COMPLIANCE & CASE MANAGEMENT: TITLE IX COORDINATOR AND ADMINISTRATOR TRAINING & CERTIFICATION LEVEL THREE COURSE

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YOUR FACULTY

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Disclaimer

COURSE AGENDA

I. **Managing**
   i. Complex Cases
   ii. Outside Investigators
   iii. Multiple Victim or Perpetrator Situations
II. **Caselaw Review and Application to Professional Practice**
   i. Appeals
   ii. Retaliation
   iii. First Amendment
   iv. Title IX and Gender-based Claims
   v. Due Process Key Case Law
III. **OCR Update: Review of the Proposed Regulations**
IV. **Train the Trainer: VAWA Section 304 Compliance**

A NOTE ABOUT TERMINOLOGY

- "Victim" versus "Survivor."
  - Complainant, accuser, and reporting party.
- Gender pronouns.
- Rape, sexual assault, sexual violence, and sexual misconduct:
  - Any nonconsensual contact between two or more people, regardless of gender, act or gratuitous violence.
  - Law vs. campus policy.
- Relationship/interpersonal violence:
  - Dating violence and domestic violence/abuse.
- Accused, respondent, and perpetrator…

COMPLEX CASES AND RELATED ISSUES

- Complex Cases
- Outside Investigators
- Multiple Victim or Perpetrator Situations

MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT

- Larry Nassar was a team doctor for USA Gymnastics and Michigan State University.
- Graduated from U. of Michigan in 1985 and became an athletic trainer for USA Gymnastics in 1986.
- He received an osteopathic medical degree (D.O.) in 1993 from MSU and in 1996 became the medical coordinator for USA Gymnastics.
- In 1997, he became the MSU gymnastics team physician and an Assistant Professor.
- In August 2016, the *Indianapolis Star* published a piece (followed by many more) detailing the failures of USA Gymnastics in addressing sexual abuse. (https://www.indystar.com/story/news/investigations/2016/08/04/usa-gymnastics-sex-abuse-protected-coaches/85829732/)

MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT

- The morning the article was published, Rachel Denhollander, an attorney with three children wrote an email to the *Indianapolis Star*:
  - *"My experience may not be relevant to your investigation, but I am emailing to report an incident that may be. I was not molested by my coach, but I was molested by Dr. Larry Nassar, the team doctor for USAG. I was fifteen years old, and it was under the guise of medical treatment for my back."*
- The *Indianapolis Star* began an investigation, interviewed Denhollander on camera, spoke with other former gymnasts and, in Sept. 2016, published another story, "Former USA Gymnastics doctor accused of assault" (https://www.indystar.com/story/news/2016/09/12/former-usa-gymnastics-doctor-accused-abuse/89995734/)

MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT

- Some of Nassar's behaviors included:
  - Using his bare hands to digitally penetrate the women and girls (penetration was almost always entirely unnecessary).
    - "Pelvic floor" adjustments.
  - Touch their breasts without medical necessity; and
  - Being visibly sexually aroused during treatments.
- He denied the allegations.
- Criminal charges filed against Nassar and in Nov. 2017, pleaded guilty to 10 counts of first degree criminal sexual conduct.
  - Nearly 100 victims/survivors provided impact statements during sentencing hearing.
  - Nassar sentenced to over 100 yrs in prison.

MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT

- MSU had performed an investigation in 2014, based on a TIX complaint filed by an MSU student (Amanda Thomashow)
  - Thomashow accused Nassar of massaging her breasts and genital area during a medical exam.
  - The TIX Coordinator performed the investigation, concluding Nassar's actions were "medically appropriate"
    - The TIXC reached this conclusion after consulting with four of Nassar's colleagues at MSU
    - The TIXC provided MSU with a different, more detailed report than what was provided to Thomashow
- In 2016, following the *Indy Star's* articles, victims/survivors began filing lawsuits against MSU.

MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT

- In May 2018, MSU agreed to a $500 million settlement
  - $425 million would be distributed among 333 claimants.
  - $75 million would be set aside in a reserve fund for two years in case other survivors came forward.
  - MSU did not admit any wrongdoing as part of the settlement.
  - By comparison, Penn State's initial settlement was $109 million for over 30 victims/survivors
- Incidents led to investigations by the Michigan Attorney General, OCR, NCAA, US congressional committees, and the Michigan House of Representatives.
- Also, numerous USA Gymnastics and USOC officials have either been fired or resigned.

MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT

- Several high-level leaders hindered an appropriate University responses and subsequently experienced consequences:
  - University President resigned and charged with lying to law enforcement about her knowledge of the details of MSU's Title IX investigation by the school into Nassar.
  - Dean of the College of Osteopathic Medicine, who was Nassar's boss, stepped down from dean position and was charged with willful neglect of duty related to the Nassar scandal, fourth-degree criminal sexual conduct, and misconduct in office.
  - MSU gymnastics coach charged with lying to law enforcement relative to when she first became aware of allegations against Nassar.
  - On Jan 16, 2019, Interim President, John Engler, stepped down effective Jan. 23, in part because of comments re: victims/survivors seeking the "spotlight"

MICHIGAN STATE UNIVERSITY: LARRY NASSAR SETTLEMENT

- MSU commissioned the Michigan Attorney General's office to conduct an investigation into the school's handling of the Nassar situation
  - The lead investigator described his role was to determine, "Who knew what, when they knew it and what, if anything, they did about it."
    - Investigators have accused MSU officials of attempting to "stonewall" their investigation, mislead the public
  - Of the 280 interviewed, 13 said they reported the abuse to an identified employee at or around the time it happened
  - Many reported to assistant coaches and athletic trainers
  - MSU had previously hired a law firm to conduct a privileged investigation into the matter; the results of that investigation are not public

RECENT CASE LAW

LAWS, COURTS, AND REGULATIONS

- **Laws** passed by Congress (e.g.: Title IX) – Enforceable by Courts and OCR
  - Federal Regulations – **Force of law**; Enforceable by Courts and OCR
    - Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2001 Guidance)
    - Sub-Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2011 DCL)
- Federal Caselaw – **Force of law** based on jurisdiction
  - Supreme Court – binding on entire country
  - Circuit Courts of Appeal – binding on Circuit
  - District Court – binding on District
- State caselaw – **Force of law**; binding only in that state based on court jurisdiction

APPEALS

APPEALS: KEY ELEMENTS

- Appeal heard by an impartial person/board.
  - No conflict of interest.
- No new allegations permitted
- Typically no hearing → document-based and recording review.
- Limited exceptions to allowing new evidence to be considered on appeal.
- Limited grounds for appeal.
- Deference to original hearing authority.
  - But not rubber-stamp.
- Written rationale for a decision.
- Equitable and prompt.

JOHN DOE V. THE RECTORS AND VISITORS OF GEORGE MASON UNIV. U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)

- **Facts**
  - "John Doe", student at GMU, had a romantic and sexual BDSM relationship with "Jane Roe."
  - On October 27, 2013, Jane and Doe had a sexual encounter in Doe's room, where Jane used her hand to push Doe away and said "I don't know" in response to a request for a sexual act, but allegedly never used the agreed upon safe word ("Red").
  - The relationship ended in January 2014
  - In March 2014, Doe sent Jane a text message that he would "shoot himself" if she would not contact him by the following day.

JOHN DOE V. THE RECTORS AND VISITORS OF GEORGE MASON UNIV. U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)

- **Facts**
  - In April 2014, Jane reported the events of October 2013 to her college's Police Department, who contacted GMU Dean of Students Office.
  - GMU Asst. Dean had frequent contact with Jane over the summer regarding the report.
  - In August, GMU Asst. Dean sent an email to Doe, indicating that he was accused of four violations of GMU's sexual misconduct policy.
  - Three-member, trained hearing panel found him "not responsible."

JOHN DOE V. THE RECTORS AND VISITORS OF GEORGE MASON UNIV. U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)

- **Facts**
  - Jane appealed, citing procedural irregularities
  - Appellate officer = Asst. Dean who did intake, interacted frequently with Roe, and provided Doe of notice of the allegations
  - During appeal, Asst. Dean met with Roe (not allowed)
    - Met with Doe as well, but admitted he already made a decision at that point.
  - Asst. Dean reversed the panel's decision and found Doe responsible for
    - (i) penetration of another person without consent and
    - **(ii) communication that may cause injury, distress, or emotional and physical discomfort (new allegation)**

JOHN DOE V. THE RECTORS AND VISITORS OF GEORGE MASON UNIV. U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)

- **Facts**
  - The Asst. Dean provided no rationale for the decision.
  - Doe appealed to the Dean of Students, who affirmed, providing no rationale, other than consistency of sanctions with past practice
  - Doe filed a lawsuit and the court rejected GMU's Motion to Dismiss a 14th Amendment claim and a Free Speech claim

JOHN DOE V. THE RECTORS AND VISITORS OF GEORGE MASON UNIV. U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)

- Court found that GMU infringed Doe's right to free speech regarding the "shoot myself" comment
  - GMU's policy was overbroad
  - The application of GMU's policy abridged his right to free speech
  - That his comments did not fall under the "true threat" exception

JOHN DOE V. THE RECTORS AND VISITORS OF GEORGE MASON UNIV. U.S. DIST. CT., E.D. VIRGINIA. (FEB 25, 2015)

- **Fourteenth Amendment claim:**
  - Court found John Doe possessed a Liberty Interest
    - Expulsion, coupled with a permanent transcript notation, can do significant harm to his reputation, integrity and his career and educational prospects.
  - GMU deprived him of that interest
    - He was expelled and a permanent notation was made on his transcript.
  - Deprivation effectuated without constitutionally sufficient due process

JOHN DOE V. GEORGE MASON UNIV. U.S. DIST. CT., C.D. CALIF. (NOV. 2, 2105)

- GMU violated Doe's due process by:
  - Failing to provide notice of all allegations used to make a decision.
  - Deviating substantially from its appellate procedures by having off-the-record meetings with Jane.
  - Re-hearing the case on appeal without providing Doe adequate opportunity to "mount an effective defense."
  - Failing to provide a detailed rationale for the appellate decisions.
  - Pre-determining the outcome.
  - Creating a significant conflict of interest.
    - Citing the Asst. Dean/Appellate officer's repeated contact with Jane prior to and while considering the appeal.

RETALIATION

ELEMENTS OF A RETALIATION CLAIM

- The following elements establish an *inference of retaliation*:
  - Did the reporting party engage in protected activity?
  - Was reporting party subsequently subjected to adverse action?
  - Do the circumstances suggest a connection between the protected activity and adverse action?
- What is the stated non-retaliatory reason for the adverse action?
- Is there evidence that the stated legitimate reason is a pretext?

CARLSON V. UNIVERSITY OF NEW ENGLAND
U.S. 1ST CIR. (AUG. 10, 2018)

Retaliation-based case

- **Facts**
  - Lara Carlson hired by Univ. of New England in 2009 as tenure-track professor.
  - In 2011, Paul Visich (Carlson's supervisor and tenure committee review chair) engaged in sexually harassing behaviors towards Carlson:
    - Touched Carlson's knee, thigh, and hand.
    - Stared at her chest while speaking with her.
    - Sent her inappropriate and sexually charged emails and comments.
  - Carlson reported to HR and her Dean.
    - She asked he no longer supervise her or be the head of her tenure committee.
    - Neither happened.

CARLSON V. UNIVERSITY OF NEW ENGLAND
U.S. 1ST CIR. (AUG. 10, 2018)

- **Facts (cont.)**
  - She was forced her to meet with Visich directly, despite her objections.
    - No real progress following the meeting.
  - Six months later, Visich:
    - Gave Carlson a very negative performance review.
    - "Rubbed her shoulder and back in an unwelcomed manner,"
    - Caused her to be removed as the head of College Bowl team, and made changes to the prerequisite to one of her courses that had the effect of radically diminishing its enrollment.

CARLSON V. UNIVERSITY OF NEW ENGLAND
U.S. 1ST CIR. (AUG. 10, 2018)

- **Facts (cont.)**
  - Promotion and tenure review committee rejected Visich's negative evaluation
    - At Carlson's request (again), he was removed as chair of her tenure review committee.
  - Carlson again requested a new supervisor.
  - Dean refused, recommending she be transferred to a different department.
    - Carlson agreed, "if she were allowed to 'keep [her] classes and continue to do [her] job.'"
  - Carlson awarded tenure in 2014.

CARLSON V. UNIVERSITY OF NEW ENGLAND
U.S. 1ST CIR. (AUG. 10, 2018)

- **Facts (cont.)**
  - However, she was removed form teaching courses and advising students in previous department; also removed from their website, which had funding implications
  - Received minimal raise (smallest since arriving at UNE)
  - Filed a complaint in federal court alleging retaliation under Title VII and the Maine Human Rights Act
    - District Court granted summary judgment for UNE
  - 1st Cir. Reversed, citing the department transfer, her removal from courses, etc. may constitute retaliation

CARLSON V. UNIVERSITY OF NEW ENGLAND
U.S. 1ST CIR. (AUG. 10, 2018)

- **Key Takeaways**
  - A jury could find that the transfer was an adverse action:
    - UNE induced Carlson to agree to the department transfer under false pretenses and misrepresentations
    - UNE's Dean was inconsistent in her explanations of the changes to Carlson's teaching responsibilities (possible pretext)
    - Carlson would not have accepted the transfer but for the misrepresentations
    - UNE therefore could have been acting in retaliation, and these events would not have occurred but for her reports of Visich's harassment.
    - UNE did not put forward a non-retaliatory justification for why the Dean would have misrepresented impact of transfer on Carlson's teaching responsibilities.
  - Salary issue dismissed.

FIRST AMENDMENT CASES

TITLE IX & THE FIRST AMENDMENT

- **Title IX cannot be enforced or use to infringe on First Amendment protections.**
- **Time, place, and manner** limitations on expression must be applied consistent with the forum in question.
  - 1) Traditional; 2) Designated; 3) Limited Public; 4) Nonpublic
  - Content neutral.
  - Narrowly tailored to serve a significant state/gov't interest.
  - Leave ample alternative channels for communication of the information.
  - What about non-school-based speech?

TITLE IX & THE FIRST AMENDMENT

- Protected Speech
  - Offensive language.
  - Hate speech.
  - Time, Place, Manner restrictions.
  - Being a jerk.
- Unprotected Speech
  - Fighting Words; Obscenity; True Threat; Defamation.
  - Sexual and Racial Harassment (Hostile environment).
  - Incitement of Imminent Lawless Action.
- Controversial Speakers

JOHN DOE V. VALENCIA COLLEGE
U.S. 11TH CIR. CT OF APPEALS (SEPT. 13, 2018)

- Facts
  - Koeppel (age 42) and Roe (age 24) were biology lab partners in summer 2014.
  - Koeppel bought Roe gifts and shared his affection for her.
  - Roe said she was not interested, had a boyfriend, and did not want to give him the wrong impression.
  - Koeppel saw a Facebook posting that made him think Roe was single again, so he reached out.
  - Roe and her boyfriend called Koeppel and told him to stop.
  - ***Koeppel did not stop.***

JOHN DOE V. VALENCIA COLLEGE
U.S. 11TH CIR. CT OF APPEALS (SEPT. 13, 2018)

- Facts:
  - During the investigation, Koeppel admitted he sent Roe inappropriate messages, many of them sexually and some sexually explicit photos.
  - Roe and boyfriend filed a complaint with police.
  - Police called Koeppel and told him to stop; **he didn't stop.**
  - In August, an emotional Roe reported to Valencia's Dean of Students.
  - DOS implemented a NCO and provided him notice of the charges.
  - Koeppel then sent 20 messages to Roe to convince her to withdraw her complaint.

JOHN DOE V. VALENCIA COLLEGE
U.S. 11TH CIR. CT OF APPEALS (SEPT. 13, 2018)

- Koeppel ultimately found responsible for Stalking – a violation Valencia's Code of Conduct and suspended for one year.

- Decision upheld on appeal.

- In his lawsuit, Koeppel alleged that Valencia
  - Violated his 1st Amendment rights
  - Valencia's policies were overbroad and vague
  - Valencia violated his due process rights
  - Valencia violated Title IX (erroneous outcome)

- Court rejected all of his arguments

JOHN DOE V. VALENCIA COLLEGE
U.S. 11TH CIR. CT OF APPEALS (SEPT. 13, 2018)

- The court upheld Valencia's stalking policy.
  - Koeppel argued it was subjective because it used the words "alarms, torments, or terrorizes,"
  - Court said Koeppel's conduct was "clearly proscribed" and the policy included language the actor's behavior must be willful, malicious, and repeated; and
  - Language that the victim must also be "reasonably and seriously alarm[ed], tormented, or terrorized."

- 1st Amendment not violated because he continued to harass her even after her repeated requests for him to stop, the police requesting him to stop, and a no contact order from the College.

JOHN DOE V. VALENCIA COLLEGE
U.S. 11TH CIR. CT OF APPEALS (SEPT. 13, 2018)

- Court relied on *Tinker v. Des Moines* (signature 1st Amendment case) to indicate he:
  - interfered with Roe's rights
  - Valencia is entitled to take off-campus jurisdiction
- Due process claim failed because he did not have a constitutionally protected right to enrollment at Valencia
  - Even if he did, court noted the school did not act in an arbitrary or capricious manner
- No erroneous outcome under Title IX because he failed to provide facts that cast "some articulable doubt on the accuracy of the disciplinary proceeding."
- Also under TIX, there is no casual connection between the outcome and gender bias

FEMINIST MAJORITY FOUNDATION V. UNIVERSITY OF MARY WASHINGTON

U.S. CT. OF APPEALS, 4TH CIRCUIT (DEC. 19, 2018)

- November 2014: University of Mary Washington's student senate voted to authorize male-only fraternities. Student members of Feminists United at UMW questioned the decision and were subsequently subjected to offensive and threatening anonymous messages posted on Yik Yak.
  - Yaks referred to Feminists United members by "femicunts, feminazis, cunts, bitches, hoes, and dikes"
  - Included threats to "euthanize," "kill," and "[g]rape" FU members.
  - Some Yaks named specific members and reported the location of one member in hopes that she would be confronted on campus.
- Feb/Mar 2015 - Feminist United members expressed concern for their safety due to online posts.

FEMINIST MAJORITY FOUNDATION V. UNIVERSITY OF MARY WASHINGTON

U.S. CT. OF APPEALS, 4TH CIRCUIT (DEC. 19, 2018)

- Although UMW held a listening session, Title IX Coordinator told Feminist United members that UMW had "no recourse" for such online harassment.
- UMW never investigated the harassment and threats, and never asked any law enforcement agencies to investigate them, citing concerns for infringing upon students' First Amendment rights
- In May 2017, plaintiffs filed suit in Eastern District of Virginia, alleging UMW was deliberately indifferent to sex discrimination which served to create and foster a hostile campus atmosphere.

FEMINIST MAJORITY FOUNDATION V. UNIVERSITY OF MARY WASHINGTON

U.S. CT. OF APPEALS, 4TH CIRCUIT (DEC. 19, 2018)

- In September 2017, the district court dismissed the complaint finding that the alleged harassment "took place in a context over which UMW had limited, if any, control."
- U.S. Court of Appeals for Fourth Circuit vacated the dismissal of Title IX sex discrimination complaint and remanded for further proceedings.
- Court relied on *Davis* noting that an educational institution can only be liable for student-on-student sexual harassment when the institution "exercises substantial control over both the harasser and the context in which the known harassment occurs."

FEMINIST MAJORITY FOUNDATION V. UNIVERSITY OF MARY WASHINGTON

U.S. CT. OF APPEALS, 4TH CIRCUIT (DEC. 19, 2018)

- The court found that UMW had control or "disciplinary authority" over the harasser; UMW had ability to punish students who posted sexually harassing and threatening messages online.
- The court rejected the argument that UMW was unable to control the harassers because the offending Yaks were anonymous by noting UMW cannot escape liability when it never took any action to try to identify the harassers.
- The court found that although harassment occurred online, UMW had substantial control over the context of the harassment because the Yik Yak messages concerned events occurring on campus, specifically targeted UMW students, and originated on or within the immediate vicinity of the UMW campus utilizing the campus' wireless network.

FEMINIST MAJORITY FOUNDATION V. UNIVERSITY OF MARY WASHINGTON
U.S. CT. OF APPEALS, 4TH CIRCUIT (DEC. 19, 2018)

- The court noted UMW could have acted to disable access to Yik Yak campus-wide as it controlled activities that occurred on its network.
  - "[W]e cannot conclude that UMW could turn a blind eye to the sexual harassment that pervaded and disrupted its campus solely because the offending conduct took place through cyberspace."
- UMW maintained that the First Amendment would be implicated if they punished students for their speech and barred students from accessing Yik Yak on UMW's wireless network.
  - The court rejected this argument:
    - "(1) true threats are not protected speech, and
    - (2) the University had several responsive options that did not present First Amendment concerns."

FEMINIST MAJORITY FOUNDATION V. UNIVERSITY OF MARY WASHINGTON

U.S. CT. OF APPEALS, 4TH CIRCUIT (DEC. 19, 2018)

- The court agreed with the plaintiffs:
  - UMW could have addressed the conduct without exposing itself to First Amendment liability by:
    - Taking obvious and reasonable (such as more vigorously denouncing the conduct,
    - Conducting a mandatory assembly of the student body to discuss and discourage such harassment through social media,
    - Hiring an outside expert to develop policies for addressing and preventing harassment, or
    - Offering counseling services for those impacted by the targeted harassment).

CASE STUDY #1:
"iPHONE"

Association of Title Administrators

CASE STUDY: IPHONE

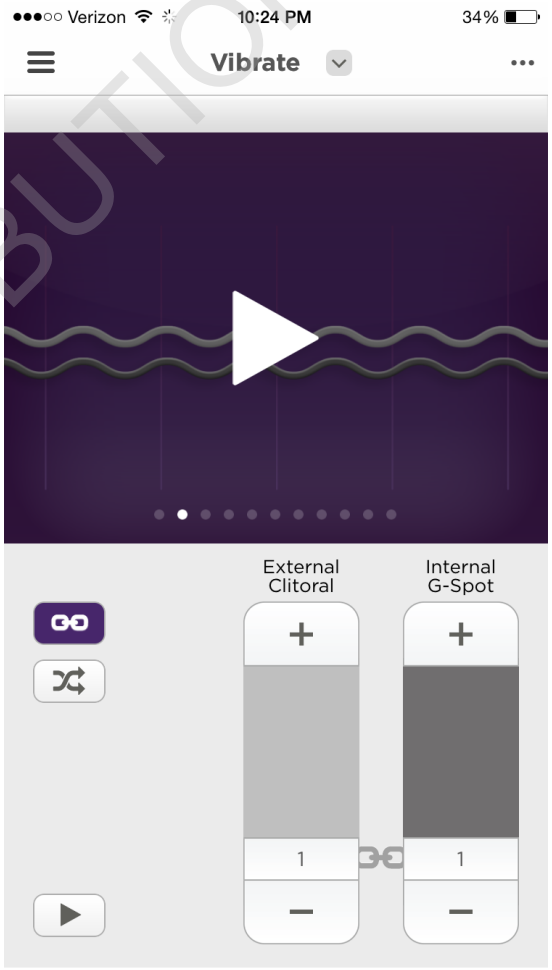
- Maris has been dating Greg for the past few months after the two of them began hanging out following their Psychology 101 class. Greg is a swimmer on the university team. Maris is a first-year student and Greg is a junior.
- Maris has had a few sexual partners in the past and was immediately attracted to Greg, who was outgoing and gregarious, and well-liked on the team and at the parties they frequented together. Maris and Greg enjoyed an adventurous sex life that often included having sex in public places (like the bathroom at a restaurant and even in the swimming pool afterhours).

CASE STUDY: IPHONE

- Maris purchases a product called the we-vibe (http://we-vibe.com) that allows Maris to insert the vibrator and have the speed, duration, and vibration intensity controlled by an app on both her and Greg's phone.
- Their sex life includes the use of vibrators and toys and some light BDSM play. Both Greg and Maris have very high sex drives (having sex four to five times a day,) and this new toy is very much appreciated when they are apart.

CASE STUDY: IPHONE

- While Greg was at a party and Maris was in her dorm room, Greg received a text message from Maris, saying that she had turned on and inserted the vibrator and wanted Greg to help "get her off."
- Greg agreed and opened the app on his phone. Maris continued to text him while Greg adjusted the controls of the vibrator inside Maris.



CASE STUDY: IPHONE

- Jeff, a swimming teammate, saw Greg on his phone and asked what he was doing. Greg initially tried to avoid the conversation, but had consumed several drinks and eventually showed Jeff his phone.
- Greg showed him how the controls work on the phone — toggle slides for intensity — and how the top controls the pattern.
- A text notification from Maris popped up saying, “Want more. Harder.” Jeff asked to set the controls and Gregg shrugged and handed him the phone.

CASE STUDY: IPHONE

CASE STUDY: IPHONE

- Four other teammates saw Jeff and Greg talking and came over to investigate. The phone was passed around the team and everyone took a turn adjusting the controls and reading the texts from Maris. She wrote, “I love this!” and “You are going to make me cum!”
- The group of six laughed at this and Greg pulled up some naked pictures of Maris for them to look at. They talked about how hot she was and soon all six of them were sharing pictures of their girlfriends and people they have slept in a competition to see who had the “dirtiest” and “hottest” images.

CASE STUDY: IPHONE

- Maris and Greg signed off the app and agreed to see each other after the party. Greg was pretty intoxicated and made a joke about how his teammates helped out with the app. Maris became very upset about this and they had a big argument before she broke up with him and told him to get out of her room.
- In the morning, Maris shared this story with her RA and asked to make a complaint.

CASE STUDY: IPHONE

- If you were in the role of taking the compliant, what additional questions or information would you need to know?
- What are the Title IX issues in this case? How would you categorize the issues? What issues involve Greg? What issues involve his friends? What are the concerns with the other images on Greg's teammates phones?
- How does Maris and Greg's past sexual behavior impact the case?
- What would be the likely outcome of this case on your campus?

CASE STUDY: IPHONE

- What kind of conversation could Greg and Maris have had before Greg shared the we-vibe app or the pictures on his phone?
- What kind of prevention or education messaging might VAWA like to see to prevent a case like this from occurring? Which group or department should be involved in creating and sharing this message?
- What are some of the challenges technology presents in Title IX cases?

TITLE IX & GENDER-BASED CLAIMS

Gender Bias

Erroneous Outcome

Disparate Impact or Treatment

JOHN DOE V. PENN STATE UNIVERSITY
U.S. DIST. CT., M.D. PA. (JAN. 8, 2018).

- Incident involved a male and a female student and an allegation of non-consensual sexual penetration in Sept. 2016.
- Investigation began in Sept. 2016; Jane Roe never provided a written statement.
- Investigator allowed Doe to view a draft copy of the report in her office in his **sixth** meeting, but he could not take the report with him. This was also the first time he had seen the incident reports from Res. Life and Univ. PD. (the documents that represented the formal complaint).
- Investigator.
- In May 2017, Administrative Hearing officer found him responsible and recommended suspension until the end of 2017.

JOHN DOE V. PENN STATE UNIVERSITY
U.S. DIST. CT., M.D. PA. (JAN. 8, 2018).

- Hearing held in June 2017.
  - Hearing Panel adhered strictly (and to its detriment) to the information contained in the investigator's flawed report (which excluded key evidence) and did not allow Doe to submit key evidence or have his questions asked.
- Doe was not allowed to see Roe while she testified via webcam transmission; PSU policy required that Doe be allowed to see her.
- Found responsible.
  - Suspended through the end of 2017; required to undergo counseling; lost on-campus living privileges; and panel recommended his removal from the accelerated pre-med program (a significant sanction).

JOHN DOE V. PENN STATE UNIVERSITY
U.S. DIST. CT., M.D. PA. (JAN. 8, 2018).

- Doe sued PSU, the TIX Coordinator, the Investigator, Administrative Hearing officer, Student Conduct administrator, and obtained a TRO against PSU prohibiting implementation of the sanctions.
- Among his allegations, Doe alleged violations of Due Process, Title IX, and Section 1983.
- PSU filed a Motion to Dismiss, which was denied in part and granted in part.
- Section 1983 claim: MTD denied in relation to the TIXC, Hearing Officer, and Investigator --> allowed to proceed against them in their individual capacities.
  - E.g.: Doe alleged lack of notice of the charges, lack of rationale in the "cursory and perfunctory decision letter."

JOHN DOE V. PENN STATE UNIVERSITY
U.S. DIST. CT., M.D. PA. (JAN. 8, 2018).

- Title IX claim of Erroneous Outcome
  - Alleged PSU's process was unfair and biased toward the accuser – Court dismissed this argument, stating this may be a pro-victim bias, but not a sex or gender bias.
  - Alleged the DCL and external social and political pressure, including OCR investigation of PSU → Court said this does not infer gender bias, rather a pro-victim bias.
  - Alleged all students suspended or expelled for sexual misconduct were male → Court said this allegation was enough to survive the Motion to Dismiss.

JOHN DOE V. MIAMI UNIVERSITY, ET AL.
U. S. Ct. of Appeals, 6th Circuit (Feb. 9, 2018)

- John Doe alleged that he was found responsible for sexual misconduct because he was male.
  - Erroneous Outcome claim. Requires plaintiff to show:
    - 1) facts sufficient to cast some doubt on the accuracy of the discipline proceeding, and
    - 2) a causal connection between the flawed outcome and gender bias.
- Both Doe and the reporting party were highly intoxicated. Miami U's policy reads, "an individual cannot consent who is substantially impaired by any drug or intoxicant…"
  - BUT only Doe was charged, despite evidence he may have been more intoxicated.

JOHN DOE V. MIAMI UNIVERSITY, ET AL.
U. S. Ct. of Appeals, 6th Circuit (Feb. 9, 2018)

- Miami U.'s process was very quick and Doe had 48 hrs. to provide evidence and witnesses.
- Doe sought and obtained a medical leave due to stress of the process.
- Prior to hearing, Doe was not provided the names of witnesses, nor given access to the investigation report.
- Investigator that provided him the charges was a member of the hearing board and allegedly dominated the hearing and stated to him, "I bet you do this (i.e. sexually assault women) all the time" during the hearing.
- Doe was found responsible and suspended for 3 terms.

JOHN DOE V. MIAMI UNIVERSITY, ET AL.
U. S. Ct. of Appeals, 6th Circuit (Feb. 9, 2018)

- Court held in Doe's favor:
  - Transcript notation and Liberty Interest → heightened impact necessitates heightened due process.
  - Conflict of Interest: Administrator served conflicting roles. (investigator, hearing panel member, sanctioning agent)
  - Lack of Impartiality: Administrator had pre-determined Doe's guilt as demonstrated by her conduct in the hearing.
  - Withholding report reflected bias.

JANE ROE V. UNIVERSITY OF CINCINNATI
U.S. DIST. CT., S.D. OHIO (AUG. 21, 2018)

- Facts
  - UC students, Jane Roe and John Doe attended a party where they consumed alcohol.
  - Roe walked Doe home from the party because she was worried about his level of intoxication.
  - Doe's roommates were also concerned, asked Roe to leave, but she said she was dizzy and did not leave.
    - Roe allegedly told Doe's roommates, "I promise you, nothing is going to happen. I'm just gonna give him his water, look him over, that's it."
  - After arriving at home, Doe vomited.

JANE ROE V. UNIVERSITY OF CINCINNATI
U.S. DIST. CT., S.D. OHIO (AUG. 21, 2018)

- Roe allegedly locked the door, took off her clothes, "made out" with Doe, and was digitally penetrated by him. In the morning, Doe woke to find Roe in his room and blood on his hands and sheets.
- Doe was very upset and asked roommate to get Roe to leave.
- He reported the incident to military personnel that day (10/1/17).
- On 10/2/17, he filed a complaint with UC's Title IX office; an investigation ensued.
- UC held an in-person hearing, after which the panel determined Doe was incapacitated and Roe should have known. She was suspended until Doe graduated.

JANE ROE V. UNIVERSITY OF CINCINNATI
U.S. DIST. CT., S.D. OHIO (AUG. 21, 2018)

- Roe filed an injunction against UC to keep the finding and sanction from going into effect.
  - § 1983 claim, citing equal protection and due process violations

- Equal Protection
  - Roe claimed inequity because UC did not investigate her level of intoxication – Ct rejected this argument.
    - However, throughout UC's process, Roe claimed the sex was consensual, that she was able to consent, and fully recalled the incident.
  - Roe also claimed UC was motivated to find women in violation of Title IX because of extensive TIX litigation against UC and public pressure.
    - She provided no statistics or evidence, so the court rejected this argument.

JANE ROE V. UNIVERSITY OF CINCINNATI
U.S. DIST. CT., S.D. OHIO (AUG. 21, 2018)

- Due Process claim
  - Roe felt she was not allowed sufficient opportunities for cross-examination
    - Court refused to adopt the 6th Circuit standard, stating that schools should be able to conduct hearings with greater flexibility
    - Not solely a credibility-based determination
      - There was a contemporaneous text message from Roe to a friend saying how intoxicated Doe was at the time of the incident.

NOTE: This case concluded a few weeks before the Baum decision, which may or may not have impacted the court's decision.

SNYDER-HILL, ET AL. V. THE OHIO STATE UNIVERSITY
U.S. DIST CT., S.D. OHIO (COMPLAINT FILED JULY 2018)

- In July 2018, 10 former OSU students – Steve Snyder-Hill and nine other men – filed a lawsuit against OSU.
- The men alleged extensive sexual misconduct and assault by former OSU athletic team doctor, Student Health Services physician, and Assistant Professor, Dr. Richard Strauss:
  - Inappropriately touched and fondled their genitals during examinations.
  - Digitally penetrated their rectums, touched their bodies in other inappropriate ways, moaned during examinations
  - Made sexualized comments and asked inappropriate sexual questions.
  - Found reasons to examine their genitals even when the scope of their visit did not require such examination (example: an appointment for an ankle injury).
  - Plaintiffs also alleged Dr. Strauss completed rectal examinations when not medically necessary.

SNYDER-HILL, ET AL. V. THE OHIO STATE UNIVERSITY
U.S. DIST CT., S.D. OHIO (COMPLAINT FILED JULY 2018)

- Administrators, coaches, and Athletic Directors are alleged to have known about the abuse, but failed to take corrective action leading to more victimization
  - Allegations span from 1978-1998.
- Since its initial filing, the number of plaintiffs has grown to thirty-nine (39) former OSU students
- Dr. Strauss committed suicide in 2005.
- As evidence of an ongoing culture of abuse, Plaintiffs referenced:
  - OSU's decision to close its sexual assault prevention and response unit.
  - How OSU instructed students to see Dr. Strauss for exams after they had reported complaints of misconduct by Dr. Strauss.
  - OSU's pattern of permitting other sexual predators within the campus community.

SNYDER-HILL, ET AL. V. THE OHIO STATE UNIVERSITY
U.S. DIST CT., S.D. OHIO (COMPLAINT FILED JULY 2018)

- Many plaintiffs were unable to identify what happened to them as sexual assault until reports came out in 2018.
- The plaintiffs allege there could be thousands of victims given Dr. Strauss' 20 year tenure at OSU, as well as his prominent roles as an OSU Student Health Services physician and athletic teams doctor.
- Plaintiffs alleged that coaches and other professional staff members knew that Dr. Strauss was committing the abuse and that students regularly called him nicknames such as Dr. Balls, Dr. Nuts, Dr. Jelly Paws, and Dr. Cough.

DUE PROCESS

WHAT IS DUE PROCESS?

- Two overarching forms of due process:
  - Due Process in Procedure:
    - Consistent, thorough, and procedurally sound handling of allegations.
    - Institution substantially complied with its written policies and procedures.
    - Policies and procedures afford sufficient Due Process rights and protections.
  - Due Process in Decision:
    - Decision reached on the basis of the evidence presented.
    - Decision on finding and sanction appropriately impartial and fair.

JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)

- Facts
  - John Doe and J.C. met at new student orientation in Fall 2011.
  - They became close friends and began a 21-month "intimate, sexually active, and…exclusive dating relationship"
  - After their relationship ended, they maintained a friendship for four months, but their friendship deteriorated.
  - Both John and J.C. were attracted to the same person, who rejected J.C.'s friend request.
  - The next day (6 months after relationship ended), J.C. filed a two sentence complaint: "Starting in the month of September 2011, the Alleged Violator of Policy [John] had numerous inappropriate, nonconsensual sexual interactions with me."

JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)

- **Facts**
  - Upon receipt of this complaint, and without any additional information, Brandeis' Dean of Students immediately removed John from the residence halls, classes, his campus job, and his student leadership position.
  - Two days later, John was charged with six potential violations:
    - Sexual misconduct
    - Taking sexual advantage of incapacitation
    - Lack of consent to sexual activity
    - Sexual harassment
    - Causing physical harm to another
    - Invasion of privacy

JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)

- Brandeis had recently changed its procedures for sexual misconduct allegations that relied on the investigation and findings of a "Special Examiner" and:
  - Did not provide for a hearing
  - Did not allow the accused to know the details of the charges
  - Did not allow the accused to see the evidence prior to a decision
  - Did not allow the accused to see the Special Examiner's report until the process had concluded (including appeal)
  - Did not allow for cross-examination of the parties or witnesses (even through an intermediary)

JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)

- Appeals
  - "There was no right of appeal on the grounds
    - That there was insufficient evidence to sustain the findings
    - That the Special Examiner was mistaken as to any factual issue
    - That the Special Examiner acted arbitrarily or capriciously;
    - Moreover, the accused was expected to prepare his appeal without access to the Report on which the finding of responsibility was based."

JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)

- Doe was not provided with the Special Examiner's report
- Had a summary read to him after the Special Examiner determined a finding
  - The Special Examiner's finding was technically a "recommendation" to an administrator or panel, but in practice the recommendation was always adopted.
- John Doe was found responsible by the Dean of Students and a panel of three met privately to determine sanction.
- They sanctioned John with a disciplinary warning, a requirement to undergo sensitivity training, and a permanent notation on his transcript.
- An appellate group of three faculty denied John Doe's appeal.

JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)

- The Special examined 12 incidents and found John Doe responsible for four of them:
  - Touching J.C.'s groin while they watched a movie (they had sex for the first time the next night)
  - Looking at J.C.'s privates when they showered together.
  - Kissing J.C. to wake him up (something he did over the course of their relationship; S.E. rigidly determined J.C. was incapacitated and could not consent)
  - An incident where John allegedly attempted to perform oral sex on J.C. when he didn't want it.
- The S.E. relied heavily on the fact that John's answers to questions were inconsistent; **however, the questions were rarely specific enough to allow John to even know what he was supposed to address in his response.**

JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)

- John Doe sued Brandeis citing eight causes of action, of which four survived Brandeis' motion to dismiss:
  - **Breach of contract – Motion denied**
  - **Breach of the implied covenant of good faith and fair dealing – Motion denied**
  - Estoppel and reliance – Motion granted
  - **Negligence – Motion granted in-part (negligent supervision claim survives)**
  - Defamation – Motion granted
  - Invasion of privacy – Motion granted
  - Intentional infliction of emotional distress – Motion granted
  - **Negligent infliction of emotional distress – Motion denied**
- *Note: While John Doe did not make a Title IX claim, this case is significant because of the due process and procedural elements involved in sexual misconduct cases.*

JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)

- The court wrote a blistering and chastising decision, ultimately concluding that the composite picture painted by the numerous failures to provide a fundamentally fair process led to a denial of Brandeis's motion to dismiss.
- The court listed ten separate issues of procedural fairness:
  - No right to counsel
  - No right to confront accuser
  - No right to cross-examine witnesses
  - No right to examine evidence or witness statements
  - Impairment of the right to call witnesses and present evidence
  - No access to Special Examiner's report
  - No separation of investigatory, prosecution, and adjudication functions
  - No right to effective appeal
  - Burden of proof

JOHN DOE V. BRANDEIS UNIVERSITY

U.S. DIST. CT., MASS. (MARCH 31, 2016)

- **Key Takeaways**
  - Provide a responding party with detailed allegations and allow them to respond to each of the allegations prior to rendering a finding.
  - **Stop hiding the ball** – let the parties review reports
  - Ensure appellate procedures allow a party to appeal on the basis that the decision "was not supported by the evidence, unfair, unwise or simply wrong."
  - It is not always enough to follow your procedures if those procedures are deficient in providing basic due process or fundamental fairness protections.
    - "Brandeis appears to have substantially impaired, if not eliminated an accused student's rights to a fair and impartial process." (p.12).

DOE V. UNIVERSITY OF CINCINNATI
U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)

- Facts
  - John Doe was a graduate student at UC
  - Aug-Sept 2015: John Doe met Jane Roe on Tinder and after a few weeks, met in person, then went to his apartment, where they engaged in sexual intercourse
  - Three weeks later, Roe reported to UC's Title IX office that Doe had sexually assaulted her.
  - UC's Title IX office investigated the allegation (took nearly 5 months), then referred the matter to a faculty/student hearing board
  - Evidence is disclosed to the accused in advance of the hearing

DOE V. UNIVERSITY OF CINCINNATI
U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)

- Facts
  - Hearing provided a "circumscribed form of cross-examination" --> provide written questions to the panel who determine relevance and whether the question will be asked.
  - Hearing held on June 27, 2016, but Roe did not attend
  - Doe did not know Roe would not attend
  - UC altered its procedures in her absence and Doe was unable to ask her any questions
  - Chair read Roe's closing statement into evidence

DOE V. UNIVERSITY OF CINCINNATI
U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)

- Facts
  - Hearing board deliberated, found Doe responsible, and recommended a 2-year suspension, which UC's Asst. Dean accepted.
  - Appellate administrator recommended that UC lessen the suspension to 1 yr.
  - UC's Dean of Student accepted this recommendation
  - Doe informed of final decision in Sept. 2016, with sanction to start at the end of Fall 2016.

DOE V. UNIVERSITY OF CINCINNATI
U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)

- Doe sued UC for violation of Title IX and violation of due process and moved for preliminary relief enjoining UC from enforcing the decision
  - Doe argued UC's action was unconstitutional, as he was provided no opportunity to cross-examine Roe, per UC procedures.
  - Dist. Ct. agreed.
- UC appealed the District Court's decision on the preliminary injunction
- 6th Circuit upheld the District Court's decision

DOE V. UNIVERSITY OF CINCINNATI
U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)

- **6th Circuit's decision**
  - Due process: **Where credibility is the deciding factor/pivotal issue**, the Complainant's absence from the hearing made it difficult and problematic for the "trier of fact" to assess credibility
  - The inability to confront one's accuser rendered the process fundamentally unfair.
  - Cross examination in some form is essential to due process, even if indirect or via video conferencing; does not have to be at the same level as a judicial trial
  - Limited their decision to the facts of the case and UC's procedures, but it is a reflection of the due process needed when a student is facing suspension or expulsion.

JOHN DOE V. CALIFORNIA STATE UNIVERSITY
SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)

Due process-based case

- **Facts**
  - Doe expelled from Cal Poly, San Luis Obispo in 2016 for sexual assault
  - Call Poly received notice from Jane Roe's roommates
  - Doe and Roe attended a fraternity party, danced, and kissed
  - Roe alleged they went to a room at the party where Doe:
    - Forcibly kissed Roe
    - Held her down on a bed
    - Bit her lip until it bled, and removed her shirt.
  - Roe alleged she fought back and was able to leave the house.

JOHN DOE V. CALIFORNIA STATE UNIVERSITY
SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)

- Roe was reluctant to participate and provided a statement
- Roe refused to provide Doe's name, related text messages, or to participate in a formal resolution
- University initiated a "confidential resolution"
- Doe alleged encounter was consensual
- Eye witness walked in on Doe and Roe and said it appeared consensual
- Doe provided text messages after alleged incident between him and Roe
- Doe recommended three additional witnesses, who were not interviewed

JOHN DOE V. CALIFORNIA STATE UNIVERSITY
SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)

- Doe was expelled and his appeal was denied
- In his filing, Doe cited due process issues, such as:
- Three additional witnesses who were not interviewed
- Doe was not able to pose questions to Roe because she did not participate in the process
- Doe was not able to pose questions, directly or indirectly, to Roe's roommates or other witnesses.
- Several key pieces of evidence were misrepresented in the investigation report
- Doe was informed of the determination of responsibility, but was told the investigation report was not yet complete
- Not allowed to review report

JOHN DOE V. CALIFORNIA STATE UNIVERSITY
SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)

- Judge ordered the expulsion be reversed.
- Judge noted that the University:
  - Failed to inform Doe of the complete allegations, including policies violated.
  - Failed to disclose all evidence on which the determination relied.
  - Failed to allow Doe to question Roe or witnesses, directly or indirectly, despite the university's reliance on the credibility of testimony.
  - Reached a determination that was not supported by substantial evidence.

JOHN DOE V. CALIFORNIA STATE UNIVERSITY
SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)

- **Key Takeaways**
  - Reporting party's lack of participation is a significant due process concern.
  - Provide parties an opportunity to review and respond to all relevant evidence.
  - Question reporting and responding party's witnesses. If witnesses are not interviewed, document the rationale.
  - Provide for direct or indirect questioning between the parties and of witnesses
  - Provide an opportunity to review the investigation report once all evidence is collected.

JANE ROE V. JAVAUNE ADAMS-GASTON, ET AL.
U.S. Dist. Ct., S. Dist. Ohio, E Div. (April 17, 2018)

- This case involved an Ohio State University student who was charged twice for sexual misconduct. She was initially suspended, then expelled following the second hearing.
- Roe argued that she was denied her right to due process because she was unable to cross-examine adverse witnesses during the hearing.
- She sought, and was awarded, a preliminary injunction against the university for her expulsion.
- In this case Ohio State conducted a thorough investigation and provided a written report to the hearing board including interview notes taken by the investigator.

JANE ROE V. JAVAUNE ADAMS-GASTON, ET AL.
U.S. Dist. Ct., S. Dist. Ohio, E Div. (April 17, 2018)

- Both parties attended the first hearing.
- Hearing panel felt Roe was not credible and her account was not plausible, as compared to the complainants and witnesses.
- In the second hearing, the complainant did not attend, but sent a statement directly to hearing officer and asked that statements be read aloud during the hearing; Roe objected to the statements being read, but the statements were in the hearing packet.
- 3 adverse witnesses did not attend, but their statements were in the hearing packet.
- Hearing officer found Roe in violation; found her statement lacked credibility as compared with the credible and plausible statements of witnesses.
- Roe was expelled.

JANE ROE V. JAVAUNE ADAMS-GASTON, ET AL.
U.S. Dist. Ct., S. Dist. Ohio, E Div. (April 17, 2018)

- Roe sued, stating OSU deprived her of due process because she could not cross examine the reporting party and the witnesses.
- The Court held that a hearing was necessary.
- The hearing does not need to have the formalities of a criminal trial but the accused student must be given an opportunity to respond, explain, and defend herself.
- Due process requires an opportunity to confront and cross examine adverse witnesses, especially where the evidence consists of the testimony of individuals whose memory might be faulty or motivated by malice or vindictiveness.
- Hearing panel should be given an opportunity to assess demeanor.

JOHN DOE V. UNIVERSITY OF MICHIGAN, ET AL.
U.S. DIST. CT., E. DIST. MICHIGAN, S DIV. (JULY 6, 2018)

- Doe completed all graduation requirements then was accused of sexual assault. He sought a preliminary injunction preventing the investigation, indicating Michigan's policy violated due process rights.
  - Doe alleged that due process requires a live hearing and an opportunity for cross examination.
- Michigan's policy provides for an investigation. The investigator provides the opportunity for the parties to pose questions to each other or to witnesses; investigator makes a finding and provides a rationale to the TIXC and General Counsel.
- Court found in Doe's favor, citing the high risk of harm (expulsion).

JOHN DOE V. UNIVERSITY OF MICHIGAN, ET AL.
U.S. DIST. CT., E. DIST. MICHIGAN, S DIV. (JULY 6, 2018)

- Court said Michigan's method of private questioning through an investigator leaves Doe with no way of knowing which questions are actually being asked of adverse witnesses or their responses.
- Without a live proceeding, the court said the risk of an erroneous deprivation of Doe's interest in his reputation, education and employment is significant.
- Interestingly, court did not require Michigan to change its process.

JOHN DOE V. CLAREMONT MCKENNA COLLEGE
CAL. CT. APP., 2ND DIST. (AUGUST 8, 2018)

- May 2015, John Doe was found responsible for nonconsensual sexual intercourse with Jane Doe, a student from Scripps College.
- He was suspended for one year.
- The decision was made as a result of an "Investigation Findings and Review" committee – two CMC faculty/staff and the investigator.
- Procedures for the Committee "meeting" did not allow for questioning by the Committee or the parties.
- Jane did not attend the Committee meeting.
- The Investigator also did not ask Jane the questions John requested the investigator ask.

JOHN DOE V. CLAREMONT MCKENNA COLLEGE
CAL. CT. APP., 2ND DIST. (AUGUST 8, 2018)

- He petitioned in state court for a writ of administrative mandate to set aside the decision.
- Trial court denied the petition. Appellate court reversed.
- Court approvingly cited 6th Circuit's Cincinnati decision regarding credibility determinations and the ability of the parties to pose questions to each other.
  - *"We hold that where, as here, John was facing potentially severe consequences and the Committee's decision against him turned on believing Jane, the Committee's procedures should have included an opportunity for the Committee to assess Jane's credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee's asking her appropriate questions proposed by John or the Committee itself. "*

JOHN DOE V. CLAREMONT MCKENNA COLLEGE
CAL. CT. APP., 2ND DIST. (AUGUST 8, 2018)

- Court recognized a college is not a court, that it cannot compel people to appear at a hearing, the burden of added procedures on the college, and the possibility of intimidating or retraumatizing the complainant.
  - *"In light of these concerns we emphasize, as did Cincinnati, that the school's obligation in a case turning on the complaining witness's credibility is to "provide a means for the [fact finder] to evaluate an alleged victim's credibility, not for the accused to physically confront his accuser."*
  - "While we do not wish to limit the universe of ideas of how to accomplish this, we note that the mechanism for indirect questioning in *Regents*, including granting the fact finder discretion to exclude or rephrase questions as appropriate and ask its own questions, strikes a fair balance among the interests of the school, the accused student, and the complainant."

JOHN DOE V. BAUM, ET AL.
U. S. Ct. of Appeals, 6th Circuit (Sept. 7, 2018)

- Jane Roe accused John Doe of sexual misconduct – claiming she was incapacitated.
- The University of Michigan investigated over the course of 3 months, interviewing 25 people.
- "The investigator was unable to say that Roe exhibited outward signs of incapacitation that Doe would have noticed before initiating sexual activity. Accordingly, the investigator recommended that the administration rule in Doe's favor and close the case."
- Roe appealed.

JOHN DOE V. BAUM, ET AL.
U. S. Ct. of Appeals, 6th Circuit (Sept. 7, 2018)

- The 3-member Appellate Board reviewed the evidence and reversed the investigator's decision (did not meet with anyone or consider any new evidence). They felt Roe was more credible.
- Before sanctioning, Doe withdrew, one semester shy of graduation.
- Doe sued, alleging Title IX and Due process violations.
- On a Motion to Dismiss by Michigan, the District Court dismissed the case, but 6th Circuit reversed.
- The Due Process and the Title IX Erroneous Outcome claims survived.

JOHN DOE V. BAUM, ET AL.
U. S. Ct. of Appeals, 6th Circuit (Sept. 7, 2018)

- **Due Process**
  - "Our circuit has made two things clear: (1) if a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension, and (2) when the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination."
  - "If 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."
    - Either directly by the accused or by the accused's agent.

JOHN DOE V. BAUM, ET AL.
U. S. Ct. of Appeals, 6th Circuit (Sept. 7, 2018)

- Title IX Erroneous Outcome
  - The due process issues cited above inform their finding.
  - The attention gained because OCR launched an investigation two years ago that garnered and continued to garner attention, the complaint was filed by a female, Michigan could lose all of its funding, the news media beat up Michigan for not supporting victims enough,
  - The Appellate Board dismissed all the evidence provided by male witnesses (caser was basically men on Doe's side, women on Roe's side) stating that they were biased because they were fraternity brothers of Doe, but made no such qualification for her witnesses (all of whom were her sorority sisters, but their decision made no mention of that).
  - The Appellate Board made these judgments on a "cold record".
- "Taken together, male bias is a plausible explanation that is better explored in discovery."

JOHN DOE V. U. OF SOUTHERN MISSISSIPPI
S.D. MISS. (NOV. 27, 2018)

- In July 2018, John Doe, a scholarship athlete, was accused of sexual misconduct
- The University conducted an investigation and sent Doe a summary of the interviews, requesting a response
- Doe did not respond and was subsequently found responsible and suspended for one year
- In September, he successfully filed for an injunction, prohibiting the University from implementing the sanction
  - He cited the draft, leaked regs as entitling him to more due process than the University provided him → Court rejected that claim
  - However, Court had concerns about the process, reinstated Doe as a student and a scholarship athlete.

JOHN DOE V. U. OF SOUTHERN MISSISSIPPI
S.D. MISS. (NOV. 27, 2018)

- University conducted a new hearing under substantially revised and enhanced procedures:
  - University updated based on Doe v. Cincinnati and U. of Miss. caselaw
  - Each party provided a separate room to observe entire proceedings
  - Advisors (as well as any attorneys)were allowed to observe as well
  - Parties could request a digital recording of the hearing
  - Parties received written summaries of evidence and provided an opportunity for review and response.
  - Parties could email follow-up questions to hearing panel, who would ask the questions, or reject a question at their discretion.

JOHN DOE V. U. OF SOUTHERN MISSISSIPPI
S.D. MISS. (NOV. 27, 2018)

- Doe filed a second injunction, citing especially the Proposed Regs., the 6th Circuit's *Baum* decision
  - Cited the inability to be in-person during questioning limited ability to determine credibility
  - Hearing Panel's ability to reject certain questions limited ability to cross-examine

- Court denied the injunction request, stating that the revised procedures "appear to adequately satisfy due process"

JOHN DOE V. U. OF SOUTHERN MISSISSIPPI
S.D. MISS. (NOV. 27, 2018)

- Court's decision
  - *Doe v. Baum* went "well beyond what was required" and declined to decide the current case consistent with *Baum*
  - University's revised procedures were consistent with Doe v. Cincinnati, which required the *decision-maker* to see the parties
  - Extensively analyzed 6th Circuit's overreach in *Baum*
  - *Due process does not require asking ALL questions posed by the parties*
  - Rejected Proposed Regs argument
    - "[T]here is no guarantee, or even probability, that the proposed regulations will be adopted wholesale as proposed."
    - "[I]t is not the federal agency's role to determine what constitutes adequate due process—such a determination remains the role of the courts."

JOHN DOE V. U. OF SOUTHERN MISSISSIPPI
S.D. MISS. (NOV. 27, 2018)

- Key Takeaways
  - Splits with the *Doe v. Baum* decision, citing Baum's overreach
  - Recognizes greater flexibility of due process in a school setting
  - Credibility does not require physical presence, as long as decision-maker can see them
  - Failure of injunction to require the University to wait for the Proposed Regs to be finalized likely chilled other similar injunctions
  - Highlights possible Ultra Vires actions by Dept. of Ed.

JOHN DOE V. U. OF SOUTHERN CALIFORNIA
CA. COURT OF APPEAL, 2ND APP. DISTRICT (DEC. 11, 2018)

- Facts
  - April 2014, Doe and Roe attended a paint party
  - Both had consumed alcohol prior to and during the party
  - They went to Roe's apartment where Roe alleges Doe sexually assaulted her and engaged in nonconsensual vaginal and anal intercourse
  - Investigation begun by USC investigator (April) → outsourced to an outside attorney (May) → transferred back to USC investigator (June)
  - USC investigator did not re-interview key witnesses
  - USC admin. determined Doe knew or should have known Roe could not consent.

JOHN DOE V. U. OF SOUTHERN CALIFORNIA
CA. COURT OF APPEAL, 2ND APP. DISTRICT (DEC. 11, 2018)

- **Facts**
  - Roe did not remember much of what happened, but reconstructed events based on three witnesses interviewed by other investigator.
  - USC administrator felt other witnesses were not "sufficiently reliable."
  - Doe was expelled from USC.
  - USC denied Doe's appeal.

JOHN DOE V. U. OF SOUTHERN CALIFORNIA
CA. COURT OF APPEAL, 2ND APP. DISTRICT (DEC. 11, 2018)

- Trial court denied Doe's petition to set aside his expulsion
- Ct. of Appeals:
  - Reversed, citing credibility of witnesses as a key issue → USC administrator should have interviewed key witnesses because their credibility was central to the finding.
  - Key discrepancies in testimony and evidence required further examination.
    - E.g.: there were red substances in Roe's apt; were they paint or blood?
    - USC did not ask Roe to provide her clothes.
    - USC did not obtain, or seek to obtain rape treatment center medical records.

JOHN DOE V. U. OF SOUTHERN CALIFORNIA
CA. COURT OF APPEAL, 2ND APP. DISTRICT (DEC. 11, 2018)

- **Key Takeaways**
  - A California state Ct of Appeals cited favorably to *U. of Cincinnati*, *Baum* and *Claremont McKenna.*
  - Possibility of severe sanctions in a credibility-based case warrants a fair hearing to allow the decision-maker to determine witness credibility.
    - In-person in order to observe demeanor.
    - Directly address the witnesses and parties.
  - When you are aware evidence exists, ask for it!
    - Thoroughness, fairness, and impartiality demand it.

LEE V. UNIVERSITY OF NEW MEXICO
U.S. DIST. CT., DISTRICT OF NEW MEXICO (SEPT. 20, 2018)

- UNM student, J. Lee was found responsible for sexual misconduct and expelled from UNM.
- Lee sued under Title IX, Breach of Contract, violation of due process, gender discrimination, and violation of NM Constitution.
- Due process claims to survived a motion to dismiss
  - UNM provided an evidentiary hearing for non-sexual misconduct related resolutions, but not for sexual misconduct.
  - UNM failed to properly inform Lee of all of the allegations (underage drinking)
- The court stated an ***investigation that relies on credibility requires a formal or evidentiary hearing including cross-examination of witnesses and presentation of evidence to preserve basic fairness.***

LEE V. UNIVERSITY OF NEW MEXICO
U.S. DIST. CT., DISTRICT OF NEW MEXICO (SEPT. 20, 2018)

- Court stated that preponderance of the evidence standard is inappropriate where serious sanctions are possible, including expulsion and permanent transcript notation.
  - This is the first ruling to explicitly hold that the preponderance standard is constitutionally improper.
  - Favorably cited in the DOE's proposed Title IX regulations to justify assertion that preponderance is inadequate "where the consequences of a finding of responsibility would be significant, permanent, and far-reaching." (https://www.federalregister.gov/d/2018-25314/p-142)
- This decision falls in line with the 6th Circuit decision *Doe v. Cincinnati* relating to a formal evidentiary hearing when credibility is at issue and serious sanctions are possible.

OCR UPDATES

OVERVIEW OF PROPOSED REGULATIONS

- November 29, 2018: OCR published proposed amendments to Title IX regulations:
  - Provided 60 days for public comment – open until January 28th (period to be extended due to government shutdown)
  - OCR will then review comments and finalize the regulations
  - OCR has to respond materially to comments
  - Will amend the Code of Federal Regulations
  - **Will have the force of law once adopted**
  - Proposed amendments are significant, legalistic, and very due process-heavy
  - Will likely go into effect 30 days after final regulations published in Federal Register

RESPONSIBLE EMPLOYEES?

- Proposed regulations shift "actual notice" to:
  - Anyone who has the authority to take action to redress the harassment
  - All pre-K-12 teachers when conduct is student-on-student
- This is ONLY the standard for when OCR would deem a school to be on notice; it is the floor.
- ATIXA has not changed its recommendation to require all non-confidential employees to report harassment or discrimination
- Continue to train employees on obligation to report

DEFINITIONS: NOTICE

- "Notice" is the benchmark indicating when an institution is required to stop, prevent, and remedy
- Current OCR definition of notice – "knew or should reasonably have known"
  - Incorporates both actual and constructive notice
- Proposed regulations restrict to actual notice exclusively
  - *Actual knowledge* means notice to Title IX Coordinator or any official with authority to institute corrective measures
  - *Respondeat superior* or constructive notice insufficient
  - PK-12 teachers are "officials" – post-secondary faculty are not
  - Mere ability or obligation to report does not qualify as "official"

JURISDICTION

- Jurisdiction
  - *Davis* standard – control over the harasser and the context of the harassment
  - "occurs within its education program or activity"
- Geography should not be conflated with the Clery Act – education programs or activities can be off-campus, online
- Proposed regulations specify "harassment…against a person in the United States"
  - Unclear effect on study abroad programs or school-sponsored international trips – "nothing in the proposed regulations would prevent…"
- Open question of student/employee harassment of non-student/employee

JURISDICTION

- Current requirement to address on-campus effects of off-campus misconduct
  - Even if conduct took place outside education program or activity, schools responsible for addressing effects that manifest in the program/activity
  - Students and/or employee conduct outside program, IPV
- Leaked draft of regulations prior to publication indicated schools "are not responsible" for exclusively off-campus conduct but could be responsible for on-going on-campus /in program effects
- Published proposal eliminated this comment, presume *Davis* standard still applies – "nothing in the proposed regulations would prevent…"

DEFINITIONS: SEXUAL HARASSMENT

- Current OCR Definition of Sexual Harassment is “unwelcome conduct of a sexual nature”
  - Includes quid pro quo “requests for sexual favors”
  - When sexual harassment constitutes sex discrimination by causing a hostile environment (discriminatory effect), prohibited by Title IX
- Proposed regulations
  - Conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (QpQ)
  - Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity (HE)
  - Sexual assault, as defined in 34 CFR 668.46(a)
- No mention of retaliatory harassment in proposed regs

DELIBERATE INDIFFERENCE STANDARD

- In *Gebser* (1998) and *Davis* (1999), the Supreme Court held that a funding recipient is liable under Title IX for deliberate indifference **only** if:
  - The alleged incident occurred where the funding recipient controlled both the harasser and the context of the harassment; AND
  - Where the funding recipient received:
    - Actual Notice
    - To a person with the authority to take corrective action
    - Failed to respond in a manner that was clearly unreasonable in light of known circumstances
- OCR has historically used a broader, less stringent standard

DUE PROCESS OVERVIEW

- Proposed regulations place heavy emphasis on due process protections for the responding party
- New standard of proof mandates
- Notice at various investigation stages
- Collection and production of evidence for review
- Mandate for determination and sanction process
- Live hearings with cross-examination
- Schools provide advisor; must allow advisor questioning of parties/witnesses

STANDARD OF PROOF

- Current OCR standard – preponderance of the evidence is standard civil court will use to evaluate school's response
- Proposed regulations allow preponderance only if same for other conduct code violations, otherwise must use clear & convincing
- Effectively mandates clear & convincing for schools with higher standards for other proceedings (i.e. AAUP faculty hearings)
- May create incongruence between school process and court scrutiny (where preponderance will still be the standard)
- ATIXA position – preponderance only equitable standard

PROMPT

- Proposed regulations specify “prompt timeframes” written into grievance procedures
- Temporary delays only allowable for “good cause” and with written notice of the delay to parties
- OCR does not appear to contemplate reasonable delays at the earliest points of an investigation
- Responding party may not yet know of investigation or allegations – written notice of delay may be first indication

WRITTEN, DETAILED NOTICE

- Proposed regulations require several written, detailed notices to the parties
  - Any reasonable delay for good cause
  - Upon receipt of a formal complaint
    - Sufficient details – identity of parties, alleged violations, date, location
    - Sufficient time to prepare a response
  - Informal process requirements, if applicable
  - All hearings, interviews, and meetings requiring attendance with sufficient time to prepare
  - Upon determination of responsibility, including sanctions
- Notice requirements may affect industry standard investigative practices
- *Doe v. Timothy P. White, et. al.,* (2018)

SUPPORTIVE MEASURES

- Non-disciplinary, non-punitive individualized services
- Must not unreasonably burden other parties
- Proposed regulations address mutual restrictions, neglect unilateral or individualized restrictions
- Appears to anticipate, but also prohibit, that one party will sometimes be restricted more than the other
- May chill reporting if automatic mutual restrictions limit access to education program

BURDEN OF PROOF ON FUNDING RECIPIENT TO GATHER EVIDENCE

- Burden of proof and burden of gathering evidence on the school, not the parties
- "Sufficient to reach a determination" = appropriately thorough?
- Unclear if all relevant evidence must be collected
- Parties may be able to request certain evidence be obtained
- Evidence collected by law enforcement is admissible
- Who determines what evidence is relevant and sufficient?

"PRESUMPTION OF INNOCENCE"

- Proposed regulations require published grievance procedures include a presumption of innocence for the responding party
- No change from effective procedures – determination has always been based on evidence
- Presumption is a legal framework, may create inequity
- Unclear how presumption will work procedurally
- Should there be an equitable presumption that the reporting party is telling the truth?

CONFLICT OF INTEREST, OBJECTIVITY, AND BIAS

- Existing mandate for impartial resolutions with fair procedures
- Proposed regulations prohibit conflicts-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or an individual party
- Training mandates apply to PK-12 as well as higher ed
- Unclear how prohibition of bias against reporting/responding parties establishes equity under Title IX or falls within OCR's statutory authority
- Due process mandate does not distinguish public v. private

INVESTIGATION AND RESOLUTION MODELS

- Treatment of reporting/responding parties may constitute discrimination
- The end of the single investigator model – live hearing required for all postsecondary resolution proceedings
- Must allow advisor to be present at all meetings, interviews, hearings
- If no advisor, school must provide one
- Statutory authority exceeded with procedural mandates?

PROVIDING PARTIES WITH COPIES OF ALL EVIDENCE

- All relevant evidence considered – inculpatory and exculpatory
- No restriction on discussing case or gathering evidence
- Equal opportunity to inspect all evidence, including evidence not used to support determination
- May chill reporting if irrelevant information must be provided to either party
- Unclear at what point in process evidence must be provided
- No limits on types/amount of evidence offered
- Creates possible equitable limits on evidence for both parties

PROVIDING COPIES OF INVESTIGATION REPORT FOR REVIEW AND COMMENT

- Proposed regulations mandate creation of an investigation report
- Must fairly summarize all relevant evidence
- Provided to parties at least 10 days before hearing or other determination
- Parties may review and submit written responses to report
- Unclear if analysis (including credibility) and findings of fact should be included
- Unclear if a full report or a summary is required

LIVE HEARING

- Proposed regulations mandate live hearing for postsecondary institutions, optional for PK-12
- Parties must attend hearing, otherwise all testimony submitted by absent party must be excluded
- Hearing administrator may not be Title IX Coordinator or the investigator
- Must allow live cross-examination to be conducted exclusively by each party's advisor (separate rooms still allowed)
- Unclear how irrelevant questions will be screened, but rationale for excluding questions required (verbal or written?)

ADVISORS

- Advisor can be anyone – no restrictions in proposed regulations
- If a party does not have an advisor to conduct cross-examination, the school must provide one
- Advisor must be "aligned with the party"
  - "Defense" and "prosecution" advisors?
- No prior training required, no mandate for school to train
- ED presumes no financial impact because all parties retain counsel; not at institutional expense
- Mandate for higher education only – PK-12 may still conduct indirect cross-examination through hearing administrator

APPEALS

- If schools offer appeals (not required), must be made available equitably
- All parties receive notification of any appeal
- Opportunity for all parties to support or oppose outcome
- Written decision with rationale delivered simultaneously to all parties
- Appeal decision-maker cannot have had any other role in the investigation or resolution process
- “Reasonably prompt” timeframe for producing appeal decision

IMPACT ON EMPLOYEES

- Proposed regulations often refer exclusively to "students," but employees are also affected
- Tenured faculty cross-examining students at a live hearing
- Faculty found responsible – sanctions affirmed by committee?
- Union employees – diminished right to an advisor because of union representation?
- Extensive due process protections for at-will employees accused of misconduct
- Potential inequity in employee processes for Title VII-based sexual harassment
  - More due process for sex discrimination than race discrimination

OTHER ELEMENTS IN THE PROPOSED REGS

- Remedial action required by OCR for noncompliance with Title IX will not include money damages
  - OCR clarifies that reimbursements or compensation do not fall within the meaning of this provision
- Institutions may presume religious exemption
  - If under OCR investigation, may then be required to submit exemption justification in writing
  - Allows institutions to avoid public assertion of exemption from certain civil rights protections
  - Problematic for students/employees who deserve to know if certain protections are not honored at their institution

OTHER ELEMENTS IN THE PROPOSED REGS

- Statement that proposed regulations do not restrict or deprive rights under the First, Fifth, and Fourteenth Amendments, FERPA, the Clery Act, or Title VII of the Civil Rights Act.
  - Clery/VAWA and FERPA considerations?
  - Clery Act provisions do not apply to PK-12 – the proposed regulations extend many Clery Act requirements to PK-12

OPERATING OUTSIDE THE TIX FRAMEWORK

- *Ultra vires?*
  - Require signed formal complaint rather than actual notice
  - Prescribed standard of evidence for Title IX procedures
  - Mandated standard of proof for other conduct procedures
  - Extension of Clery/VAWA definitions and requirements to PK-12
  - Require live hearings for Title VII sexual harassment procedures
  - Individualized safety and risk analysis prior to interim suspension on an "emergency basis"
  - Treatment of responding party may constitute discrimination
  - Regulation of due process elements in internal procedures – blanket application to public and private institutions
  - Notice requirement upon receipt of formal complaint
  - Mandatory live hearing at public and private higher education institutions
  - Recordkeeping requirements

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VAWA 2013 – SECTION 304 & CLERY

THE CLERY ACT & APPLICABILITY

- The Clery Act applies only to Post-Secondary Schools, Colleges, and Universities.
  - There is, however, is increasing traction within Congress to developing a similar mechanism within K-12.
- Most of the principles of The Clery Act/VAWA Sec. 304, are universal and instructive for all educational institutions, such as:
  - Policy best practices
  - Reporting
  - Transparency
  - Equitable resolution mechanisms
  - Due Process
  - Support for victims, etc.

THE CLERY ACT

Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (1990)

- Crime reporting.
- Campus crime log.
- Campus Sexual Assault Victims Bill of Rights (1992).
- Primary crimes (7+3).
- Hate crimes (8 categories).
- Policy and procedure disclosures.
- Timely Warnings & Emergency Notifications.
- Sex offender information dissemination.
- Enforcement and fines.
- Violence Against Women Reauthorization Act of 2013 (VAWA) – Section 304.

THE CLERY ACT: CAMPUS SECURITY AUTHORITY

- **Clery identifies a CSA as:**
  - Campus police.
  - Non-police security staff responsible for monitoring campus property.
  - Individuals and offices designated by the campus security policies as those to whom crimes should be reported.
  - Officials of the institution with significant responsibility for student and campus activities.
- Mandatory Reporting: All CSAs must report known crimes (primary and hate crimes) to chief campus CSA.
  - What about speak outs such as Take Back the Night?

THE CLERY ACT: CAMPUS SECURITY AUTHORITY

The Clery Act requires "Campus Security Authorities" (CSAs) to report certain incidents to the campus's Clery Coordinator

- Dean of Students.
- Campus Public Safety/Campus Police.
- Director of Athletics, all athletic coaches – including part-time and graduate assistants.
- Faculty Advisor to student groups.
- RAs.
- Greek Life personnel.
- Title IX Coordinator.
- Most District Officials.
- Director of Campus Health or Counseling Center.
- Victim Advocates or others performing advocacy-based services.
- Ombuds.
- SART members.
- Local law enforcement contracted with the institution to provide campus/school-safety related services.

RECENT CLERY AMENDMENT: VAWA REAUTHORIZATION & SECTION 304

VAWA Section 304:

- Section 304 significantly amended the Clery Act.
- Created extensive new policy, procedure, training, education, and prevention requirements for:
  - Sexual assault.
  - Stalking.
  - Dating violence.
  - Domestic violence.

The "Big 4"

- Prohibits retaliation.

VAWA 2013 SECTION 304 "PRIMARY" CRIMES

- Criminal homicide:
  - Murder and non-negligent manslaughter.
  - Negligent manslaughter.
- **Sex offenses:**
  - **Rape.**
  - **Fondling.**
  - **Incest.**
  - **Statutory rape.**
- Robbery.
- Aggravated assault.
- Burglary.
- Motor vehicle theft.
- Arson.
- **PLUS:**
  - **Dating violence.**
  - **Domestic violence.**
  - **Stalking.**

VAWA 2013 – SEC. 304
UCR DEFINITIONS: SEXUAL ASSAULT

- **Sexual Assault:** *Any sexual act directed against another person, without consent of the victim, including instances where the victim is incapable of giving consent.*
  - Includes:
    - Rape
    - Fondling
    - Incest
    - Statutory Rape

VAWA 2013 – SEC. 304
UCR DEFINITIONS: SEXUAL ASSAULT

- **Rape**
  - *The penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. This offense includes the rape of both males and females.*

- **Statutory Rape:**
  - *Sexual intercourse with a person who is under the statutory age of consent.*

VAWA 2013 – SEC. 304
UCR DEFINITIONS: SEXUAL ASSAULT

- **Fondling**
  - *The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.*

- **Incest**
  - *Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.*

VAWA 2013 – SEC. 304: UCR DEFINITIONS: DATING VIOLENCE

- **Dating Violence**
  - *Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.*

VAWA 2013 – SEC. 304: UCR DEFINITIONS: DOMESTIC VIOLENCE

- **Domestic Violence**
  - *By a current or former spouse or intimate partner of the victim;*
  - *By a person with whom the victim shares a child in common;*
  - *By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;*
  - *By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred;*
  - *By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.*

VAWA 2013 – SEC. 304
UCR DEFINITIONS: STALKING

- **Stalking**
  - *Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:*
  - *Fear for the person's safety or the safety of others; or*
  - *Suffer substantial emotional distress.*

  - **Course of Conduct***: two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.*

VAWA 2013 SECTION 304
BIAS AND HATE CRIMES

- Added two categories of actual or perceived bias.
  - Race.
  - Gender.
  - **Gender identity.***
  - Religion.
  - Sexual orientation.
  - **Ethnicity.***
  - **National origin.***
  - Disability.

VAWA SEC. 304: REPORTING CATEGORIES – HATE CRIMES

- **Reportable as hate crimes:**
  - Murder and non-negligent manslaughter.
  - Forcible sex offenses.
  - Non-forcible sex offenses.
  - Robbery.
  - Aggravated assault.
  - Burglary.
  - Motor vehicle theft.
  - Arson.
  - Larceny-theft.
  - Simple assault.
  - Intimidation.
  - Destruction/damage/ vandalism of property.

DISCIPLINARY PROCEDURES UNDER VAWA SEC. 304

VAWA 2013 SEC. 304 DISCIPLINARY PROCEDURES

- Prompt, Fair, and Impartial Process
  - Prompt, designated timeframes (can be extended for good cause with notice to parties).
  - Conducted by officials free from conflict of interest or bias for either party.
  - Consistent with institutions' policies.
  - Transparent to accuser and accused.
  - Timely and equal access to parties "and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings."

VAWA 2013 SEC. 304 DISCIPLINARY PROCEDURES

- Policy statements must also include:
  - "A clear statement of policy that addresses the procedures for institutional disciplinary action in cases of alleged" VAWA offenses AND that,
  - "Describes each type of disciplinary proceeding used by the institution" including:
    - The steps.
    - Anticipated timelines.
    - Decision-making process.
    - How to file a disciplinary complaint (including contact information for the person or office to whom a report should be made).
    - How the institution determines which type of proceeding to use based on the circumstances of an allegation of a VAWA offense.

VAWA 2013 SEC. 304 STANDARD OF EVIDENCE

- ASR Policy statement of disciplinary procedures must also include a description of the "standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of" the four VAWA offenses.
  - No specific standard required
- However, the institution must use the standard of evidence described in the statement in all such proceedings.

VAWA 2013 SEC. 304 TRAINING

- Proceedings must "be conducted by officials who receive annual training on":
  - Issues related to the four VAWA offenses
  - How to conduct an investigation and a hearing process that:
    - Protects the safety of victims.
    - Promotes accountability.
    - Caution: this does not mean the training should be biased or slanted in favor the reporting party.
      - Ensure training is equitable and covers not just victim-based issues, but also those pertaining to a responding party.

VAWA 2013 SEC. 304 "PROCEEDING"

- "Proceeding" is defined broadly as:
  - "all activities related to a non-criminal resolution of an institutional disciplinary complaint, including, but not limited to, fact-finding investigations, formal or informal meetings, and hearings."
  - "Proceeding does not include communications and meetings between officials and victims concerning accommodations or protective measures to be provided to a victim."
- This disclosure is required for any and all faculty, student, and staff disciplinary procedures.
- "You must follow the procedures described in your statement regardless of where the alleged case of dating violence, domestic violence, sexual assault or stalking occurred (i.e. on or off your institution's Clery Act geography)."

VAWA 2013 SEC. 304 ADVISORS

- Provide accuser and accused with the same opportunity to have others present including an advisor of their choice for “any institutional disciplinary proceedings” and “any related meetings”
  - An advisor is “any individual who provides the accuser or accused support, guidance or advice.”
  - An advisor is optional and can be anyone (including an attorney or a parent).
  - Institutions can restrict role of advisors in proceedings as long as both parties’ advisors have the same restrictions.
  - Institutions should notify parties of these restrictions prior to proceedings.
  - Institutions can train a pool of advisors the parties can use, but cannot restrict advisors to just the pool.
  - Advisors can serve as proxies if an institution so chooses.

VAWA 2013 SEC. 304
WRITTEN MATERIALS PROVIDED TO VICTIMS

- When a student or employee reports they have been a victim of any of the VAWA offenses (either on or off campus) the institution will provide the student or employee a written explanation of the [their] rights and options
  - "**Must be a prepared, standardized and written set of materials, including detailed information regarding a victim's rights and options.**"
    - This does not mean that you hand the student a copy of the [ASR] or the policy statements contained in the [ASR].

VAWA 2013 SEC. 304
WRITTEN MATERIALS PROVIDED TO VICTIMS

- Written information should be provided to students and employees about existing resources (updated regularly):
  - Counseling & Mental Health
  - Health
  - Victim advocacy
  - Legal assistance
  - Visa and immigration assistance
  - Student financial aid
  - Other services available for victims
  - Both within the institution and in the community
- Information should include contact information about these resources, including how to access these resources.

NOTE: While not required by VAWA, assistance and resources should also be provided to those who are accused.

VAWA 2013 SEC. 304
WRITTEN MATERIALS PROVIDED TO VICTIMS

- Written materials should also include victims about options for, and available assistance in, and how to request changes to:
  - Academic
  - Living
  - Transportation
  - Working situations, or
  - Protective measures (e.g., no contact orders, Orders of Protection, etc.)
- The institution must make such accommodations if the victim requests them and they are reasonably available.
  - "the institution is obligated to comply with a student [victim]'s reasonable request for a living and/or academic situation change following an alleged sex offense."

NOTE: While not required by VAWA, assistance and resources should also be provided to those who are accused.

VAWA: LAW ENFORCEMENT

- "Options about the involvement of law enforcement and campus authorities, including notification of the victim's option to:
  - Notify proper law enforcement authorities, including on-campus and local police
  - Be assisted by campus authorities in notifying law enforcement authorities if the victim chooses, and
  - Decline to notify such authorities
  - Clarifications from The Clery Handbook:
    - An institution's ASR statement must provide specific contact information for the authorities
    - An institution's ASR statement must also explain what is involved in making a police report

Note: The Clery Handbook adds: "The statement that your institution will comply with a student's request for assistance in notifying authorities is ***mandatory.****"*

VAWA 2013 SEC. 304 NOTIFICATION OF OUTCOME

- Require simultaneous notification, in writing, to both accuser and accused, of:
  - The result of any institutional proceeding arising from allegations of VAWA offenses.
    - Result "defined as any initial, interim and final decision by any official or entity authorized to resolve disciplinary matters within the institution."
    - Result = Finding, Sanction, and Rationale.

      Note: The Clery Handbook contains an explicit FERPA exclusion.
  - Procedures for appeal (if any).
  - Any change to results.
  - When such results become final.

VAWA 2013 SEC. 304 NOTIFICATION OF OUTCOME

- What must be included in the rationale?
  - How evidence and information presented was weighed.
  - How the evidence and information support the result and the sanctions (if applicable).
  - How the institution's standard of evidence was applied.
    - Simply stating the evidence did or did not meet the threshold is insufficient.
- Simultaneous: "means that there can be no substantive discussion of the findings or conclusion of the decision maker, or discussion of the sanctions imposed, with either the accuser or the accused prior to simultaneous notification to both of the result."

CASE STUDY: SEXUAL ASSAULT

- [Jane Doe] is not a Steubenville High student; she attended a smaller, religion-based school, where she was an honor student and an athlete.
- At the parties, the [Jane Doe] had so much to drink that she was unable to recall much from that night, and nothing past midnight, the police said. The girl began drinking early on, according to an account that the police pieced together from witnesses, including two of the three Steubenville High athletes who testified in court in October. By 10 or 10:30 that night, it was clear that the dark-haired teenager was drunk because she was stumbling and slurring her words, witnesses testified.

Source: New York Times, "Rape Case Unfolds on Web and Splits City", Dec. 16, 2012

CASE STUDY: SEXUAL ASSAULT

- [Jane Doe] woke up long enough to vomit in the street, a witness said, and she remained there alone for several minutes with her top off. Another witness said [two football players] Mays and Richmond were holding her hair back.
- Afterward, they headed to the home of one football player who has now become a witness for the prosecution. That player told the police that he was in the back seat of his Volkswagen Jetta with Mays and the girl when Mays proceeded to flash the [Jane Doe]'s breasts and penetrate her with his fingers, while the player videotaped it on his phone. The player, who shared the video with at least one person, testified that he videotaped Mays and the girl "because he was being stupid, not making the right choices." He said he later deleted the recording.

Source: New York Times, "Rape Case Unfolds on Web and Splits City", Dec. 16, 2012

CASE STUDY: SEXUAL ASSAULT

- [Jane Doe] "was just sitting there, not really doing anything," the player testified. "She was kind of talking, but I couldn't make out the words that she was saying."
- At that third party, the girl could not walk on her own and vomited several times before toppling onto her side, several witnesses testified. Mays then tried to coerce the girl into giving him oral sex, but the girl was unresponsive, according to the player who videotaped Mays and the girl.
- The player said he did not try to stop it because "at the time, no one really saw it as being forceful."
- At one point, [Jane Doe] was on the ground, naked, unmoving and silent, according to two witnesses who testified. Mays, they said, had exposed himself while he was right next to her.
- Richmond was behind her, with his hands between her legs, penetrating her with his fingers, a witness said.

Source: New York Times, "Rape Case Unfolds on Web and Splits City", Dec. 16, 2012

CASE STUDY: SEXUAL ASSAULT

- "I tried to tell Trent to stop it," another athlete, who was Mays's best friend, testified. "You know, I told him, 'Just wait — wait till she wakes up if you're going to do any of this stuff. Don't do anything you're going to regret.' "
- He said Mays answered: "It's all right. Don't worry."
- That boy took a photograph of what Mays and Richmond were doing to [Jane Doe]. He explained in court how he wanted her to know what had happened to her, but he deleted it from his phone, he testified, after showing it to several people.
- The girl slept on a couch in the basement of that home that night, with Mays alongside her before he took a spot on the floor.
- When she awoke, she was unaware of what had happened to her, she has told her parents and the police. But by then, the story of her night was already unfolding on the Internet, on Twitter and via text messages. Compromising and explicit photographs of her were posted and shared.

Source: New York Times, "Rape Case Unfolds on Web and Splits City", Dec. 16, 2012

CASE STUDY: SEXUAL ASSAULT

- What are the possible policy violations?
- What issues of jurisdiction arise?
- How should the Coach and the Athletic Department respond?
- How should the high school respond? The District?
- Are there others besides Mays and Richmond who have violated your policies?
- How do you deal with the fact that Jane Doe was drinking and is underage?
- What other concerns or questions do you have about how to proceed?

Source: New York Times, "Rape Case Unfolds on Web and Splits City", Dec. 16, 2012

ADDITIONAL VAWA 2013 SEC. 304 TRAINING REQUIREMENTS

- Consent
- Bystander Intervention

BRAINSTORMING
TITLE IX AND VAWA SEC. 304

Some questions and thoughts to consider throughout our discussion:

- Inventory current practices?
- Strategic planning/incremental approach?
- What should your institution focus on first?
- Who takes the lead?
- How in the world are we going to do this?
- What are the barriers to fulfilling the training requirements for each level?
- What collaboration is needed to train each level?

VAWA 2013 – SEC. 304 & PREVENTION PROGRAMS

- VAWA 2013 Sec. 304 requires an array of prevention-based programming In person.
  - Primary prevention programs for **all incoming students** and **new employees**;

    AND
  - **Ongoing** prevention and awareness campaigns for **students and employees**" (includes faculty, staff, and administrators).

VAWA 2013 – SEC. 304 & PREVENTION PROGRAMS

"Incoming Students"

- ✓ First-year students.
- ✓ Transfer students.
- ✓ Student-athletes
- ✓ International students.
- ✓ Graduate students.
- ✓ Professional students.
- ✓ Online students.
- ✓ Others?

"New Employees"

- ✓ Full-time
- ✓ Part-time.
- ✓ Faculty – all levels.
- ✓ Staff.
- ✓ Administrators.
- ✓ Union and non-union.
- ✓ Student employees:
  - RAs, TAs, GAs…
- ✓ Others?

VAWA 2013 – SEC. 304 & PREVENTION PROGRAMS

- **"Ongoing."**
  - Go beyond orientation programs.
  - Conduct follow-up programs.
  - Shift mentality from compartmentalized "prevention months" to "prevention year."
  - Host speakers, film series, presentations by students, faculty, staff, online trainings/modules, discussion groups, social norming, etc.

VAWA 2013 – SEC. 304 & PREVENTION PROGRAMS

- The institution's prevention programming (both for incoming students/employees and ongoing campaigns) must include:
  - The applicable jurisdiction's "**definition of consent** in reference to sexual activity."
    - http://atixa.org/resources/consent-statutes-by-state/
  - "A description of safe and positive options for **bystander intervention**."
  - Information on Risk Reduction
  - Information on Victim Services

VAWA 2013 – SEC. 304 & PREVENTION PROGRAMS

- The institution's prevention programming (both for incoming students/employees and ongoing campaigns) must include (cont.):
  - "A statement that the institution…prohibits the crimes of…dating violence, domestic violence, sexual assault, stalking."
  - Definitions of consent, dating violence, domestic violence, sexual assault, and stalking "in the applicable jurisdiction."
  - Key Issue: Institutional definitions do NOT need to mirror VAWA/Clery or state-based definitions. Not considered a best practice.

VAWA SEC. 304 RESOLUTION PROCESS TRAINING

- Requirements for All
- VAWA Training for “Level A”

RESOLUTION PROCESS TRAINING REQUIREMENTS FOR ALL

- All students and employees.
  - Each type of disciplinary proceeding used by the institution.
    - How institution determines which type of proceeding to use.
    - Steps, anticipated timelines, and decision-making process.
  - Standard of evidence.
  - Full range of possible or available
    - Sanctions.
    - Remedies.
    - Protective measures.

RESOLUTION PROCESS TRAINING

- Rights of complainant and respondent during resolution processes (i.e. investigations, hearing, and appeal).
  - Advisors – role and function.
  - Timely notification requirements.
  - Notification of results (pre- and post-appeal).
    - (Parties may opt-out from receiving notification.)
  - Procedures for appeal.

VAWA 2013 – SEC. 304
TRAINING FOR TITLE IX ADMINISTRATORS

- Annual training for those who oversee Title IX compliance and those involved in disciplinary proceedings (e.g. investigators, hearing, and appellate officers) on:
  - Domestic violence, dating violence, sexual assault, and stalking.
  - How to conduct an **investigation** "that protects the safety of victims and promotes accountability."
  - How to conduct a **hearing process** that protects the safety of victims and promotes accountability."
  - Accordingly, these groups must also be trained annually on applicable disciplinary policies and procedures.

VAWA 2013 – SEC. 304
TRAINING FOR TITLE IX ADMINISTRATORS

- Key disciplinary process policies and procedures required for training:
  - Policies on SA, DV, DV, stalking, and consent.
  - Available remedies.
  - Thorough understanding of each stage of the processes.
  - Promptness.
  - Role and function of advisors for both parties.
  - Timely notice requirements.
  - Result notification.
  - Appellate policies and procedures.
  - Bias and conflicts of interest.
  - Retaliation.

VAWA SEC. 304 TRAINING SAMPLE SCENARIO

- Angela & James
- Discussion Points

SCENARIO DISCUSSION: ANGELA & JAMES

- On Friday, Sept. 5, Angela, a first-year student, attends an off-campus party after pre-gaming with her friends. From 9-10 p.m., Angela had four shots of vodka before arriving at the party, and upon arrival, was handed a solo cup of vodka-laden "punch" from a cooler. From 10 p.m.-12 a.m., Angela drinks two full cups of "punch."
- Assume Angela has not eaten anything since 6 p.m.

SCENARIO DISCUSSION: ANGELA & JAMES

- James arrives at the party at 10:00 p.m. and soon begins dancing with Angela. James had two "Jack and Cokes" before the party, and from 10:00 p.m.-12:00 a.m., drinks 1 ½ cups of the vodka-laden punch.
  - James is also taking anti-depressants and took some of his roommate's Adderall prior to a test Friday afternoon.

SCENARIO DISCUSSION: ANGELA & JAMES

- By midnight, James and Angela are getting more physically intimate and they are grinding into each other while dancing.
- Around midnight, Angela stumbles outside and throws up, leaning over the porch railing.
- Some of the partiers take video of Angela throwing up and post it to Twitter, tagging it #PartyFail.
- James goes looking for Angela and finds her outside, leaning over the porch looking queasy and offers to take her home. Angela's friends see her stumbling away with James, but don't want to get involved or "block" the situation.

SCENARIO DISCUSSION: ANGELA & JAMES

- The next morning, Angela wakes up naked, alone, with a pounding headache, and in a room she has never been in. She looks around and sees some of James' things and realizes she is in James' room. She also sees an empty condom wrapper on the nightstand and can feel that something happened.
- Angela quickly gathers her clothes and returns to her room, where she locks herself in her bedroom and cries.

SCENARIO DISCUSSION: ANGELA & JAMES

- Angela's roommate, Julia, can tell something is wrong with Angela, who is acting very withdrawn, cries a lot, and talks about going home because the institution is not a good fit for her. Julia also notices some new cuts on Angela's arms and thighs.
- Julia decides to address the situation directly with Angela, who then opens up about her experience with James. Angela shares that she feels James took advantage of her, but that she should have acted differently and put herself in that situation, so she is really to blame.

SCENARIO DISCUSSION POINTS

- Discussion points throughout the scenario:
  - Alcohol and its effects.
  - Bystander intervention opportunities and techniques.
  - Risk factors and risk mitigation.
  - Range of available remedies and campus resources.
  - Available disciplinary processes.
  - Possible sanctions.
  - Victimology and supporting victims.
  - What else?

QUESTIONS?

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