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NH Legal Perspective: The Title IX Balancing Act

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WHEN ONE STUDENT accuses another of sexual assault, what must a school do to ensure that the subsequent investigation is fair to both sides and compliant with the law?

Title IX - and related guidance from the U.S. Department of Education's Office of Civil Rights - requires that schools take immediate and effective steps to end sexual harassment and sexual violence, including the implementation of grievance procedures designed to result in a prompt and fair resolution of such complaints. In order to satisfy Title IX, the investigation of any alleged sexual misconduct must be thorough, reliable, and impartial. It must end any existing discrimination, prevent its recurrence, and remedy the effects upon the individuals involved and the community.

While this may sound simple in theory, accusations of sexual misconduct are often incredibly murky. Many involve alcohol consumption and situations in which consent was given and thereafter revoked, given for one act but not another, or nominally given by someone sufficiently impaired that effective consent may have been impossible. Typically there are no witnesses other than the accused and the accuser, who give diametrically opposed accounts of the relevant events. These factors all add up to create a high-stakes, he-said/she-said nightmare in which two student futures are on the line. All of that, of course, doesn't even take into account the difficulties associated with formulating an investigative procedure and a decision-making forum that leaves all parties feeling that they have been respected and heard, and that they have had a fair opportunity to present evidence in support of their position.

True, campus disciplinary hearings are theoretically educational rather than punitive. Schools cannot criminally convict or incarcerate students. But, it is important to remember that a school's finding that an individual has violated the school's sexual misconduct policy can have major and lasting impacts on that individual's future - for example, lessened job prospects associated with having a policy violation on record. On the flip side, the failure to take sexual misconduct allegations seriously can likewise have lasting impacts on the individual who has reported the misconduct and can also chill future reports, among other negative consequences. Ultimately, therefore, it is vitally important that school procedures to address these situations do not presume either guilt or innocence and truly endeavor to facilitate a thorough process that leads to a reliable conclusion.

Previously, schools (particularly colleges and universities) were criticized for not taking complaints of sexual misconduct seriously enough. In the face of increasing pressure to address these concerns - some of which came from the federal government - many schools made changes to their procedures for investigating and resolving Title IX complaints. Now, some are accused of going too far. In the past few years, numerous students accused of sexual misconduct have filed lawsuits challenging

campus processes that, they claim, failed to properly vet the allegations - often due to what the plaintiffs claim are investigative and hearing procedures that are biased in favor of the accuser. And, despite the deference that the courts give to the schools in reviewing these claims, a notable number of those plaintiffs have been successful.

Adding to the confusion and uncertainty, the guidance from the federal government, which initially led many colleges and universities to modify their policies governing the investigation of sexual misconduct allegations, came from the Obama administration. Now, there is reason to believe that the Trump administration may roll back some of that guidance, necessitating that schools revisit their Title IX policies and their approaches to accusations to ensure they align with the current administration's interpretation of the law.

In short, schools are currently walking a fine line in their efforts to craft policies and procedures governing sexual misconduct claims that are fair to the accused and the accuser - and satisfy the federal government - thereby avoiding costly litigation, an investigation, and/or loss of federal funding. Given that campus sexual misconduct allegations are on the rise, it is increasingly important that schools have legally compliant policies and procedures in place, and that whoever actually carries out the investigation of a particular claim - be it an outside attorney or a school-employed investigator - does so in a manner that is thorough, reliable, and impartial, and that will stand up against a subsequent legal challenge.

If you are concerned about your school's Title IX policies and procedures, or want to ensure that a particular investigation is legally compliant and appropriate, consult an attorney who can tailor advice to your specific situation.

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