary hearing," citing *Wells*, 7 F. Supp. 3d 746).

[75] *Mallory*, 76 Fed. Appx. at 638–39.

archaic beliefs and stereotypes about gender."[76] Schools have argued (and some courts have found) that the archaic assumptions theory is limited to allegedly discriminatory actions in school *athletic* programs.[77] Other courts have not limited the archaic assumptions theory to athletics.[78]

2. Title IX Claims in the Courts: A More "Straightforward" Approach

More recently, several circuit courts have moved away from the four tests set forth in *Yusuf* and have adopted a more straightforward approach first suggested by the U.S. Court of Appeals for the Seventh Circuit in *Doe v. Purdue University*, 928 F.3d 652, which held:

> We see no need to superimpose doctrinal tests on the statute. All of these categories simply describe ways in which a plaintiff might show that sex was a motivating factor in a university's decision to discipline a student. We prefer to ask the question more directly: do the alleged facts, if true, raise a plausible inference that the university discriminated against [the accused] 'on the basis of sex'?[79]

Although this shift is a recent development, it appears thus far that claims of sex discrimination in this context analyzed under this more holistic framework have a better success rate than those evaluated under the strict tests set forth in *Yusuf*.

B. Due Process Claims (Public School Officials)

Many students who have been expelled or suspended by their public schools for alleged sexual misconduct have brought claims for violations of the Due Process Clause of the

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[76] *Marshall v. Ohio Univ.*, No. 2:15-CV-775, 2015 WL 7254213, at *8 (S.D. Ohio Nov. 17, 2015). *See also Pederson v. La. State Univ.*, 213 F.3d 858, 881 (5th Cir. 2000) (concluding that "because classifications based on 'archaic' assumptions are facially discriminatory, actions resulting from an application of these attitudes constitutes intentional discrimination.").

[77] *See, e.g.*, *Does v. Regents of the Univ. of Minn.*, No. 18-1596 (DWF/HB), 2019 WL 2601801, at *4–5 (D. Minn. June 25, 2019) *Marshall v. Ohio Univ.*, No. 2:15-cv-775, 2015 WL 7254213, at *8 (S.D. Ohio Nov. 17, 2015).

[78] *See, e.g.*, *Kappa Alpha Theta Fraternity, Inc. v. Harvard Univ.*, No. 18-12485-NMG, 2019 WL 3767517, at *7 (D. Mass. Aug. 9, 2019) (in suit challenging Harvard's policy disfavoring single sex campus organizations, district court denied motion to dismiss Title IX claim under a theory of "gender stereotyping," finding that "Harvard's purported ideal of the 'modern' man or woman is informed by stereotypes about how men and women should act").

[79] *Doe v. Purdue Univ.*, 928 F.3d at 667-68. *See also Doe v. Univ. of the Scis.*, 961 F.3d at 209 ("[W]e adopt the Seventh Circuit's straightforward pleading standard and hold that, to 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."); *Sheppard v. Visitors of Virginia State University*, 2021 WL 1227809, __ F. 3d __ (4th Cir. 2021) ("We agree with the Seventh Circuit's approach and see no need to deviate from the text of Title IX."); (*Rossley v. Drake Univ.*, 979 F.3d 1184, 1192 (8th Cir. Nov. 5, 2020) (ruled against plaintiff on summary judgment but affirmed its adoption of Seventh Circuit pleading standard that plaintiff "must allege adequately that the University disciplined [the plaintiff] on the basis of sex—that is, because he is a male" (citation omitted)); *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 947 (9th Cir. 2020) ("[W]e find persuasive the Seventh Circuit's approach to Title IX claims in this context."); *Doe v. American Univ.*, No. 19-cv-03097, 2020 WL 5593909, at *7 (D.D.C. Sept. 18, 2020) ("This court adopts the straightforward pleading standard set forth by the Seventh Circuit in *Doe v. Purdue University*.").

Fourteenth Amendment to the U.S. Constitution pursuant to 42 U.S.C. § 1983. Section 1983 creates a private cause of action for persons who are deprived of a federal constitutional or statutory right by a "person" acting under color of state law.[80] The Fourteenth Amendment provides that no state shall deprive any person of life, liberty, or property without due process of law. Public colleges or universities are considered state actors. Accordingly, their employees act under color of state law and are subject to the Due Process Clause of the Fourteenth Amendment.

Federal circuit courts have ruled that the due process rights conferred by the Fourteenth Amendment are implicated by higher education disciplinary actions.[81] The Supreme Court of the United States has held that, when a school disciplines a student for nonacademic reasons, the Due Process Clause requires—at the very least—that the student "must be given some kind of notice and afforded some kind of hearing."[82]

With respect to notice, the student — at a minimum — must "be given oral or written notice of the charges against him" and, if he denies them, "an explanation of the evidence the authorities have . . . ."[83] In addition to these notice requirements, the Sixth Circuit has found that "[n]otice satisfies due process if the student had sufficient notice of the charges against him and a meaningful opportunity to prepare for the hearing."[84] Accused students involved in sexual misconduct disciplinary proceedings have successfully asserted due process claims based on inadequate notice.[85]

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[80] *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

[81] *See, e.g., Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017) ("State universities must afford students minimum due process protections before issuing significant disciplinary decisions. . . . [A]llegations of sexual assault may 'impugn [a student's] reputation and integrity, thus implicating a protected liberty interest.'" (citation omitted)); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12, 14 (1st Cir. 1988) (recognizing that a student has a protected constitutional right to higher education and is entitled to "procedural due process" to avoid "unfair or mistaken exclusion from the educational environment . . . ."). Note that the Seventh Circuit is a significant outlier in this regard. *See, e.g., Charleston v. Bd. of Trs. of Univ. of Ill. at Chi.*, 741 F.3d 769, 772 (7th Cir. 2013) ("[O]ur circuit has rejected the proposition that an individual has a stand-alone property interest in an education at a state university, including a graduate education.").

[82] *Goss*, 419 U.S. at 579; *see also Haidak*, 933 F.3d at 66 ("Notice and an opportunity to be heard have traditionally and consistently been held to be the essential requisites of procedural due process."); *Gorman*, 837 F.2d at 13 (federal courts "have uniformly held that fair process requires notice and an opportunity to be heard before the expulsion or significant suspension of a student from a public school."). "[T]he concept of due process is equivalent to 'fundamental fairness' . . . . Notice and an opportunity to be heard have traditionally and consistently been held to be the essential requisites of procedural due process." *Newman v. Commonwealth*, 884 F.2d 19, 23 (1st Cir. 1989) (citation omitted); *Goss*, 419 U.S. at 574 (When a right is protected by the Due Process Clause, a state "may not withdraw [it] on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred . . . .").

[83] *Id.* at 581.

[84] *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 638 (6th Cir. 2005) (citation omitted).

[85] *See, e.g., Doe v. Purdue Univ.*, 928 F.3d 652, at 663 (7th Cir. 2019) (reversing district court dismissal of due process claim, finding male student accused of sexual misconduct adequately pled disciplinary proceeding was "fundamentally unfair," in violation of his due process rights, by alleging that "John received notice of Jane's allegations and denied them, but Purdue did not disclose its evidence to John. . . . [W]ithholding the

With respect to the hearing, "the inquiry is whether, under the particular circumstances presented, the hearing was fair, and accorded the individual the essential elements of due process."[86] Due process requires, at a minimum, "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[87]

One question that has arisen in many cases is whether cross-examination is required at a hearing under the Due Process Clause, and if so, whether the accused student must be permitted the right to directly cross-examine his accuser and witnesses, or whether due process is satisfied by some other means of cross-examination.[88]

Some courts have held that the Due Process Clause requires a live hearing when credibility is at issue, and some courts have noted that a school violates due process when it permits the complainant to not attend the hearing, thereby depriving both the accused student and the hearing panel of the opportunity to cross-examine or question the complainant.[89]

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evidence on which it relied in adjudicating his guilt was itself sufficient to render the process fundamentally unfair."); *Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d at 615–18 (granting summary judgment to plaintiff on due process claim based, in part, on defendants' failure to provide constitutionally adequate notice of the specific incidents for which he was being considered for expulsion).

[86] *Gorman*, 837 F.2d at 16.

[87] *Mathews v. Eldridge*, 424 U.S. 319, 222 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *Haidak*, 933 F.3d at 71-72 (holding student did not receive constitutionally adequate process when he was suspended for five months pending the expulsion hearing without prior notice and a hearing on the suspension).

[88] *See, e.g., Id.* at 69 ("[D]ue process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'"); *Baum*, 903 F.3d at 585–86 ("[I]f 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.") A significant number of federal district courts elsewhere have relied on these decisions, or on Supreme Court or other circuit court decisions, with respect to the need for some form of meaningful cross-examination at a hearing in student-public school disciplinary cases involving competing "she said/he said" narratives. *See, e.g., Norris*, 362 F. Supp. 3d at 1019–20; *Oliver v. Univ. of Tex. S.W. Med. Sch.*, No. 3:18-CV-1549-B, 2019 WL 536376, at *11, 13 (N.D. Tex. Feb. 11, 2019); *Doe v. Univ. of Miss.*, 361 F.Supp.3d 597, 612–13 (S.D. Miss. 2019); *Powell v. Mont. St. Univ.*, No. CV 17-15-BU-SEH, 2018 WL 672806, at *7 (D. Mont. Dec. 21, 2018); *Lee v. Univ. of N.M.*, No. 17-1230, Order, at 2-3 (D.N. Mex., Sept. 20, 2018); *Doe v. Pa. St. Univ.*, 336 F. Supp. 3d 441, 449–50 (M.D. Pa. 2018); *Nokes v. Miami Univ.*, No. 1:17-cv-482, 2017 WL 3674910, at *12 n.10 (S.D. Ohio Aug. 25, 2017). *See also* Samantha Harris, *In flawed but ultimately helpful ruling, First Circuit recognizes limited right to cross-examination in campus disciplinary proceedings*, FIRE Newsdesk (Aug. 8, 2019), https://www.thefire.org/in-flawed-but-ultimately-helpful-ruling-first-circuit-recognizes-limited-right-to-cross-examination-in-campus-disciplinary-proceedings.

[89] *See, e.g., Doe v. Purdue Univ.*, 928 F.3d at 664 (finding procedures employed by the university in plaintiff's disciplinary proceeding were fundamentally unfair under the Due Process Clause where the panel concluded "Jane was the more credible witness . . . without ever speaking to her in person" in a case "that boiled down to a 'he said/she said'" credibility issue); *Doe v. Univ. of Cincinnati*, 872 F.3d at 401–03 (rejecting the school's argument that Jane Roe's "nonappearance did not impact the fairness of the proceedings because Doe still had an opportunity to be heard"; the fact that the hearing panel decided the parties' "competing claims" and "resolved this 'problem of credibility' . . . without seeing or hearing from Roe at all . . . is disturbing and, in this case, a denial of due process"); *Doe v. Univ. of Miss.*, 361 F. Supp. 3d at 611–13 (denying university's motion to dismiss male student's due process claim in part because "[n]either Roe nor any other witnesses against Doe appeared at the hearing," so that "he was not permitted to cross-examine — either directly or through written

Other issues that may give rise to due process claims include, but are not limited to:

- The exclusion of exculpatory evidence.[90]
- Not allowing a respondent to see the evidence against them.[91]
- The use of biased training materials to train hearing panelists.[92]

Finally, remember that no matter what happens with the new regulations—which tried to fix many of these problems—due process principles will still trump whatever the regulations say. In other words, even without the new regulations, you can still rely on due process arguments when you're dealing with a public school.

C. Breach of Contract Claims (Private and Public Schools)

As noted at the beginning of this Section, accused students alleging Title IX violations may also (and often do) assert state law claims, including, most frequently, breach of contract.

The elements of student breach of contract claims against their schools are, at a minimum, the same elements of all breach of contract actions: the existence of a contract (*i.e.*, an offer, acceptance and consideration), the plaintiff's performance of his own contractual obligations, the defendant's alleged breach, and damages resulting from the breach.[93]

With respect to the existence of a contract, the courts in most (but not all) jurisdictions recognize that the "basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution that are made available to the matriculant become a part of the contract."[94] These courts generally hold that the school's student handbook, code of conduct, and

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questions submitted to the hearing panel — the witnesses whose accounts of the evening led to his discipline."); *Doe v. N. Mich. Univ.*, 393 F. Supp. 3d 683, 694 (W.D. Mich. 2019) (denying motion to dismiss due process claim based on allegations plaintiff was not given "a live hearing with an opportunity to cross-examine his accuser.").

[90] *See, e.g.*, *Doe v. Univ. of Conn.*, No. 3:20cv92 (MPS), 2020 WL 406356 (D. Conn. Jan. 23, 2020) (finding that a student's due process rights were likely violated by the university's exclusion of exculpatory witnesses).

[91] *See, e.g.*, *Doe v. Purdue Univ.*, 928 F.3d at 663 ("[W]ithholding the evidence on which it relied in adjudicating his guilt was itself sufficient to render the process fundamentally unfair.").

[92] *See, e.g.*, *Doe v. Univ. of Miss.*, 361 F. Supp. 3d at 610 ("[T]here is a question whether the panel was trained to ignore some of the alleged deficiencies in the investigation and official report the panel considered.").

[93] Restatement (Second) of Contracts, §§ 22, 71, 235, 243, 347 (1981).

[94] *Zumbrun v. Univ. of S. Cal.*, 25 Cal. App. 3d 1, 10, 101 Cal. Rptr. 499, 504 (Cal. Ct. App. 1972) (collecting cases from numerous states); see also *Chang v. Purdue Univ.*, 985 N.E.2d 35, 46 (Ind. App. 2013) ("[T]he most pervasive and enduring theory is that the relationship between a student and an educational institution is contractual in nature. . . . [A] university's catalogues, bulletins, circulars, and regulations that are made available to its students become a part of this contract . . . ."(citation omitted)).

sexual misconduct policy are contracts between the school and the student and may be the basis for student breach of contract claims against the school in sexual misconduct cases.[95]

Depending on the state where the complaint is filed, a breach of contract claim may be based on the school's breach of general promises in the applicable student handbook, code of conduct, or sexual misconduct policy (*e.g.*, promises to conduct a "fair and equitable process," or a contractual guarantee of "fundamental fairness," etc.). In perhaps the most significant breach of contract decision to date in this context, the U.S. Court of Appeals for the Third Circuit held that a private university's contractual promise of a "fair" and "equitable" procedure "require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers."[96]

Courts in other states require the plaintiff to point to specific procedures or provisions in the school's student handbook, code of conduct, or sexual misconduct policy that the school allegedly failed to follow in the plaintiff's disciplinary proceeding.[97] In some

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[95] Not all state courts recognize that a school's student handbook, code of conduct, or sexual misconduct policy are enforceable contracts. *See, e.g., Shaw v. Elon Univ.*, No. 1:18CV557, 2019 WL 3231754, at *4, 7 (M.D.N.C. July 18, 2019) (granting motion to dismiss breach of contract claim, noting "most North Carolina lower courts and federal courts applying North Carolina law have found that university handbooks, bulletins, guidelines, codes of conduct, manuals, and the like are not independently enforceable contracts . . . . Elon's procedures are couched in language . . . [that] is aspirational, establishing no firm and definite timeline or terms."); *Doe v. Washington and Lee Univ.*, No. 6:14–CV–00052, 2015 WL 4647996, at *11 (W.D. Va. Aug. 5, 2015) (under Virginia law, a university's Student Handbook and Sexual Misconduct Policy are not enforceable contracts because the promises in them are "aspirational" statements, educational ideals, or policies that are "subject to continual examination and revision.").

[96] *Doe v. Univ. of the Scis.*, 961 F.3d at 215. *See also Doe v. Quinnipiac Univ.*, 404 F.Supp.3d at 668 (denying university's motion for summary judgment on breach of contract claim based, in part, on sufficient evidence of breaches of general promises in the school's policies and procedures, including promises "to comply with Title IX" and "to respond to complaints promptly, thoroughly, and equitably and to conduct an unbiased investigation."); *Doe v. Grinnell Coll.*, 473 F.Supp.3d 909, 935 (S.D. Iowa 2019) (denying college's motion for summary judgment on male student's breach of contract claim where it is undisputed that Grinnell deviated from its policy, and a reasonable jury could conclude that the deviations "made the disciplinary proceedings unfair to [Plaintiff] and thus amounted to a material breach of the contract that caused him harm.").

[97] *See, e.g., Montague v. Yale Univ.*, No. 3:16-cv-00885 (D. Conn. Mar. 29, 2019) (applying Connecticut law, denying defendant's summary judgment motion on breach of contract claim based on allegations university "violated its own confidentiality policies . . . when it divulged certain information . . . to the complainant," "manipulated its own procedures by pressuring Jane Roe to file a complaint," and violated its procedures "by allowing Roe to fully participate in the proceedings against [the accused student] even though she was not the named complainant"); *Doe v. Princeton Univ.*, No. 18-16539 (MAS) (LHG), 2019 WL 161513, at *8–9 (D.N.J. Jan. 9, 2019) (applying New Jersey law, denying motion to dismiss breach of contract claim where Princeton's procedures allow delay of proceedings for "good cause," and plaintiff plausibly alleged Princeton breached its "good cause" provision); *Doe v. George Washington Univ.*, 366 F. Supp. 3d at 11 (applying D.C. law, court refused to dismiss plaintiff's breach of contract claim based on allegations that the "Appeals Panel was presented with direct contradictions in the evidence" with respect to Roe's capacity to consent and whether Doe should reasonably have known she was incapacitated and "appears to have strained to overlook such contradictions . . . ."); *Sung Park v. Ind. Sch. of Dentistry*, 692 F.3d 828, 830–31 (7th Cir. 2012) (following Indiana law, noting plaintiff sufficiently alleged that the school breached its contract with her by failing to follow the disciplinary procedures set out in the school's Student Handbook and Codes of Conduct).

jurisdictions, in order to state a breach of contract between a student and a private university, the student may have the additional "high" burden of establishing that the school's conduct in breaching the contract was "arbitrary or capricious" or "in bad faith," or that the disciplinary decision was "without any discernable rational basis."[98]

IV. EVALUATE POTENTIAL REMEDIES AND FORMS OF RELIEF

A. Injunctive and Equitable Relief – Title IX, Due Process

Under Title IX and the Due Process Clause, courts may order injunctive or equitable relief to redress harms to the student that cannot be remedied by money damages. Some courts have held that a finding of sexual misconduct and sanction of expulsion or suspension can constitute a "per se" injury — an injury that, by its nature, is presumed to be immediate, irreparable and irreversible, so that prospective future harms can be avoided or adequately remedied only through appropriate equitable relief.

The potential equitable remedies sought by accused students and granted by some courts include (but are not limited to) the following:

(1) vacate or reverse the finding of responsibility;
(2) expunge any reference to the disciplinary proceedings from the student's educational and/or disciplinary records;
(3) reinstate the student in good standing;
(4) provide the student with a "clean" academic transcript that does not refer to the finding or sanction; and
(5) provide the student with a dean's certification letter that reflects the student's status as a "student in good standing, eligible to return" and that sets forth mutually acceptable information about the disciplinary proceedings for the school to provide to third parties who inquire about the proceedings (*e.g.*, graduate schools or prospective employers).[99]

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[98] *See, e.g.*, *Doe v. Columbia Coll. Chi.*, 933 F.3d at 858 (granting motion to dismiss breach of contract claim under Illinois law, which places a "high" burden on the complaining student, requiring "decisions that were arbitrary, capricious, or made in bad faith" and that the school "must have disciplined a student without any rational basis."); *but see Montague*, No. 3:16-CV-00885 (rejecting Yale's argument that it was entitled to deference in connection with breach of contract claim, stating deference accorded to academic decisions did not apply to cases involving discipline arising from sexual misconduct, and rejecting Yale's argument that the court's review was limited to an "arbitrary and capricious" standard).

[99] Although individual defendants in due process lawsuits sometimes argue that the court does not have subject matter jurisdiction over them under sovereign immunity principles, the case law holds that individual state officials can be sued in their official capacities for prospective declaratory or injunctive relief. *See, e.g.*, *Doe v. Va. Polytechnic Inst. and State Univ.*, 2019 WL 3848794, at *4–5 (refusing to dismiss four male students' due process claims against individual defendants in their official capacities, since plaintiffs "are seeking to expunge and clear their academic records," and, thus, their claims fall within the "injunctive relief" exception to sovereign immunity); *Doe v. Univ. of Miss.*, 361 F. Supp. 3d at 604–05, 615 (applying exception to Eleventh Amendment immunity "for claims for prospective relief against state officials who have been sued in their

In *Doe v. The Rector and Visitors of George Mason University*, 179 F. Supp. 3d 583, the court granted a permanent injunction to a male student expelled from a state university for alleged sexual misconduct and considered the remaining issue of "the issuance of an appropriate remedy" for the school's due process violations. *Id.* at 585. The plaintiff requested that the court issue four remedies: (1) vacate the decision of the university against the accused student, (2) reinstate the student "in good standing" with the university, (3) expunge any reference to his expulsion on misconduct grounds from his educational records, and (4) prohibit the university from conducting a new hearing on new allegations from the complainant. The court granted the first three remedies but denied the fourth remedy.

In granting permanent injunctive relief, the court undertook the typical four-part analysis for the grant of an injunction — *i.e.*, irreparable harm, inadequacy of damages, balance of the hardships, and public interest. On irreparable harm/inadequacy of damages, the court stated, "[T]here can be no doubt that plaintiff has suffered an irreparable injury and that he has no adequate remedy at law. . . . Defendants' unconstitutional conduct deprived plaintiff of three semesters of education at GMU, thereby delaying plaintiff's graduation from that institution. The clock cannot be turned back . . . ." *Id.* at 587.[100]

B. Compensatory Damages – Title IX, Due Process, Breach of Contract[101]

1. Title IX

The Supreme Court has made clear that Title IX and comparable statutes allow courts to award the full range of normal remedies, including damages, "'to make good the wrong done.'"[102] Courts applying *Franklin* and *Barnes* have interpreted these decisions to permit

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official capacities," including "Doe's requests for expungement, sealing [of his records], and re-enrollment"; but dismissing "official-capacity claims" against all defendants who did not have "authority to grant the prospective relief" except the Chancellor (citation omitted)); *Painter*, 2017 WL 4678231, at * 3–4 (denying summary judgment on male student's due process claims, finding Eleventh Amendment immunity did not bar plaintiff's claims for injunctive or prospective relief, including request for expungement); *Rosie D. v. Swift*, 310 F.3d 230, 232 (1st Cir. 2002) (holding that under the doctrine of *Ex Parte Young*, "the Eleventh Amendment does not prevent [plaintiffs] from seeking prospective injunctive relief against state officials in a federal court."); *Ex Parte Young*, 209 U.S. 123, 159–60 (1908) (establishing the right to ask for prospective injunctive relief against state officials in federal court).

[100] In *Painter v. Adams,* 2017 WL 4678231, at *5–6, in the context of denying defendants' motion for summary judgment in part, the court noted that plaintiff seeks "prospective or injunctive relief, such as the expungement of academic or disciplinary records and other similar prospective relief," and that "the adverse disciplinary decision impugns [plaintiff's] reputation and his ability to gain entry into graduate schools."

[101] We focus on these causes of action because they are the bread and butter of accused student litigation and have proved the most successful vehicles for challenging a university's wrongful actions. Further, proof elements of tort claims such as defamation or negligent or intentional infliction of emotional distress vary greatly from state to state, but you should always consider whether you have the facts to support state law tort claims.

[102] *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 66, 74–76 (1992) (referring to relief as "monetary damages" or "monetary awards" and specifically rejecting limiting Title IX plaintiffs to monetary relief that is equitable in nature such as back pay), *quoting Bell v. Hood*, 327 U.S. 678, 684 (1946); *see also Barnes v. Gorman*, 536 U.S. 181, 186–87 (2002) (a recipient of federal funds is "subject to suit for compensatory damages . . . .").

the award of the full range of compensatory damages, including pecuniary losses and non-pecuniary losses (*e.g.*, injuries involving emotional distress).[103] An article, titled "Proof of School's Liability for Unfair Disciplinary Action Against Student Accused of Sexual Harassment or Assault," sets forth the following damages available "in an action arising from a university's subjection of the plaintiff to an unfair disciplinary process or sanction"[104]:

- Past and future impairment of ability to enjoy life
- Injury to reputation
- Past and future economic loss
- Loss of educational opportunities
- Loss of future career prospects
- Loss of future athletic prospects
- Mental anguish
    - Fright and shock
    - Anxiety, depression, and other mental suffering or illness
- Reasonable and necessary actual expenses for psychologists and counselors
- Reasonable and necessary actual expenses for future psychiatrists, psychologists, counselors, medications, etc.
- Exemplary or punitive damages for malicious or reckless conduct[105]

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[103] *See, e.g.*, *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1198–1204 (11th Cir. 2007) (discussing *Barnes* and *Franklin* and concluding that emotional damages are a form of compensatory damages available for intentional discrimination claims); *Dawn L. v. Greater Johnstown Sch. Dist.*, 586 F. Supp. 2d 332, 383–84 (W.D. Pa. 2008) (concluding emotional distress damages are available under Title IX).

[104] 165 Am. Jur. Proof of Facts 3d 1 (Feb. 2018).

[105] It does not appear that the Supreme Court of the United States has directly ruled on the availability of punitive damages in Title IX cases, but in *Barnes v. Gorman*, 536 U.S. at 187–88, the Supreme Court held that private litigants cannot recover punitive damages under Title VI of the Civil Rights Act. Applying the Supreme Court's reasoning in *Barnes*, several circuit courts have held that punitive damages are not available under Title IX. *See, e.g.*, Sheely, 505 F.3d at 1197–98; *Mercer v. Duke Univ.*, 50 Fed. Appx. 643, 644 (4th Cir. 2002) ("The Supreme Court's conclusion in *Barnes* that punitive damages are not available under Title VI compels the conclusion that punitive damages are not available for private actions brought to enforce Title IX."); *see also Doe 20 v. Bd. of Educ. of Cmty. Sch. Dist. No. 5*, 680 F. Supp. 2d 957, 995 (C.D. Ill. 2010) ("The general rule today is that no punitive damages are allowed unless expressly authorized by statute. . . . Title IX does not expressly authorize punitive damages . . . ." (citation omitted)); *Frechel-Rodriguez v. P.R. Dep't of*

- Statutory damages (*e.g.*, treble, in certain contexts under federal and state statutes)
- Expert witness fees
- Attorney's fees
- Prejudgment interest
- Litigation fees and costs

A model jury instruction for Title IX damages states, in relevant part, that the jury

> must determine an amount that is fair compensation for plaintiff's damages. . . . The damages that you award must be fair compensation — no more and no less. You may award damages for any pain, suffering or mental anguish plaintiff experienced as a consequence of defendant's allegedly unlawful act. No evidence of the monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award you make should be fair in light of the evidence presented at the trial. In determining the amount of any damages that you decide to award, you should be guided by common sense.[106]

2. Due Process

Although compensatory damages may be available to prevailing due process plaintiffs, individual defendants typically argue that, as state officials acting in their "official capacities" on behalf of the school, they are not "persons" subject to suit for monetary damages under § 1983. The case law is clear that a plaintiff may sue state officials in their "official capacities" for prospective injunctive relief.[107] A jury "may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."[108]

3. Breach of Contract

Educ., 478 F. Supp. 2d 191, 198–99 (D.P.R. 2007) (dismissing plaintiff's request for punitive damages under Title IX); *cf. Canty v. Old Rochester Reg'l Sch. Dist.*, 54 F. Supp. 2d 66, 70 (D. Mass. 1999) (allowing punitive damages in a Title IX action but limiting it to the "rare case" where "ongoing egregious violations" existed; in *Canty* this standard was met where a school district allegedly ignored a pattern of sexual abuse by a single teacher for over two decades).

[106] 3C Fed. Jury Prac. & Instr. § 177:70 (6th ed.).

[107] *See, e.g.*, *Rosie D.*, 310 F.3d at 232, citing *Ex parte Young*, 209 U.S. at 156–57; cf. *Neal v. Colo. State Univ.-Pueblo*, No. 16–cv–873–RM–CBS, 2017 WL 633045, at *17–25 (D. Colo. Feb. 16, 2017) (recommending that plaintiff's due process claim for injunctive relief against members of the university's Board of Governors be allowed to proceed, but recommending dismissal of plaintiff's due process claim for damages against the Board of Governors and other individual defendants).

[108] *Smith v. Wade*, 461 U.S. 30, 56 (1983).

The measure of damages in breach of contract claims by prevailing students in school sexual misconduct cases is the same as for any other breach of contract claim — *i.e.*, the amount of losses that were caused by the breach. [109]

C. Attorney Fees and Litigation Costs: Title IX, Due Process

Title IX permits the award of attorney fees and litigation costs, because 42 U.S.C. § 1988 — which entitles prevailing civil rights plaintiffs to recover attorney's fees as well as litigation costs — expressly includes Title IX among the enumerated federal statutes within its ambit. In recent due process cases involving public universities brought under 42 U.S.C. § 1983, where defendants were immune from damages claims, courts awarded attorney fees.[110]

V. PRE-SUIT COMMUNICATION WITH THE SCHOOL

It is generally wise to see if you can resolve things with the school before filing suit. Consider whether to communicate with the school's in-house counsel or outside counsel regarding your representation of the client and the possibility of a resolution of the client's grievances without the need for litigation. These communications may be followed up with a demand letter, or the demand letter may be the first initiative in the communications.

The demand letter may identify (a) the legal claims the plaintiff will assert in litigation, (b) the relevant facts about the accusation and the disciplinary proceedings, (c) the specific ways in which the proceedings were unfair, inequitable, and gender-biased, and (d) the relief that plaintiff demands in order to avoid the need for litigation. That relief may include all or some of the following: (i) vacate or reverse the finding of responsibility and sanction; (ii) reinstate the client as a student in good standing; (iii) expunge the disciplinary record; (iv) provide a clean academic transcript without a notation of the finding or sanction; (v) provide a dean's certification letter for use by the student as an aid in transferring to another college or in applying to graduate school or for prospective employment, which will contain agreed-upon language.

Be aware that state laws may affect the scope of relief. Also consider entering into a tolling agreement to avoid statute of limitations issues in the event that the school is receptive to opening a discussion about possible resolution without the need for litigation.

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[109] *See* Restatement (Second) of Contracts § 347 (Measure of Damages in General: "The loss in the value to him of the other party's performance caused by its failure or deficiency" and "any other loss, including incidental or consequential losses, caused by the breach . . . .").

[110] *See, e.g.*, *Doe v. Rector & Visitors of George Mason Univ.*, No. 1:15-cv-209, 2016 WL 3480947, at *6 (E.D. Va. June 21, 2016) (awarding plaintiff attorneys' fees and costs totaling $278,531.45); *Doe v. Alger*, No. 5:15-cv-00035, 2018 WL 4655749, at *1 (W.D. Va. Sept. 27, 2018) (after entering judgment in plaintiff's favor on liability, court awarded $519,271.08 in attorney fees, $41,408.15 in litigation costs, and $13,500.80 for bill of costs, for a total award of $574,180.03). *See also Doe v. Univ. of Conn.*, No. 3:20CV92, 2021 WL 395817 (D. Conn. Feb. 4, 2021) (in depth discussion of principles supporting attorneys' fee award under 42 USC § 1983 where student successfully obtained TRO).

VI. LITIGATION: PRELIMINARY INJUNCTION, COMPLAINT, PSEUDONYM MOTION

A. Evaluate the Need for Emergency Relief: Temporary Restraining Order/Preliminary Injunction

Courts have recognized that expulsion or suspension from a university resulting from a disciplinary finding of responsibility for sexual misconduct may constitute immediate and irreparable harm that cannot be remedied by money damages. In some of these cases, the courts have granted preliminary injunctive relief to respondents, ordering the school to temporarily halt the imposition of a sanction of expulsion or suspension pending the court's decision on the merits of the plaintiff's claims.

A preliminary injunction typically will not be granted until the claim is ripe or until all administrative remedies have been exhausted, *i.e.*, after all phases of the disciplinary proceedings have been completed and the finding and sanction have become final.[111]

When the disciplinary proceedings have concluded with a finding of responsibility and sanction, courts may step in to temporarily suspend implementation of the sanction pending a decision on the merits.[112]

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[111] *See, e.g.*, *Doe v. Princeton Univ.*, 2019 WL 161513, at *4, 6 (denying plaintiff's motion for preliminary injunction requesting court to delay the disciplinary proceeding until Department of Education's new regulations are implemented; court noted it "cannot assess the likely result of the Title IX investigation and whether Plaintiff will suffer any adverse consequences," and "[t]he alleged harm Plaintiff alleges he will suffer is also too speculative."). The district court's ruling in *Doe v. University of Michigan*, 325 F. Supp. 3d 821, 826, 830 (E.D. Mich. 2018), presents an exception to the general "ripeness" rule. In that case, the court granted a TRO and preliminary injunction prohibiting the defendants from continuing their investigation, sanctions, and appeals process and requiring them to provide plaintiff with the opportunity for a live hearing with circumscribed cross-examination through which he may submit questions to officials to be asked of the claimant.

[112] *See, e.g.*, *Doe v. Trs. of Boston Coll.*, No. 1:19-CV-11626, Order of Preliminary Injunction (D. Mass. Aug. 20, 2019) (granting preliminary injunction staying student's suspension for alleged sexual misconduct, finding irreparable harm and likelihood of success on merits of claims that he was deprived of fair process); *Doe v. Univ. of Southern Miss.*, No. 2:18-CV-153, Memorandum Opinion and Order, at 1–2, 4, 12 (S.D. Miss. Sept. 26, 2018) (granting preliminary injunction on student's procedural due process claim, ordering the university to "immediately reinstate Plaintiff as a student in good standing at the University during the pendency of this matter"); *Doe v. Univ. of Cincinnati*, 872 F.3d at 407 (affirming district court's grant of preliminary injunction, finding that absent an injunction "Doe would be suspended for a year and suffer reputational harm both on and off campus based on a finding rendered after an unfair hearing."); *Doe v. Pa. State Univ.*, 276 F. Supp. 3d 300, 314 (M.D. Pa. 2017) (granting preliminary injunction halting the imposition of a two-year suspension, finding that the "harm Doe would suffer absent some preliminary relief is real, immediate, and irreparable."). *See also Nokes v. Miami Univ.*, 2017 WL 3674910, at *8–14 (granting preliminary injunction halting imposition of two-year suspension, finding likelihood of success on merits of Title IX and due process claims and irreparable harm if injunction is denied); *Doe v. Brown Univ.*, 210 F. Supp. 3d 310, 312 (D.R.I. Sept. 28, 2016) (noting that the parties agreed to hold an expedited bench trial on both the merits of the student's breach of

B. Draft and File the Complaint – Title IX, Due Process, and Breach of Contract Claims

1. Title IX

Title IX complaints typically are publicly available and accessible on the dockets maintained by the federal courts in which the complaints are filed.

These complaints may include general factual assertions on the background of Title IX, including the relevant statutory language, excerpts from the implementing regulations and from OCR's 2001 Guidance emphasizing the need for fair, impartial, and equitable grievance procedures and "due process to both parties involved," and a factual history, beginning with OCR's 2011 Dear Colleague letter, describing the legal and financial pressure exerted by the federal government to force colleges and universities to protect and favor female complainants and to punish alleged male perpetrators in Title IX disciplinary proceedings. More recent complaints may include facts about the Department of Education's actions, starting in September 2017, to redress the gender bias, lack of fairness, and due process violations against accused male students in university proceedings created by OCR's prior actions, culminating with the new regulations promulgated in May 2020. (These background facts are all set forth in the Introduction to this *Guide*).

In addition to this narrative about Title IX and the history of OCR's deleterious impact on school disciplinary proceedings, the complaints typically allege specific facts about the school's handling of the accusation and disciplinary proceedings at issue, and the school's relevant sexual misconduct policies and procedures. These factual allegations collectively attempt to demonstrate that the outcome of the disciplinary proceedings was erroneous or was the result of selective enforcement, deliberate indifference, or archaic assumptions, and that the school's actions were motivated at least in part by gender bias against accused male students.

2. Due Process

Due process claims brought by accused students against their schools for unfair and constitutionally inadequate sexual misconduct disciplinary proceedings are often similar to Title IX claims. The requirement of "fundamental fairness," adequate notice, and a

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contract claim and his request for a preliminary injunction; on August 23, 2016, the court issued a preliminary injunction allowing student to return to Brown for fall semester pending the bench trial merits decision); *Ritter v. Okla. City Univ.*, No. CIV-16-0438-HE, 2016 WL 2659620, at *3 (W.D. Okla. July 22, 2016) (granting preliminary injunction to expelled student, finding that "loss of educational and career opportunities" is irreparable harm); *Doe v. Middlebury Coll.*, No. 1:15–cv–192–jgm, 2015 WL 5488109, at *3 (D. Vt. Sept. 16, 2015) (granting preliminary injunction, finding irreparable harm because "[p]laintiff would have to explain, for the remainder of his professional life, why his education either ceased prior to completion or contains a gap."); *King v. DePauw Univ.*, No. 2:14–cv–70–WTL–DKL, 2014 WL 4197507, at *13 (S.D. Ind. Aug. 22, 2014) (granting preliminary injunction enjoining the school from enforcing its suspension, noting that even a successful lawsuit could not "erase the gap" in student's education record, and "the question will still be raised, and any explanation is unlikely to fully erase the stigma associated with such a finding.").

meaningful opportunity to be heard in school disciplinary proceedings under the Due Process Clause is akin to Title IX's requirement that such proceedings must be fair, thorough, and impartial, and must accord due process to both parties. To secure fundamentally fair proceedings, for example, students should at least be afforded basic procedural safeguards like a clearly stated presumption of innocence, adequate time to prepare for a reasonably prompt disciplinary hearing and access to the available evidence, the right to impartial fact-finders, the right to present evidence, and the ability to question witnesses in real time and respond to another party's version of events.

3. Breach of Contract

As noted at the beginning of Section III.C, above, students alleging Title IX violations may also (and often do) assert state law claims, including breach of contract. As explained earlier, you will need to review the case law in the state where the school is located and where the breaches occurred to assess pleading requirements for student/school breach of contract claims. For example, you will need to know whether the applicable case law: (i) recognizes student handbooks, codes of conduct, and sexual misconduct policies as contracts between the student and the school; (ii) permits contract claims based on general promises of "fairness," or requires the plaintiff to identify specific provisions and procedures that the school failed to follow; and (iii) imposes a heightened pleading standard requiring allegations demonstrating that the school's conduct was "arbitrary and capricious" or "in bad faith."

You will then need to marshal all the applicable codes of conduct, sexual misconduct policies, contractual provisions and procedures, and the steps the school took (or failed to take) throughout the disciplinary proceedings that allegedly breached the applicable codes, policies, and procedures.

C. Draft and File Motion to Proceed Under Pseudonym

Plaintiffs who have sued their schools for a wrongful finding of sexual misconduct often file a motion or petition seeking permission to file their complaint anonymously, under the pseudonym of John Doe. The rationale for seeking leave to proceed anonymously is to protect the identity of the student from public disclosure, by referring to him or her as John or Jane Doe (and typically protecting the identity of the complainant by referring to him or her as John or Jane Roe), while at the same time allowing public access to the filings in the case through the normal court docket.

Although Fed. R. Civ. P. 10(a) requires that a complaint name all parties, federal courts permit the use of pseudonyms when the potential harm to the party requesting anonymity outweighs the possible prejudice to the opposing party, and the party seeking anonymity satisfies other factors considered by the courts in evaluating motions to proceed under a pseudonym.

For example, in *Sealed Plaintiff v. Sealed Defendant #1*, 537 F.3d 185, 190 (2d Cir. 2008), the Second Circuit set forth the following non-exhaustive list of factors for district courts to consider in assessing whether to allow a plaintiff to proceed anonymously:

> (1) whether the litigation involves matters that are highly sensitive and of a personal nature;
>
> (2) whether identification poses a risk of retaliatory physical or mental harm to the party seeking to proceed anonymously or even more critically, to innocent non-parties;
>
> (3) whether identification presents other harms and the likely severity of those harms, including whether the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity;
>
> (4) whether the plaintiff is particularly vulnerable to the possible harms of disclosure, particularly in light of his age;
>
> (5) whether the suit is challenging the actions of the government or that of private parties;
>
> (6) whether the defendant is prejudiced by allowing the plaintiff to press his claims anonymously, whether the nature of that prejudice (if any) differs at any particular stage of the litigation, and whether any prejudice can be mitigated by the district court;
>
> (7) whether the plaintiff's identity has thus far been kept confidential;
>
> (8) whether the public's interest in the litigation is furthered by requiring the plaintiff to disclose his identity;
>
> (9) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigants' identities; and
>
> (10) whether there are any alternative mechanisms for protecting the confidentiality of the plaintiff.

The decision whether to permit parties to proceed anonymously is "left within the discretion of the district court."[113] Similarly, courts in other circuits permit a party to

[113] *Doe v. Elmbrook Sch. Dist.*, 658 F.3d 710, 721 (7th Cir. 2011) (citation omitted).

proceed anonymously "where the party has a privacy right so substantial as to outweigh the 'customary and constitutionally-embedded presumption of openness in judicial proceedings.'"[114]

"Courts dealing with requests to proceed under fictitious names have avoided trying to articulate any mechanical legal test."[115] Because "[t]here is no simple formula" for determining when to allow the use of pseudonyms, the courts have identified "a number of factors that should be considered to determine whether a plaintiff's interest in privacy is so significant as to outweigh the strong presumption favoring public identification of litigants."[116]

The Seventh Circuit has set forth the following non-exclusive factors to assess whether to permit a plaintiff to proceed anonymously:

> (1) whether the plaintiff is challenging governmental activity;
>
> (2) whether the plaintiff would be required to disclose information of the utmost intimacy;
>
> (3) whether the plaintiff would be compelled to admit his or her intention to engage in illegal conduct, thereby risking criminal prosecution;
>
> (4) whether the plaintiff would risk suffering injury if identified;
>
> (5) whether the party defending against a suit brought under a pseudonym would be prejudiced;
>
> (6) the public interest in guaranteeing open access to proceedings without denying litigants access to the justice system.[117]

Courts across the country have allowed student-plaintiffs who have brought claims against colleges and universities stemming from sexual misconduct disciplinary proceedings to proceed anonymously, and a substantial number of colleges and universities have

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[114] *Doe v. Ind. Black Expo, Inc.*, 923 F. Supp. 137, 139 (S.D. Ind. 1996), quoting *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992). "The presumption that parties' identities are public information, and the possible prejudice to the opposing party from concealment, can be rebutted by showing that the harm to the [party requesting anonymity] . . . exceeds the likely harm from concealment." *Doe v. City of Chi.*, 360 F.3d 667, 669 (7th Cir. 2004).

[115] *Ind. Black Expo, Inc.*, 923 F. Supp. at 140.

[116] *Id.* at 139–40.

[117] *See Doe v. City of Indianapolis*, No. 1:12-cv-00062-TWP-MJD, 2012 WL 639537, at *1 (S.D. Ind. Feb. 27, 2012); *see also Ind. Black Expo, Inc.*, 923 F. Supp. at 140 (applying similar five-factor test).

recognized this substantial privacy right by not opposing student-plaintiffs' motions to proceed anonymously.[118]

The following is a checklist for your further consideration with respect to the drafting and filing of a pseudonym motion:

- ✓ Consider whether to communicate with the school to determine if the school will not oppose the motion, so that the motion can be titled a Joint or Unopposed Motion.
- ✓ In the motion, seek to protect the identities of all students involved in the disciplinary proceedings, including the complainant and all witnesses.
- ✓ In the motion, consider the need to provide an affidavit, declaration, or evidence supporting the factors that the court will consider in evaluating the motion.
- ✓ Avoid public discussion of the case.
- ✓ Evaluate the possible need for redactions of case-related documents.
- ✓ Evaluate the possible need for sealing of highly sensitive case-related documents.

[118] *See, e.g.*, *Doe v. Alger*, 317 F.R.D. 37, 42 (W.D. Va. 2016) (holding plaintiff's "privacy interest outweighs the presumption of the openness of judicial proceedings . . . ."); *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 360 n.1 (S.D.N.Y. 2015) ("Columbia consented to Plaintiff's request to proceed pseudonymously in light of the sensitive subject matter and the age of the students involved."); *Doe v. Univ. of the South*, 687 F. Supp. 2d at 764 (upholding the magistrate's order granting motion to proceed under pseudonym in a case where plaintiff, a college male, was found responsible for sexually assaulting a female classmate); *Doe v. Colgate Univ.*, No. 5:15-cv-1069 (LEK/DEP), 2016 WL 1448829, at *2 (N.D.N.Y. Apr. 12, 2016) (holding that student bringing suit against his university challenging its investigation and finding of sexual misconduct can proceed anonymously after balancing all pseudonym factors); *Doe v. Brandeis*, No. 1:15-cv-11557 (D. Mass. June 17, 2015) (permitting use of pseudonym after weighing factors because student-plaintiff could be subject to "social stigmatization" if his identity were disclosed in lawsuit against university which found him responsible for sexual misconduct); *Doe v. Swarthmore Coll.*, No. 2:14-cv-00532 (E.D. Pa. Jan. 29, 2014) (granting motion to proceed under pseudonym and finding the student-plaintiff's application of pseudonym factors to his case "compelling"). *See also Doe v. Trs. of Univ. of Pa.*, 2:16-cv-05088 (E.D. Pa. Sept. 26, 2016) ECF No. 12 (granting motion for pseudonym, noting the plaintiff "has a legitimate fear of significant harm should the preliminary finding of his responsibility for a sexual assault be made public"); *Doe v. Washington and Lee Univ.*, No. 6:14-cv-00052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015) (allowing plaintiff to proceed under pseudonym, with no indication on docket of opposition); *Doe v. Univ. of S. Fla. Bd. of Trs.*, No. 8:15-cv-682 (M.D. Fla. May 29, 2015) (allowing plaintiff to proceed pseudonymously); *Doe v. Reed Inst.*, No. 3:15-cv-617 (D. Or. Apr. 14, 2015) ECF No. 9 (granting plaintiff's unopposed motion to proceed under pseudonym); *Doe v. Univ. of Colo., Boulder*, No. 1:14-cv-03027 (D. Colo. Nov. 7, 2014) (proceeding pseudonymously throughout the case); *Doe v. Williams Coll.*, No. 1:13-cv-11740 (D. Mass. Sept. 5, 2013) ECF No. 12 (order granting accused student's motion to proceed pseudonymously and granting motion for protective order); *Doe v. George Washington Univ.*, No. 1:11-cv-00696 (D.D.C. Apr. 8, 2011), ECF No. 2 (order granting accused student plaintiff's motion to proceed under pseudonym).

VII. LITIGATION MOTION PRACTICE & DISCOVERY

A. Motion to Dismiss, Response, Reply, and Oral Argument

Schools often respond to student complaints alleging unfair and erroneous disciplinary proceedings with motions to dismiss; this is followed by the plaintiff's response in opposition, the reply brief in support of the motion, and the possibility of court-ordered oral argument.

The text and footnotes in Sections III.A, B, and C above list court decisions on motions to dismiss complaints alleging Title IX, due process, and breach of contract claims, respectively.

B. Discovery Requests Directed to the School

Discovery in student disciplinary cases may be extensive, depending on the volume of information that the school has (*e.g.*, various versions of applicable policies and procedures, investigation and hearing documentation, internal communications, statistics and records of prior disciplinary proceedings and outcomes). In some instances, the parties may enter into a confidentiality agreement to protect documents from unauthorized disclosure, and then proceed to initial disclosures, discovery requests, responses to discovery requests, and production of documents. In instances when a school is unwilling to produce requested documents or information, motions to compel may be necessary.

The information below focuses on categories of discovery requests.

1. Document Requests

   (a) All documents generated in the disciplinary proceedings, including without limitation documents, emails, texts, transcripts, and audio recordings;

   (b) All internal communications relating to or regarding the disciplinary proceedings;

   (c) The complete file containing the school's policies and procedures used in the disciplinary proceedings;

   (d) All training materials used by the school to train Title IX personnel;

   (e) Statistics reflecting the school's Title IX disciplinary proceedings historical data during the period from 2011–2012 to the present.

2. Interrogatories

3. Expert Reports and Depositions

C. Motion for Summary Judgment

Motions for summary judgment (or for partial summary judgment) can be filed by either the school or the student, or both, after the conclusion of discovery. As with any other type of case, the standard for granting a motion for summary judgment in student disciplinary cases is whether the moving party shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

VIII. TRIAL

Only a handful of student disciplinary cases have gone to trial and reached a verdict. As with any other type of case, trials in student disciplinary cases may be decided by a judge in a bench trial or by a jury in a jury trial, and trials may include testimony of the parties, fact witnesses, and experts. Keep in mind that, if your client has budget issues, asking for a bench trial could save a great deal of money. You can shorthand things with a judge in a way that you can't with juries.

IX. SETTLEMENT DISCUSSIONS

As with any other type of case, settlements in student disciplinary cases are almost always subject to strict confidentiality obligations. Accordingly, it is not possible to make any generalizations about the nature of those settlements.

As previously stated in Section IV above, the remedies that a student would seek in litigation or in settlement are dependent on the harm that the student has suffered as a result of the school's finding and sanction. Those remedies might include (but would not be limited to) reinstatement as a student in good standing, reversal or vacating of the finding of responsibility, a clean academic transcript, and expungement of the disciplinary record. These potential remedies would be the basis for settlement discussions.

CONCLUSION

Representing accused students in campus sexual misconduct proceedings is difficult and critical work. While a campus tribunal is not a court of law, the consequences to a student of a finding of responsibility on a sexual misconduct charge can be devastating and lifelong: loss of educational and career opportunities, loss of scholarships, and potentially serious mental health effects.

Sexual misconduct is a serious offense for which those actually responsible should be punished. But for that very reason, a finding of responsibility should be made only after a full and fair process in which the accused has a meaningful opportunity to defend him- or herself. It is difficult to overstate the degree to which having the assistance of an attorney who is versed in this area of practice can make the difference in ensuring a fair process.

We hope this *Guide* has acquainted you with, and interested you in, this area of practice. Please be in touch with FIRE if you have questions or seek additional resources.

ABOUT THE AUTHORS

Lorie K. Dakessian

Lorie Dakessian is the Vice Chair of the Title IX, Due Process and Campus Discipline practice at the Philadelphia-based law firm Conrad O'Brien, P.C. She represents college students and professors nationwide who are under investigation or who have been disciplined by their colleges or universities for alleged violations of sexual harassment and misconduct policies following campus disciplinary proceedings, or complainants who raise and pursue sexual assault or harassment claims within universities. She works closely with students and their families to help them navigate and fully prepare for investigations and hearings. Where resolution cannot be achieved, she has filed lawsuits for breach of contract, violation of Title IX (or other civil rights statutes) and tort liability. The firm's Title IX practice has represented over 200 students nationwide in disciplinary matters or related litigation involving more than 70 colleges and universities. Given her experience, Lorie has spoken extensively on defending students and professors in Title IX and disciplinary actions. In addition to her representation of college students, Lorie represents clients in white-collar criminal matters, internal investigations, professional malpractice litigation, and data privacy matters.

Justin Dillon

Justin Dillon is a partner at KaiserDillon PLLC in Washington, DC. He has gained nationwide attention for his work representing students and professors in campus

misconduct cases, which he and his firm have handled at more than 100 schools across the country. He was the first lawyer in the country to win summary judgment against a university in a campus sexual assault case, and he has been published or quoted regarding campus sexual misconduct issues in more than a dozen national newspapers and magazines, including *The Wall Street Journal*, *The New York Times*, *The Washington Post*, and *The Los Angeles Times*. Along with his partner Matt Kaiser, Justin is the author of *The KaiserDillon PLLC Guide to Representing Yourself in a Campus Sexual Assault Case*. He also has spoken on these issues before organizations such as the American Bar Association, the Association of Title IX Administrators, the National Association of Criminal Defense Lawyers, Harvard Law School, the Colorado State Bar, the D.C. Bar, the Virginia State Bar, and the University of Kentucky's Center for Research on Violence Against Women.

Justin has been recognized by Chambers & Partners in Litigation: White-Collar Crime & Government Investigations in Washington, DC. He has also been recognized by The Best Lawyers in America© in the category Criminal Defense: White-Collar; named by Super Lawyers as one of the Top Rated White Collar Crime Attorneys in Washington, D.C.; and selected by *Washingtonian Magazine* as one of Washington's Best Lawyers in Criminal Defense.

Immediately before joining KaiserDillon, Justin spent five and a half years as an Assistant United States Attorney in Washington, DC. Earlier in his career, he worked at the Civil Rights Division of the U.S. Department of Justice. He is a graduate of Duke University, where he was editor-in-chief of the daily campus newspaper, and of Harvard Law School, where he served as an editor of the *Harvard Law Review*.

Patricia M. Hamill

Patricia M. Hamill is the Chair of the Title IX, Due Process and Campus Discipline practice at Conrad O'Brien, P.C. She represents college students and professors nationwide who are subjected to campus disciplinary proceedings or who have been disciplined by their colleges for alleged sexual misconduct following such proceedings. Patricia often attempts to resolve cases behind the scenes. Where resolution cannot be achieved, she has filed lawsuits for breach of contract, violation of Title IX (or other civil rights statutes) and tort liability on the basis that colleges' investigation and adjudication procedures failed to ensure the students' fundamental due process rights, discriminated against them on the basis of sex and breached the schools' contractual obligations. Patricia was the lead

attorney in Doe v. Brandeis in the District of Massachusetts, one of the most often cited cases in this area. Patricia has also used her experience as a platform for advocacy. Recently, Patricia was invited to testify before the US Senate Committee on Health, Education, Labor & Pensions (HELP) at the full committee hearing on "Reauthorizing HEA: Addressing Campus Sexual Assault and Ensuring Student Safety and Rights." Outside of the Title IX arena, Patricia is a commercial litigator who also represents clients regarding government investigations.

Chris Muha

Chris Muha represents individual and corporate clients in high-stakes investigations by government bodies and private institutions and in litigation that stems from those investigations. His tireless pursuit of evidence, thorough preparation, and powerful written advocacy ensure that the truth is uncovered and that it is convincingly presented on behalf of his clients.

Since joining KaiserDillon in 2014, Chris has represented professors and students in Title IX cases and other campus-disciplinary investigations at dozens of colleges and universities across the country. He has secured victory for clients at all levels of the disciplinary process, and he has extensive experience advising students in disciplinary hearings. He has won hearings outright, had negative findings reversed on appeal, and has even convinced schools to reverse negative findings after the entire appeals process has concluded. He also has successfully litigated on behalf of campus clients in state and federal courts. He helped obtain a first-of-its-kind summary judgment ruling in federal court on behalf of a client suspended for sexual misconduct, and he successfully litigated for two years in state court on behalf of another, uncovering extensive evidence of misconduct by the school and its attorneys in the investigation and punishment of his client.

Chris also represents government employees, contractors, and other private-sector actors in a wide range of government investigations, enforcement actions, and criminal prosecutions. He has represented clients before myriad state and federal agencies, including inspectors general offices, agency enforcement divisions, the Office of Congressional Ethics, the House Committee on Ethics, and the Department of Justice. Recently, he represented three witnesses in the House of Representatives' impeachment inquiry into President Donald J. Trump.

Chris has also represented clients in a variety of civil-litigation matters. Before joining KaiserDillon, he litigated civil cases for six years at Williams & Connolly, one of the nation's leading litigation firms. There he represented Fortune 50 companies and high-net-worth individuals in federal and state court and in arbitration proceedings. He also devoted hundreds of hours to representing pro bono clients in immigration, social security and landlord/tenant matters.

Outside of his legal practice, Chris serves as President of the Brian Muha Memorial Foundation, a nonprofit that serves young people and their families in Columbus and Steubenville, Ohio. The Foundation provides after-school recreation and tutoring to more than 200 children per week; funds multiple educational scholarships; and supplies food, clothing, rent-to-own housing, and employment opportunities to local families.