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Are You Asking the
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A photograph showing a man and a woman in a meeting. The man, on the right, is Black, wearing a dark blue sweater and a blue lanyard. He is sitting at a wooden table, looking towards the woman with his hand to his chin in a thoughtful pose. The woman, on the left, has long blonde hair and is wearing a red patterned top. She is seen from the back, facing the man. They are in a modern office setting with large windows and decorative panels in the background.

Title IX on College Campuses: A Constellation of Legal Challenges

Lorie K. Dakessian and
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Students involved in Title IX disciplinary proceedings and facing allegations of sexual misconduct or harassment on college campuses often encounter a constellation of legal challenges.¹ It's not just the challenge of defending against a Title IX complaint in the campus disciplinary setting. The accused student may have to defend him or herself on multiple fronts, and there are unique strategy decisions as a result. Why is this? Because the complainant (the student making the accusations) may file a Title IX complaint against a respondent (the accused student) with the college, file a police report about the respondent's alleged misconduct, and/or seek a Protection from Abuse (PFA) order,² all within a few days, creating a triad of interrelated legal issues. And, while greater uniform protections in Title IX campus disciplinary processes³ arrived with the implementation of the Department of Education's Title IX regulations in 2020,⁴ colleges have found ways permitted by those same

regulations to limit the rights afforded to their students by shuttling matters into non-Title IX proceedings usually with fewer protections for accused students. This already complicated terrain is likely to worsen, as the Department of Education's recently proposed Title IX regulations, if enacted as written, give permission to universities to strip students of important procedural rights they have under the current regulations, including the right to a live hearing with direct cross examination. Understanding these considerations, as well as having a thorough understanding of a college's Title IX and related policies and the current and forthcoming Title IX regulations, is critical to navigating this terrain.

Background

As we discussed in our last article in *For The Defense*,⁵ the processes that were established by the Department of

Education in its 2020 regulations generally benefit both respondents and complainants. Some key elements of a fair grievance process set forth in the 2020 regulations were informed by court decisions where respondent students had sued their colleges in the wake of unfair proceedings. Many of what were deemed to be unfair processes by courts had been instituted by colleges and universities in response to the federal government's aggressive and public steps beginning in 2011 to combat what it viewed as an epidemic of sexual assault on college campuses.⁶ At the same time, schools were (and continue to be) subject to public pressure—including from their own student populations—to crack down on alleged perpetrators of sexual misconduct. While sexual assault claims must be taken seriously and investigated properly, many schools went too far in pursuing these laudable goals, essentially eliminating due process protections for accused students, the great majority of whom are male. The 2020 regulations, which are currently in effect, codified enhanced protections for accused students such as mandating adequate notice of allegations, access to evidence, and the right to a live hearing with direct cross examination. At the same time, the regulations also allowed for informal resolution of complaints as well as supportive measures for the parties (counseling, academic accommodations, changes in housing, etc.).

Considerations Regarding Complainants' Parallel Courses of Action

Perhaps because of the added procedural protections for respondents in the current regulations, it is not uncommon to see complainants take three parallel tracks in complaints of sexual misconduct to put maximum pressure on the students they are accusing: a Title IX complaint at their college, a civil PFA action, and a criminal complaint to law enforcement. (Even without a criminal complaint, the conduct often alleged could, if proven, support a criminal charge or finding so it is necessary to proceed with caution.)

These situations call for different considerations depending on the circumstances. There is no one-size-fits-all approach.

With a criminal complaint pending, sometimes, a college is willing to briefly pause its Title IX disciplinary process until more information can be learned about the status of the criminal case (e.g., if charges will be pursued or declined). The same can be true if there is a parallel PFA matter where a college may pause the proceedings depending on if and when there will be a court hearing. In other instances, a college will push to continue its disciplinary process concurrently with the criminal or PFA cases. This obviously creates a dilemma about whether to allow your client to participate fully in the Title IX process and give statements because if your client does

not participate in the college's Title IX process, it is almost guaranteed there will be a finding of "responsible" (i.e., guilty). Sanctions following a "responsible" finding for sexual assault often include expulsion or suspension and a permanent disciplinary record.

As discussed below, sometimes there are ways to "participate" without your client giving a statement, such as sharing documentary evidence and witness accounts. At the same time, knowing what to share and when can be challenging because there is no per se right to discovery in a Title IX proceeding (or any campus disciplinary proceeding). The evidence and any interview summaries, including interviews of the complainant and witnesses, are gathered during a phased process but not shared with the parties until the conclusion of the initial investigation. Before the investigative materials are shared with the parties, often months into the process, the only information the accused has about the nature of the Title IX complaint is a preliminary notice, which usually contains a bare-bones description of the allegation.⁷

That's why — when we represent an accused student in the Title IX process and the complainant has obtained a temporary PFA order—we work closely with PFA counsel to coordinate between the PFA process and the Title IX process. If the PFA hearing happens first, then PFA counsel should consider serving a subpoena for the college's Title IX file to access statements made by the complainant in the Title IX process in order to potentially use those statements in the PFA hearing. This is necessary because, as discussed above, the accused student is often at the stage of the Title IX process where very few details have been shared. Although a subpoena upon the college or university can be successful, it is not uncommon for the university to fight turning over relevant documents because of the privacy rights of the involved students, including witnesses.⁸ If PFA counsel does obtain the Title IX file, the file may yield inconsistent statements by the complainant in his or her initial complaint to the Title IX office, information shared with witnesses, and his or her interview in the Title IX process. Counsel can use inconsistent statements to impeach the complainant when he or she testifies at the PFA hearing. And if the complainant makes statements at the PFA hearing that are inconsistent with his or her statements to the college's Title IX coordinator or investigator, then the transcript of the testimony could be used by Title IX counsel in the campus disciplinary case to undermine the complainant's allegations. Title IX counsel should be mindful of the college's deadlines for submission of evidence in the Title IX process. This is to ensure that anything that is helpful from the PFA proceeding — such as the court hearing transcript where the complainant may have made some material concessions—can be submitted to the college on time. Some colleges have

strict rules about when information must be disclosed, such as during the investigation or by a certain date prior to the Title IX hearing. If the information is not produced during the college's required time frame, then the college might exclude it from the college's evidentiary record or bar its consideration on appeal from an adverse finding.

If there is an active police investigation into the complainant's allegations, we work with our client's criminal defense counsel to evaluate the extent to which our client (the respondent) can and should participate in the college's Title IX process, while still seeking to preserve his or her civil and contractual rights. The Title IX regulations require schools to presume that respondents are not responsible and not to "draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions."⁹ Sometimes, as a result of an ongoing or likely police investigation, criminal defense counsel recommends that the respondent not provide a statement to (or interview with) the college's Title IX investigator or testify at a Title IX hearing because you should assume that the respondent's statements are discoverable. When that happens, even though the inability of the respondent to share his or her perspective will likely hamper their defense in the college's Title IX process, there may be other ways in which the respondent can participate. For example, a respondent could produce messages exchanged with the complainant or witnesses that relate to the allegations at issue, such as the ability and willingness of the complainant to consent to sexual activity, friendly exchanges after an alleged assault, or the overall timeline of events. A respondent might also have photographic or video evidence that is relevant on issues such as their own or the complainant's level of intoxication or incapacitation or may be able to obtain such information from dorm security cameras. A respondent may also consider submitting expert reports to the college, such as reports from a sexual assault nurse examiner (SANE) or a toxicologist. A respondent also can respond to the Title IX investigator's draft investigation report and request the pursuit of additional information or further questioning of the complainant or witnesses. Further, a respondent's advisor can cross-examine the complainant and witnesses at the hearing. So even if there is an active police investigation, and criminal defense counsel recommends that the respondent does not communicate his or her story in the college's Title IX proceeding, he or she still may be able to support their defense in other ways.

Considerations Regarding College Processes

As you evaluate the challenges your client faces with a pending Title IX complaint, it is important to keep in mind that the current Title IX regulations require colleges

to provide key procedural protections to any student (or faculty member) accused of sexual misconduct before a determination is made as to their responsibility. A respondent must be presumed not responsible for the alleged conduct unless and until a final decision is made at the conclusion of the grievance process, which includes an investigation followed by a live hearing with cross-examination—by the party's advisor—of the opposing party and any witness.¹⁰ Schools must have an investigator, who is not also the Title IX coordinator or a decision-maker, investigate allegations and objectively evaluate all relevant evidence, both inculpatory and exculpatory.¹¹ Schools are responsible for gathering evidence "sufficient to reach a determination" and must provide the parties an equal opportunity to present witnesses and evidence, as well as equal access to evidence obtained in the investigation.¹² Investigative reports must fairly summarize relevant evidence and the parties must be given the chance to review the evidence and respond.¹³

You may be surprised to learn, though, that not everyone accused of sexual misconduct on a college campus gets the benefit of the current Title IX procedural protections. Some students find themselves shunted off into a non-Title IX sexual misconduct process with policies and procedures that may not provide much in the way of procedural protections. In our experience, colleges take every opportunity to divert a sexual misconduct case away from Title IX's more robust due process/fairness protections, and they are allowed to do this by the regulations in the following circumstances.

Colleges are free to use their non-Title IX processes if the alleged conduct does not meet the jurisdictional threshold requiring application of a policy consistent with Title IX.¹⁴ This generally occurs when a college determines that the alleged misconduct did not occur in its "education program or activity" (e.g., in a classroom or dormitory), as required for Title IX jurisdiction.¹⁵ Unlike the required features of a college's Title IX policy, a college's non-Title IX sexual misconduct policy could permit a single-investigator model, in which one person conducts the investigation and makes a determination of responsibility. A non-Title IX policy may not necessarily require the college to conduct the same level of investigation or give the parties the same level of access to information they would have in the Title IX process. It might also preclude the parties from having an attorney serve as their advisor or may severely limit the advisor's role. Also, even if there is a live hearing component, it may consist of nothing more than allowing the parties to make brief statements to a decision-maker. Nevertheless, even if allegations do not trigger a college's obligations to proceed under its Title IX policy, practitioners should be aware that state statutes and case law in a particular jurisdiction may still require colleges to provide certain procedural rights in their disciplinary processes.¹⁶



The possibility of an informal resolution is another strategic decision that should always be considered if it is offered by the college.¹⁷ This process also is sometimes referred to as an alternative or facilitated resolution. Only student parties can participate in an informal process because the Title IX regulations do not allow informal resolutions between a student-complainant and a respondent-faculty or staff member.¹⁸ If both parties agree to participate in the informal process and approve the final terms of the resolution, then it can be a useful way to resolve issues that are within a college's purview. For example, a college may permit informal resolution terms to include restrictions on a party's housing location or the times during which certain campus locations can be accessed but decline to include a term addressing the parties' post-graduation conduct to the extent it is beyond their jurisdictional reach to enforce. We have found that informal resolutions are not likely to be successful if the complainant is participating in a criminal investigation unless the respondent is willing to take an extended leave or permanently withdraw from the college. We also have found that an informal resolution is more likely to be successful if the person who facilitates the process (sometimes the college's Title IX coordinator and sometimes another person within the college but separate from the Title IX process) is well-trained in mediating disputes between individuals and can effectively communicate to each party the benefits of the resolution. An informal resolution not only allows the parties to avoid a time-consuming and potentially expensive investigation and hearing process, but it also

provides the parties with the certainty of an outcome. The respondent avoids the risk of being found responsible, sanctioned, and having a disciplinary finding in his or her record. The complainant avoids the risk that the respondent is found not responsible, which would mean that the complainant would not get the benefit of certain restrictions that the respondent might agree to as part of an informal resolution agreement.¹⁹

Considerations Regarding the New Proposed Regulations – A Roll Back of Rights

On June 23, 2022, the Department of Education proposed a new set of Title IX regulations.²⁰ We are concerned that, under the guise of giving educational institutions more flexibility, the Department instead opened the door for schools to revert to models of campus disciplinary proceedings that, in our experience, severely limit the ability of accused students to adequately defend themselves (and that have been criticized in many federal court decisions). For example, under the proposed regulations, colleges would no longer be required to provide parties with live hearings and cross-examination, which we believe are essential to any fair process, given that the vast majority of these cases hinge on issues of credibility. Colleges also could deprive parties of access to all evidence gathered (exculpatory and inculpatory) that is directly related to the complainant's allegations and, instead, only provide parties with information deemed "relevant." Further, colleges would be allowed to terminate the current procedural protection that prohibits

the decision-maker from being the same person as the investigator or Title IX coordinator. The elimination of these key features of a fair Title IX disciplinary process will restrict the rights of accused students and undoubtedly lead to unfair outcomes.²¹

Conclusion

Students facing Title IX disciplinary proceedings, as well as criminal investigations (and possible PFA hearings), as a result of alleged sexual misconduct in a college setting must navigate a complicated terrain of overlapping legal issues. While the 2020 Title IX regulations provided a good start for fairer processes for all parties involved in campus cases, several key protections we believe are essential for respondents to fully defend themselves are now in jeopardy as a result of the new proposed regulations, which we expect to take effect in 2023. Regardless, in order for attorneys to protect clients involved in Title IX disciplinary processes, insist on the right to a fair process, and to establish a record for possible later civil litigation against the college, attorneys must be well versed both in the current and evolving Title IX regulatory framework, as well as case law interpreting the regulations and contractual obligations of universities in conducting disciplinary processes. 🏠

▶ **Click here to view and/or print the full notes section for this article.**

NOTES:

¹ The authors' practice focuses on the representation of students and members of staff and faculty in institutions of higher education. As a result, the article reflects the authors' perspectives on representations in college and university settings.

² We refer to Protection from Abuse (PFA) orders here because most of our cases involve former intimate and/or sexual partners. Different considerations may apply if Sexual Violence Protection Orders (SVPOs) or Protection from Intimidation Orders (PFIs) are involved.

³ For example, colleges and universities must provide for a live hearing and allow advisors to the parties (and not the parties themselves) to cross-examine the other party and witnesses in real time, with the right to ask "all relevant questions and follow-up questions, including those challenging credibility." 34 C.F.R. § 106.45(b)(6)(i).

⁴ The Department of Education's Title IX regulations, 34 C.F.R. §§ 106.1-106.82, took effect on August 14, 2020.

⁵ "The Protections and Potential Perils of the New Title IX Regulations" by Patricia M. Hamill and Lorie K. Dakessian, 5 *FOR THE DEFENSE* no. 4, 11 (2020), available at: [For the Defense - Vol. 5, Issue 4 \[10 - 11\] \(nxtbook.com\)](#).

⁶ See April 4, 2011 U.S. Department of Education's Dear Colleague Letter – Sexual Violence (now rescinded), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; April 2014 Dept. of Education Questions & Answers on Title IX and Sexual Violence (now rescinded), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; and May 1, 2014 Dept. of Education's Press Release listing 55 institutions of higher education with open Title IX sexual violence investigations. <https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i>.

About the Authors



Lorie K. Dakessian is the Co-Chair of the Title IX and Campus Discipline practice at the Philadelphia-based law firm Conrad O'Brien, PC. She represents college students and faculty members nationwide who are under investigation or who have been disciplined by their colleges or universities for alleged violations of sexual harassment and misconduct policies following campus disciplinary proceedings, or complainants who raise and pursue sexual assault or harassment claims within universities. She works closely with students and their families to help them navigate and fully prepare for investigations and hearings and, where appropriate, helps clients who are seeking informal resolutions with the school while navigating the complicated issues accompanying mediation. Where resolution cannot be achieved, she has filed lawsuits for breach of contract, violation of Title IX (or other civil rights statutes) and tort liability. The firm's Title IX practice has represented hundreds of students and faculty members in disciplinary matters or related litigation at colleges and universities around the country. Given her experience, Lorie has spoken extensively on defending students and faculty members in Title IX and disciplinary actions. In addition to her representation of college students, Lorie represents clients in white-collar criminal matters, internal investigations, and legal and medical malpractice litigation.



Patricia M. Hamill is the Co-Chair of the Title IX and Campus Discipline practice at the Philadelphia-based law firm Conrad O'Brien, PC. She is a highly regarded and Chambers-ranked attorney who has represented hundreds of students and faculty members in disciplinary matters or related litigation at colleges and universities around the country. Patricia often attempts to resolve cases behind the scenes. Where resolution cannot be achieved, she has filed lawsuits for breach of contract, violation of Title IX (or other civil rights statutes) and tort liability on the basis that colleges' investigation and adjudication procedures failed to ensure her clients' fundamental due process rights, discriminated against them on the basis of sex and breached the schools' contractual obligations. Patricia is often sought out by groups and institutions for her opinion on how to work within the framework of the changing federal laws and guidance. Patricia was invited to testify before the U.S. Senate Committee on Health, Education, Labor & Pensions (HELP) at the full committee hearing on "Reauthorizing HEA: Addressing Campus Sexual Assault and Ensuring Student Safety and Rights" in Washington DC (April 2019). Outside of the Title IX arena, Patricia is a commercial litigator and represents clients in white collar matters and in government investigations.

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