Navigating Title IX and Campus Sexual Misconduct Defense – Advocacy's Wild West

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A major overhaul to the way colleges and universities handle sexual misconduct is critical to a safe campus for all students.

Just before 1:00 a.m. on September 17, 2016, Bob called for an Uber to bring him and a young lady he just met to his dormitory 1.02 miles from the downtown club where the two had unintentionally bumped into one another an hour or so earlier. During that hour, the two chatted. Betsy sipped on a drink that she had been holding since Bob first approached her. She hadn't purchased another the entire time they were together and Bob had finished his one only beer of that evening before he introduced himself.

Seemingly sober, the two flirted until they ultimately decided to go back to Bob's dormitory together. Bob called for an Uber at 12:59 a.m. It arrived 4 minutes later and 5 minutes after that, at 1:08 a.m., Bob and Betsy stepped onto the sidewalk in front of Bob's dormitory building.

Until that moment, neither Bob nor Betsy discussed where the other attended college nor did they talk about where they resided.

When the Uber dropped them off in front of Bob's dormitory, Betsy realized that not only did Bob attend her college, he lived a few buildings from her. In that moment, Betsy's mood changed and 7 minutes later, Bob was tucking himself into his bed alone.

Thirteen months and a day after that, Betsy filed a Title IX complaint with her college. In it, she alleged that Bob digitally penetrated her during the 5 minute Uber ride to campus. She claimed that when the two got out of the Uber, she told Bob that she had changed her mind and just wanted to go to sleep. She said that Bob got angry, physically assaulted her by throwing her to the ground in front of the entrance to her dormitory, followed her into her building, up the stairs, down the hallway, pushed his way into her room, tore off her clothes and raped her.

If Betsy believed what she reported, the evidence would prove that Betsy possessed a distorted recollection of the events of her brief encounter with Bob.

A few days later, the Title IX Office informed Bob that he was the target of a Title IX investigation, that another student had accused him of raping her more than a year earlier, that he was ordered to have no contact, and that he would be contacted by an investigator in the near future.

Sexual assaults certainly happen on campus. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act or Clery Act,[1] requires colleges and universities that participate in federal financial aid programs to keep and disclose information about crime on and near their respective campuses. There is a monetary penalty for failing to comply.

"Title IX" has become part of campus vocabulary. Without adequate guidance, that 1972 federal law – intended to prevent gender discrimination in schools – has been applied to reported sexual violence on college campuses. "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[2]

In Davis v. Monroe Cty. Bd. Of Educ.[3], the Supreme Court held that Title IX applied to a school's disparate provision of programs, aid, benefits or sanction on the basis of sex. It also prohibits a school's deliberate indifference to acts of sexual harassment committed by one student against another.

Most folks on campus are familiar with the term but too few understand it – because it is unclear, undefined, and arbitrarily administered.

Campus sexual misconduct is handled much differently at Providence College than it is at Brown University or URI. I have participated in Title IX cases on every Rhode Island campus and no two colleges or universities follow the same process. The result is disparate and inadequate treatment of the very students it intends to protect. Procedures for campus sexual misconduct investigation and discipline are all over the board, and much of the blame belongs in Washington for its failure to promulgate clear and consistent mandates.

While it is important to protect students and provide a space for unbiased investigation, this is not how it actually plays out. When a Title IX complaint is made, some colleges rely on their own employees to investigate, while others hire external investigators. In either case, these "investigators" most often lack relevant investigation experience. Many are attorneys with a background

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in labor law and none have the skillset of a police detective. From the start, the campus disciplinary system is doomed when it endeavors to investigate criminal conduct without investigators experienced in criminal investigations.

Most campuses assemble a hearing panel (even though federal guidance does not require a hearing). These folks are the jury who decide guilt and punishment. Rules of evidence do not apply. Unlike a trial, these hearings fail to include a gatekeeper to control the flow of evidence. Instead, the admissibility of evidence is a free for all.

At the University of Rhode Island, for example, the panel is composed of mostly students who sit the accused at the same table as the victim.[4] Imagine several young adults, some still teenagers, judging their colleagues, and then having to call one of them a liar. Without any legal training, these students are called upon to employ a legal standard – fair preponderance of evidence. At Roger Williams University, for example, the hearing panel was told that if the weight of the evidence is "equal plus a feather," then it has to find the accused guilty.[5]

Too often, these unprepared jurors decide another student's fate on pure emotion. The system provides no check on this decision. It is almost always final.

Finally, the accused and the accuser are given a list of faculty or staff to rely on as their advisor through the "investigation" process. It's concerning that the campus chef or gardener could be on that list, but trained attorneys have yet to appear on any list that I have been privy to.

The process has been designed to discourage attorney participation by prohibiting attorneys to speak except to their student client.

Typically, a young adult, many miles away from home, is accused of sexual assault. The accused student is put into a campus security vehicle that looks a lot like a police car by a uniformed security officer who looks a lot like a police officer. The accused student has none of the rights he or she would otherwise have if these were real police. By the time the accused walks away from that interrogation, he almost always has said too much and more often than not, his statement was unreliable. Here's why.

In almost all of the cases I have been involved in, it seems to me that when a young man is accused of non-consensual campus sexual contact, his first reaction is to avoid saying anything that might upset his accuser. The result has almost always been an apology for something that, after careful review of the evidence, did not warrant an apology. By then it is too late and the school is quick to use that apology as an admission.

For those fortunate enough to hire an attorney – and many are not that fortunate – the campus disciplinary system does not allow the attorney to speak for the accused. At Providence College, I am told that I must be "the potted plant in the room." I am not allowed to speak with the investigator at any point in the investigation. During an interview between the investigator and the accused, I have to ask my questions through my student and the investigator passes her answer back in the same direction.[6] The student is literally a puppet. It is inefficient, ineffective, and ludicrous. To make matters worse, Providence College will not accommodate the advisor's schedule. The College decides when to have the hearing and it will not reschedule that hearing if the advisor is unavailable.[7]

The accused has no right or opportunity to confront the

accuser. Unless the complaining student decides to participate beyond her first complaint, she is never compelled to answer a question or appear before the factfinder. Without any opportunity to assess for itself the complaining student's credibility, the factfinder's focus is on the accused. The presumption of innocence is noticeably absent.

As discussed above, Title IX mandates colleges and universities to act in response to reports of campus sexual misconduct, but it has provided no definitive instruction on how to carry out that duty. The affected students and their parents are left with an entirely unreliable result. Innocent students have been found guilty while surely some guilty students continue to put campuses at risk. A major overhaul to the way colleges and universities handle sexual misconduct is critical to a safe campus for all students.

To appreciate the landscape upon which an attorney is called to navigate when advising a student accused of a Title IX offense, it helps to have a glimpse at the blueprint that was handed out to colleges and universities by the Obama Department of Education.

On April 4, 2011, President Obama's Department of Education issued that famous "Dear Colleague" letter. It was intended to provide "significant guidance" to assist its recipients in meeting their obligations under Title IX by explaining "that the requirements of Title IX pertaining to sexual harassment also cover sexual violence." "Sexual violence is a form of sexual harassment prohibited by Title IX." "If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects." The letter extended the school's obligation to this sort of harassment even if the act occurred off school grounds and outside a school's education program or activity.

That guidance made clear that the school's Title IX obligation was different and independent from "any law enforcement investigation." "Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation." Imagine that a student accused of campus sexual assault while being investigated for or charged by the police with a crime arising out of the same alleged conduct is called to be interviewed by the school's investigator. The accused is never informed that he has a right against self-incrimination or a right to have an attorney present because in a Title IX investigation, no such rights exist. The accused simply does not yet appreciate the gravity of what is about to happen to him as he goes about doing his best to explain why he is not responsible for any wrongdoing. Under the right set of circumstances, that unreliable "confession" will fall squarely into law enforcement hands and used against him as though he had been Mirandized and intelligently waived his Fifth and Sixth Amendment rights.

In a very recent case, a Providence College student was suspended after being found responsible for a Title IX violation. He fully participated in the investigation and the hearing including making several statements. A year later, he received a telephone call from the Providence Police informing him that he was the subject of a sexual assault investigation. Everything he said during the investigation and his statements to the Title IX hearing panel was available to the police to use against him.

I can say with certainty that every student I have interviewed told me that at the time they were interrogated by their college or university, they had no idea that they could decline to answer questions. Every single one of the dozens I have represented said that he reasonably believed that he had no choice but to make a statement. None of them had the skillset – or were warned by their college – that their statements could be used by law enforcement.

The "Dear Colleague" letter did not require a recipient school to adopt a specific policy. Its requirements were general. Each school was left to develop its own system to meet the requirements imposed on it under Title IX. As a result, there is very little uniformity amongst the procedures employed by our various colleges.

The letter required schools to provide "equitable grievance procedures" but were not required to conduct investigations or hold hearings to determine whether sexual harassment or violence occurred. On many campuses, a single investigator model is the norm. The same person charged with fact-finding, relevance, and credibility is also charged with determining whether the accused is guilty. The school "must use" a preponderance of the evidence standard. The letter did not require schools to permit parties to have lawyers at any stage of the proceedings.

Finally, the letter strongly discouraged schools from allowing cross-examination. I have never witnessed any school allow confrontation in a Title IX proceeding.

All, if not most, of the tools that trained advocates routinely rely upon to unearth the truth are noticeably absent from Title IX proceedings.

By the time Bob had his Title IX hearing and was exonerated of Betsy's false accusation, so much time had passed that it intersected his normal graduation and the college handed him an empty diploma when he walked across the stage. Despite having finished his college experience working to exonerate himself and get back his good name, Bob passed his classes and maintained his excellent GPA. Here's how he did it.

Bob did the police work that the school's investigator did not do. Bob advocated for himself the way his criminal defense attorney guided him and not the way the biology professor who was first assigned to be Bob's advisor had suggested. Bob was able to resurrect his Uber receipt from a year earlier which proved that he and Betsy had been in the Uber for less than 5 minutes. He compelled the college to locate the records of who swiped into what door at the relevant time and proved that it would have been impossible under any circumstances for Bob to have been inside Betsy's room for even a moment. He was able to secure Betsy's text messages from that early morning hour which proved that she was actively engaged in messaging with friends at the same time that she claimed Bob was tearing off her clothes and raping her. He searched for, located and interviewed witnesses who provided their own text messages with Betsy that turned the accusation upside down.

Bob's Uber picked him and Betsy up at 1:03 a.m. It dropped them off 60 yards from Betsy's door at 1:08 a.m. There were no reports of any suspicious behavior recorded by the Uber driver to indicate that an assault had occurred in his backseat. At 1:12 a.m., less than 4 minutes after exiting the Uber, Betsy swiped into the front door of her dormitory building after walking the 60 yards from where the Uber dropped her off. There were no reports of any suspicious activity, assaults, or any other noteworthy events in front of Betsy's busy building at a very active time for college kids.

Three minutes after Betsy swiped into her building, at 1:15 a.m., Bob swiped into his building several hundred yards away.

During her interview, Betsy told the investigator that she didn't remember how she got into her building, to the second floor, or into her room. She admitted that she had no memory of having sex with Bob. Despite her failed memory, she was

certain that Bob was "mad at her and accusing her of using him for a ride home." When confronted by the investigator that Bob claimed the two never discussed where each other attended school or resided, Betsy agreed and had no explanation why Bob would have accused her of having "used him for a ride home."

There were more compelling inconsistencies in Betsy's story. First, she told the investigator that she woke up in the clothes she had on the night prior. In a follow up interview and after she reported that Bob viciously removed her clothing, she told the investigator she woke up naked. In a pile of text messages between Betsy and several friends, Betsy texted that she was not sure whether she had sex with Bob.

When the investigator confronted Betsy with the records of door access which proved that Bob had entered his building 3 minutes after Betsy swiped into her building, Betsy scrambled for an alternate theory. Betsy suggested that Bob ran to his building, swiped into it, ran back to her building, accessed her building when someone opened the door for Bob, and then violently raped her.

Even Betsy's alternate theory had giant holes in it. Betsy could not explain how she could have been actively text messaging her friends 25 minutes after Bob swiped into his building.

For Betsy's alternate theory to hold up, Bob would have had to sprint the several hundred yards from Betsy's building to his in under 3 minutes, as evidenced by his own swipe record. He would have had to sprint back the same several hundred yards to Betsy's building. Someone with access to Betsy's building would have had to be standing there to allow Bob into it so that Bob could access it without leaving a record. Bob would have had to travel to the second floor, force his way into Betsy's room, tear off her clothes and rape her.

All those things would have had to happen in less than 20 minutes and without anyone else taking notice.

None of the above happened quickly or easily. Bob had to fight for every piece of evidence. At his hearing 6 months after being accused of violently sexually assaulting Betsy, Bob put his own investigation in front of the hearing panel. The panel found him not responsible. It wasn't in time for Bob to graduate with his class and it came with an incredible cost to a young man.

Unlike the video surveillance of the drop-off point and the dormitories that spoiled long before Betsy made her complaint, Bob was fortunate that the other evidence he relied on remained available. There are no discovery mechanisms available in a Title IX investigation. If Betsy or any of the other witnesses had refused to make available the information that exonerated Bob, Bob could not have compelled it. Had it been only his word against hers, I don't think the result would have been the same.

If you are called on to defend a young adult as part of a Title IX adjudication:

- Know that the basic principles of due process do not exist. Whatever due process your client receives will come as the result of your own ingenuity and behind the scenes advocacy.
- Be hyper-vigilant to mistakes by those administrators who have been unfairly put in positions they are not prepared for.
- Force your way into the investigation and ignore any noise

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the school might make about "tampering with witnesses." If you don't talk to witnesses, there is a good chance that no one else will.

- Keep in mind that if your client loses, his college will expel him and it will not refund the $250,000 or more that he and his parents invested in his education. The next institution of higher learning will want to know why he left his former college and if it requests the record, he is not likely going to be admitted.
- Perhaps the most important force behind your efforts is the simple fact that a young man wrongly accused of sexually assaulting a fellow classmate will never be the same young man he was before the Title IX accusation. Your efforts to exonerate him are all he has to regaining his sense of wholeness. As it stands today, the system in place to protect him from this Title IX assault on his character is far from an "equitable grievance procedure."
- Look at the growing body of case law emerging across the country as a result of challenges to Title IX adjudications and make every effort to influence change on your campus by educating the Title IX authorities and the Office of General Counsel.

At the time of this writing, the Department of Education had promulgated substantial regulation to address the inadequacies and confusion arising out of the 2011 Dear Colleague Letter. On January 31, 2019, the period for public comment on those proposed regulations closed. Those regulations, if approved, will have the force of law.[8]

If enacted, the proposed regulation will require schools to respond meaningfully to all sexual harassment reports. It will empower complainants with greater control over the type of response that will best serve their needs. It will require the school to investigate and apply certain due process standards that are absent from existing guidance. It promotes transparency.

Every survivor is taken seriously and every person accused knows responsibility has not been predetermined.

The proposed regulations require schools to have "actual knowledge" of a violation before it is accountable and it clarifies that a report to the Title IX coordinator constitutes actual knowledge.

The proposal makes clear that geography is not what determines the school's jurisdiction. Conduct that occurs within the school's own program or activity is what determines whether Title IX is implicated.

Perhaps the most important change between the old "Dear Colleague" letter and the proposed regulation is cross-examination. Where the "Dear Colleague" letter discouraged cross-examination, the proposal requires that the school allow it but it makes it clear that only the students' advisors are allowed to confront a witness. It spells out that no personal confrontation by the parties is allowed.

Unlike the present guidance which mandates the lowest standard of proof, the regulation leaves the standard of proof to each school. Each school will be able to decide for itself whether a fair preponderance of the evidence or clear and convincing evidence best suits its community.

Until the process is streamlined, consistent, and mandates

real due process, defending the Title IX complaint will remain a shootout that requires an experienced, dynamic, and determined response. As long as colleges and universities are required to adjudicate the equivalent of a capital felony, attorney advisors must advocate loudly for real due process protections. Otherwise, the accused remains not properly protected, the victim is left to rely on an inadequate system of justice, and the campus is no safer than it would be without Title IX.

ENDNOTES

1 *The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act or Clery Act, 20 U.S.C. § 1092.*

2 *20 U.S.C. § 1681(a).*

3 ***Davis v. Monroe Cty. Bd. Of Educ.,*** *526 U.S. 629 (1999).*

4 *"In non-academic incidents, the hearing panel consists of four students and one faculty selected from the Board trained members." University of Rhode Island Student Handbook.*

5 *"The Hearing body uses a preponderance of evidence standard, understood as "more likely than not" (i.e., 51%) to evaluate alleged violations of the Sexual Misconduct/Gender-Based Misconduct Policy." Roger Williams University Student Handbook.*

6 *"The Advisor's role is limited to providing support and consultation. The Advisor may not speak on behalf of a party nor actively participate in an investigation or proceeding." Providence College Sexual Misconduct/Relationship Violence Policy.*

7 *"A party (i.e., a complainant or respondent) should select as an Advisor a person whose schedule allows attendance at the scheduled date and time of the meeting or proceeding because, normally, delays will not be allowed due to the scheduling conflicts of an Advisor." Providence College Sexual Misconduct/Relationship Violence Policy.*

8 *The Department of Education published a concise summary of the relevant proposed regulations. That Background and Summary can be accessed at https://www2.ed.gov/about/offices/list/ocr/docs/background-summary-proposed-ttle-ix-regulation.pdf. The complete proposed Regulations with a comprehensive history and references to controlling law can be accessed at https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf.* ◊

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