

Lessons Learned: DO's, DON'Ts, and TIPS for Navigating the World of Title IX Litigation

Neera M. Skurky, Associate General Counsel, Duke University

Kristen S. Bonatz, Deputy General Counsel, University of North Carolina at Greensboro

Allison J. Boyle, Assistant Attorney General, Maryland Office of the Attorney General

Benita N. Jones, Of Counsel, Womble Bond Dickinson (US) LLP

1



2

How Did We Get Here? The Road to the 2020 Final Rule

3

Title IX Litigation: The First 40 Years

- From providing gender equity in athletics programs to prevention and response to sexual harassment
 - *Alexander v. Yale University, Gebser, Davis v. Monroe*
- Federal guidance
 - 1997 Sexual Harassment Guidance
 - 2001 DCL
 - 2011 DCL
- External factors
 - Sociopolitical Movements – #MeToo, #ItsOnUs
 - Criticism of process from all parties

4

Common Claims in Respondent Litigation

- Erroneous Outcome
- Selective Enforcement
- Plausible Inference
- Breach of Contract
- Negligence
- Petition for Writ of Administrative Mandamus



NACUA
2021
VIRTUAL
CONFERENCE

5

2020 Final Rule and Beyond

- Two key changes in 2020 Final Rule:
 - (1) what acts trigger Title IX; and
 - (2) what rights, mechanisms and supports institutions must provide for complainants and respondents.
- Erroneous outcome and selective enforcement theories embedded in 2020 regulations
- Will the pendulum swing again under the Biden administration?



NACUA
2021
VIRTUAL
CONFERENCE

6

Alternative Dispute Resolution: New Opportunities, New Risks

- Permitted under 34 C.F.R. § 106.45(b)(9) (“the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication”)
 - Exception for student allegations against an employee
- Considerations for counsel
 - Notice and procedural requirements
 - Recordkeeping issues: FERPA, state public records laws, record retention requirements, privilege
 - Clarity of agreement terms
 - Impact on criminal proceedings

NACUA
2021
VIRTUAL
CONFERENCE

7

NACUA
2021
VIRTUAL
CONFERENCE

Case Study 1: Trouble at the Fall Kickback

8

One night in October...

- On October 1, Drew is hanging out with friends from the institution's pre-med living-learning community: Blake, Wallis, Sam, Kennedy and Ryan. Drew fell asleep on Blake's bed, and Blake got into bed with Drew when it was time to sleep. Blake started kissing Drew and removed Drew's shirt. Blake asked Drew if Drew wanted to "go further" and Drew said yes. Blake and Drew undressed one another and Blake asked Drew if Drew wanted to have sex. Drew said no. Drew and Blake resumed kissing and then fell asleep. After Blake and Drew napped, Blake then began kissing Drew again. Drew did not return the kissing, but Blake persisted, and Drew responded.



9

One night in October... (cont'd)

- Eventually, Drew fell asleep again and woke up with Blake's arm around their waist, and Blake was rubbing Drew's chest. Drew "froze" and did not signal to Blake that Drew was awake or that the fondling was unwelcome. Blake then used Drew's hand to masturbate.
- When Blake went into the bathroom, Drew texted Kennedy 'We need to talk tomorrow.' Drew then went back to sleep, and left the next morning, calling Kennedy to explain what happened. Drew and Kennedy decide to invite Blake to lunch to see if Blake would confess. During lunch, they kept dropping hints, and at one point Blake remarked that Drew was "a really deep sleeper."
- In mid-October, Drew again hangs out with Wallis, Sam, Kennedy and Ryan. Drew leaves Blake a note telling Blake that Drew was awake, and that they needed to talk. In response, Blake meets with Drew and apologizes.



10

After Winter Break...

- Drew shares with Wallis, Sam, and Ryan what has happened. Drew reports that over break Drew reflected on Blake's lack of empathy. Once classes resume, Drew confronts Blake again in front of Wallis and Sam. The group continues to hang out over the course of the spring semester, though Drew avoids Blake.



11

Report and Intake

- On June 8, Drew reports the conduct to the Title IX office. Drew asserts that over spring semester Drew has watched Blake's interactions with others and that Blake has a pattern of mistreating romantic partners. Drew asserts that Kennedy, Wallis, Sam, and Ryan will support Drew on this. Drew also retained and offers to provide the message sent to Kennedy and some group texts with Wallis, Sam, and Ryan that were sent after Winter Break. Drew demands that Wallis, Sam, Kennedy and Ryan be interviewed.
- On June 9, the University sends Blake a notice requesting a meeting, containing standard language about options for support. Blake schedules the meeting for July 10.
- On July 1, Drew submits the messages to Investigator. Their content is ambiguous, so the Investigator does not include them in the investigation.



12

Meeting with Respondent

- Blake attends the interview with Investigator alone and does not request a support person. During the interview, Blake shares that some friends said Drew had feelings for Blake. Blake then reported that Drew fell asleep in Blake's room once and "screwed up." With minimal prompting, Blake described substantially the same facts as reported by Drew, including using one of Drew's hands to masturbate. Blake vehemently denies that Drew was "asleep". Blake acknowledged that Drew "didn't say anything the whole time" and that there was no conversation after the event, but maintains that Blake always asks for consent.



13

Meeting with Respondent (cont'd)

- Blake also relays that talk about the incident initially stayed quiet, other than Drew telling Kennedy, but when Drew came to Blake's place and confronted them, Wallis, Sam, and Ryan overheard this. Due to the stress of the situation, it has been "awkward in the pre-med community" and Blake nearly failed all classes, but did remain enrolled.



14

Completing the Investigation

- Beginning on July 11, Investigator attempts to make contact with Wallis, Sam, Kennedy and Ryan, but connecting with them over summer break proves difficult. Kennedy schedules an appointment, but fails to attend.
- The investigation is still open after Labor Day, beyond the 45 calendar day timeline in the policy, without notice to Blake that the investigation is ongoing.
- After students return to campus, interviews are completed, and consistent with the institution's policy, Blake and Blake's attorney review and sign the investigative report prior to the hearing.



15

The Hearing

- A hearing is held in October.
- Blake attempts to introduce evidence that Drew had romantic feelings for Blake, and that both Blake and Drew have been romantically involved with Kennedy. The hearing officer declines to admit this information. The hearing officer does allow Drew to testify about the message to Kennedy, though.
- Blake is found responsible for violating the institution's Title IX Policy.
- Blake appealed, disputing the validity of the investigation and findings and alleging the institution violated due process requirements and procedural substantive standards.



16

Respondent's Appeal Arguments

- The University failed to initiate a disciplinary proceeding accusing Blake of a violation of the Code of Student Conduct within a reasonable period of time.
- The University failed to provide a copy of the message to Kennedy or even make Blake aware of its existence prior to the hearing, and that the message contained a hearsay allegation from a third-party regarding an incident between Blake and another individual prior to the incident between Blake and Drew.
- Blake was denied the right to have an advocate at the July 10 meeting.



17

Respondent's Appeal Arguments (cont'd)

- The University did not meet its notice obligations because the written interview request did not identify: (1) Drew, (2) the specific section of the Code of Student Conduct allegedly violated, (3) the precise conduct allegedly constituting the potential violation, or (4) the date and location of the alleged incident prior to the initial meeting with the Investigator.
- The hearing panel did not let Blake present evidence of Drew and Kennedy's sexual history.
- The Hearing Panel's decision was not supported by the evidence, namely that there is uncontroverted evidence tendered at the hearing showing that: (1) Blake requested consent and (2) Drew continued to engage in kissing.



18

Considerations for Counsel

- Was the time frame to complete the investigation and initiate the conduct proceedings reasonable? (October to August/October) (June to October)?
- How can the failure to provide notice of an extension be cured?
- How can the failure to provide the ambiguous text messages be cured?
- Was Blake entitled to an advocate at the July 10 meeting?
- Was the specificity of notice for the July 10 meeting sufficient?
- Is the Hearing Panel's decision not supported by the evidence?



19



Case Study 2: The Friendly Faculty Advisor

20

Student – Faculty Scenario

- Title IX Coordinator receives an email from Carla, a graduate student pursuing her MFA in musical theater, alleging that her faculty advisor, Dr. Robinson, has been sexually harassing her for over two years, spanning the entirety of her program—making sexual advances, asking her to dinner, pressuring her in social settings to come home with him, and placing his hands on her on several occasions.
- Carla is nearing the conclusion of her program, with just a few weeks to go before graduation. She is fearful about the ramifications of her reporting on obtaining her degree.



21

Previous Complaint Against Faculty

- Dr. Robinson is a tenured, full professor and a longstanding member of the faculty with a reputation for being chummy with his students.
- A year prior to receiving Carla's email, the Title IX Office received an anonymous report/inquiry about Dr. Robinson alleging sexual misconduct, but the reporting party never identified him/herself by name – rather they only submitted an anonymous online report. While the Title IX Coordinator contacted Dr. Robinson about the report, there was insufficient information to proceed further with an investigation.



22

University Process

- The institution adheres to a hybrid investigator-hearing model for all cases involving faculty, staff and students; where an initial investigation is conducted to gather information to determine whether there is a basis to proceed to a hearing. Once that occurs, a hearing panel of two (2) faculty and one (1) staff member are convened to assess the evidence and make a determination regarding responsibility.



23

Considerations at the Outset of Investigation

- Are there any jurisdiction issues to consider?
- Concerns about timing of report?
- Is this a case that can be informally resolved?
- Assigning an investigator—what should the institution consider?
 - Relationship with either parties?
 - Awareness of previous complaint against Dr. Robinson? Or Dr. Robinson's reputation?



24

Initial Meeting with Student

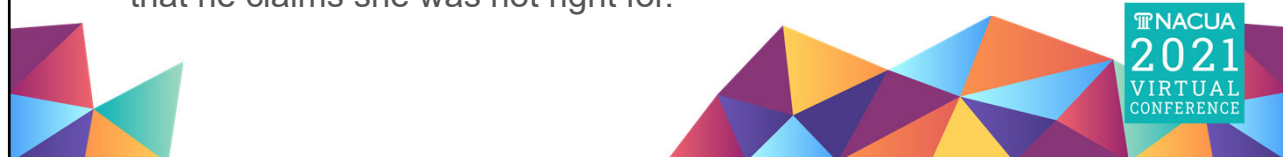
- An investigator is assigned and conducts an initial meeting with Carla, who shares the following:
 - Carla knew Dr. Robinson before commencing her MFA program, as she had performed in a summer theater program where Dr. Robinson directed.
 - Dr. Robinson had reportedly flirted with Carla during the summer theater program, but according to Carla, never crossed the line.
 - Throughout the MFA program, Dr. Robinson held weekly dinners at his house where students did read-throughs of scripts.



25

Initial Meeting with Student (cont'd)

- Carla alleges that Dr. Robinson would frequently ask her to stay after the read-throughs to focus on certain sections. On at least two occasions, Dr. Robinson reportedly placed his hands on Carla's waist and attempted to embrace her. Carla reports that she did not say anything on those occasions objecting to the touching.
- Carla also alleges that Dr. Robinson asked her to dinner on three occasions over the last semester and each time she made up an excuse as to why she could not go. After the third rejection, Carla reports that Dr. Robinson began treating her differently in class and at rehearsals – criticizing her performance, recasting her in a role that he claims she was not right for.



26

Initial Meeting with Student (cont'd)

- At the close of the initial meeting, Investigator shares the following:
 1. Explains the institution's investigation and hearing processes;
 2. Asks Carla to provide any written/electronic communications she may have with the Dr. Robinson;
 3. Asks for names of others with relevant information;
 4. Urges Carla not to discuss the investigation with others so as to not compromise the process.



27

Meeting with Faculty Member

- After sending written notification to Dr. Robinson of the allegations, providing him with a copy of the institution's sexual misconduct policy, and informing him of his right to have an attorney/advisor present, Dr. Robinson meets with Investigator.
- Accompanied by an attorney, Dr. Robinson acknowledges:
 - He knew Carla before she began her MFA program and admits to having flirted with her;
 - He admits to having dinners at his home and having students do read-throughs of scripts;
 - He admits to reassigning Carla's part recently stating that she wasn't right for the role.



28

Meeting with Faculty Member (cont'd)

- Dr. Robinson denies asking Carla to dinner and to stay on longer after student dinners/read-throughs, but admits that she and another student requested to do so on a couple of occasions.
- Dr. Robinson shares that he believes Carla has mental health problems, that she has shared with him details about having been diagnosed with a mood disorder and seeing a therapist at the institution's Wellness Center. Dr. Robinson and his attorney request that Investigator speak with that therapist.
- At the close of the meeting, Investigator explains the next steps in the investigation process and prohibition on retaliation, and identifies support measures like the EAP program.
- Dr. Robinson asks for assistance with identifying a new advisor for Carla for the remainder of her program.



NACUA
2021
VIRTUAL
CONFERENCE

29

Concerns? Next Steps?

- Should the institution consider assigning a new MFA advisor to Carla?
- How should the Investigator respond to Dr. Robinson's statements about Carla's reported mental health?



NACUA
2021
VIRTUAL
CONFERENCE

30

Witness Interviews

Investigator makes contact with several students about Carla's allegations, but the students are only willing to meet with Investigator as a group and do not want their names used in the investigation. Investigator, in consultation with Title IX Coordinator, concludes that if this is the only way to get students to participate, they will allow it.

- Good or Bad Idea? How could this help or hinder the investigation moving forward? How might the Investigator approach the students who wish to remain anonymous and participate as a group?



31

Concluding the Investigation

- Investigator interviews several more witnesses identified by both parties and has an "informal and off-the-record conversation" with a student affairs employee who has had contact with Carla's therapist. The student affairs employee also shares with Investigator her beliefs about Dr. Robinson and his reputation for inappropriate relationships with students.
- Investigator provides draft reports with summaries of all interviews and sends to the parties for review and comment.
- Parties submit follow-up questions for Investigator to pose of one another and of witnesses.
- Carla objects to the student affairs employee's statements being included and/or considered as evidence.



32

Concerns about Investigative Report

- Must the Investigator proceed further and pose questions submitted by the parties to one another and witnesses?
- Should the student affairs employee's statements be considered? Are there other considerations about including mental health information as a part of the investigation?



33

Concerns about Investigative Report (cont'd)

- While the final investigative report excludes the statement from student affairs about Carla's mental health history, the statements about Dr. Robinson's reputation remain. The student affairs witness has reportedly spoken with other staff members and students over the years about Dr. Robinson and these statements are included in the investigative report. The student affairs witness is also the student advisor for the institution's "Know Your IX" group and, as a licensed counselor, runs a support group for sexual assault survivors.
- What now? Could these be issues during the hearing?



34

Hearing Reminders

- A summary of relevant evidence should be prepared at least 10 days prior to any hearing;
- Hearing must be recorded;
- Parties' advisors/attorneys are permitted to pose questions to parties and witnesses;
- Mental health history – check your state's jurisdiction on whether/how this can/cannot be considered;
- Exclude questions about a complainant's sexual history, unless to prove someone other than respondent is responsible for alleged acts or to prove prior acts as evidence of consent.



NACUA
2021
VIRTUAL
CONFERENCE

35



Navigating Title IX Litigation: Tips for Strategic Positioning

36

Suggestions for Investigators and Adjudicators

- Set the stage for due process through the written notice
- Remain objective and impartial
- Treat all parties with civility and respect
- Don't shy away from the tough/awkward questions
- Don't conflate impressions with assessments of credibility
- Recognize limitations when making conclusions that may be construed as medical
- Understand how to seek guidance from legal counsel



37

Suggestions for Legal Counsel

- Eliminate opportunities for bias claims
- Monitor your institution's process and procedures for legal sufficiency
- Advise your client to make relevancy decisions in the hearing and adjudication process carefully
- Remember: while each case is different, strive for consistency in the application of procedures and sanctioning



38

Questions?

39

NACUA materials, PowerPoint slides and recordings available as part of this program are offered as educational materials for higher education lawyers and administrators. They are prepared by presenters and are not reviewed for legal content by NACUA. They express the legal opinions and interpretations of the authors.

Answers to legal questions often depend on specific facts, and state and local laws, as well as institutional policies and practices. The materials, PowerPoint slides and comments of the presenters should not be used as legal advice. Legal questions should be directed to institutional legal counsel.

Those wishing to re-use the materials, PowerPoint slides or recordings should contact NACUA (nacua@nacua.org) prior to any re-use.

40