

Addressing Campus Sexual Violence:

Legal Advocacy in Campus Hearings

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Personal Introduction

- B.A. from University of Wisconsin
 - Psychology & Pre-Law, certificate in Criminal Justice
- J.D. from University of Maryland Carey School of Law
 - graduated Order of the Barristers, as a Rose Zetzer Fellow, and with the William P. Cunningham Award for:
 - Drafting and lobbying for 2013 VAWA Reauthorization;
 - Advising White House Task Force to Protect Students Against Sexual Assault; &
 - Serving as a primary negotiator on VAWA Rulemaking Committee
- Published legal scholar in the *Georgetown Journal of Gender & Law* and adjunct at the University of Maryland Carey School of Law
- Echoing Green 2015 Global Fellow and member of the ABA Commission on Domestic and Sexual Violence

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SurvJustice Background

- National D.C.-based not-for-profit that increases the prospect of justice for all survivors through effective legal assistance, policy advocacy, and institutional training
 - Only national organization providing attorneys as advisors in campus hearings
 - Legal Service: 420 requests for assistance in 49 states and 5 countries
 - 25% direct assistance, 25% referral, and 75% success rate in campus hearings
 - Policy Advocacy: technical assistance on 24 pieces of legislation and 3 policies
 - Institutional Service: trained over 2,500 campus community members and over 1,500 advocates and attorneys

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Agenda

- Review realities of gender violence and the major milestones in the student movement against campus sexual violence
- Discuss how Title IX, the VAWA amendments to the Clery Act, and FERPA intersection during campus hearings
- Provide best practices for legal advocacy through the campus process support the rights of survivors (and avoid remand for due process violations)
- Review worst practices on campus and discuss SurvJustice recommendations for how to combat

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Student Movement Against Campus Gender Violence

2010 to 2015
Half-a-Decade
of Campus Movements



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2010

- **Center for Public Integrity**
 - First investigative series
 - Partnership with NPR
 - Award-Winning Series
- **U.S. Department of Education**
 - OCR meetings with advocates on new Title IX guidance to address sexual assault



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2011

- U.S. Department of Education
 - Dear Colleague Letter released
 - Vice President Biden & Sec. Duncan announcement
- Campus SAFE Blueprint
 - Guidance to law efforts



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Tidal Wave of Student Activism



2012

- **Campus Sexual Violence Elimination Act (Campus SaVE Act)**
 - introduced into Congress
 - absorbed into the Violence Against Women Act (VAWA) Reauthorization
 - historical failure to pass



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2013

- **U.S. Department of Education**
 - Dear Colleague Letter on retaliation
- **VAWA Reauthorization**
 - Congress passes in February
 - President Obama signs into law
- **ED ACT NOW**
 - U.S. Department of Education rally
 - Over 112,000 signature petition
 - White House meeting



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2014

- White House Task Force to Protect Students Against Sexual Violence
 - Not Alone Report & Website
- U.S. Department of Education
 - FAQs on Sexual violence
- Campus Safety Roundtables
 - Clery Act, Title IX &
 - Criminal justice
- Carry the Weight
- It's on Us Campaign Launch



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2015

- Congressional legislation introduced
 - Campus Accountability & Safety Act (CASA)
 - HALT Campus Sexual Violence Act
 - (Un) Safe Campus Act
 - SOS Campus Act
- AAU Climate Survey Results



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Overview of Victim Rights

Intersecting Federal Laws during Campus Disciplinary Hearings

Title IX
Clery Act
VAWA
FERPA



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Title IX



Title IX, 20 U.S.C. § 1681 *et al.*
Case law
34 C.F.R. Part 106
2001, 2011, 2013, & 2014 Title IX Guidance

Title IX: Statute

- Civil right that prohibits sex discrimination including sexual harassment that is sufficiently severe and pervasive to impede access to education
 - 20 U.S.C. § 1681(a) “*No person* in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”
 - *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979)
 - *Franklin v. Gwinnett Cnty. Public Schs.*, 503 U.S. 60 (1992)
 - *Gebser v. Lago Vista Independ. Sch. Dist.*, 524 U.S. 274 (1998)
 - *Davis v. Monroe Bd. of Educ.*, 526 U.S. 526 (1999)

Title IX: Sexual Violence

- Sexual violence is considered a severe form of sexual harassment defined in the 2011 DCL as:
 - as physical sexual acts perpetrated
 - against a person’s will, or
 - where a person is incapable of giving consent
 - due to the victim’s use of drugs or alcohol
 - due to an intellectual or other disability

“A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion.” 2011 Title IX Guidance, Dear Colleague Letter

Title IX: Retaliation

- Prohibits retaliation for anyone raising the rights and protections found under Title IX
 - *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (holding that retaliation for exercising rights under Title IX is a form of sex discrimination)
 - 2001 Title IX guidance extends retaliation prohibitions to both the accused and the associates of the accused
 - Defines retaliation as “intimidating, threatening, coercing, or in any way discriminating against the individual”
 - 2013 Title IX guidance prohibits institutions and its officials for retaliation noting monetary damages available

Title IX: Regulation & Guidance

- Schools are required to have policies to address sex discrimination including sexual harassment and violence
 - 34 C.F.R. § 106.8(b) “A recipient shall adopt and publish grievance procedures providing for *prompt and equitable resolution* of student and employee complaints alleging any action which would be prohibited by this part.”
- 2001 Revised Harassment Guidance
- 2008 Sexual Harassment: It’s Not Academic
- 2011 Dear Colleague Letter
- 2013 Dear Colleague Letter on Retaliation
- 2014 FAQs on Title IX & Sexual Violence
- 2015 Title IX Resource Guide



Title IX: Responsible Employees

- Schools must address sexual harassment they know or should know about; they should also track and proactively address hostile environments
 - 34 C.F.R. § 106.8(a) “Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient”
 - 2001 Title IX Guidance defines such a responsible employee as one who:
 - has the authority to take action to redress harassment,
 - has the duty to report to appropriate school officials harassment or any other misconduct by students or employees, or
 - an individual who a student could reasonably believe has this authority or responsibility

Title IX: Enforcement

- Enforcement options under Title IX
 - Individual lawsuit through civil courts
 - implied cause of action found by U.S. Supreme Court in *Cannon* (1979)
 - Administrative Enforcement through federal agencies under 20 U.S.C. § 1682
 - Termination federal funding after express finding on the record, after opportunity for hearing, of a failure to comply with such requirement after noncompliance found
 - Any other means authorized by law after seeking voluntary resolution
 - Email OCR complaint form to OCR@ed.gov and/or regional office (180 day filing window since last act of discrimination)

Clery Act

In memory of Jeanne Clery



Sect. 304 of 2013 VAWA Reauthorization
Clery Act, 20 U.S.C. § 1092(f)
34 C.F.R. § 668.46
34 C.F.R. Pt. 99, App. A (1988)
Handbook on Campus Safety and Security Reporting*

Clery Act: Crime Reports

- Annual Security Reports providing information on campus crime and campus safety policies and procedures
 - 20 U.S.C. § 1092(f)(1) “prepare, publish, and distribute, through appropriate publications or mailings, to all current students and employees, and to any applicant for enrollment or employment upon request”
 - timely warning, § 1092(f)(3)
 - daily crime log, § 1092(f)(4)



Clery Act: CSAs

- Campus Security Authorities must report crime statistics, 20 U.S.C. § 1092(f)(1)(F); 34 C.F.R. § 668.46(a)
 - Campus police and/or security
 - “Any other individual with responsibility for campus security but, such as an individual who is responsible for monitoring entrance into institutional property”
 - “Any individual or organization specified in campus security policy as a reporting source for criminal offenses”
 - “An official of an institution who has significant responsibility for student and campus activities”
 - including, but not limited to student housing, student discipline, and campus judicial proceedings



Clery Act: Campus Safety Policies

- Annual Security Reports providing information on campus crime and campus safety policies and procedures
 - 20 U.S.C. § 1092(f)(8)(1) “Each institution of higher education . . . shall develop and distribute as part of the report described in paragraph a statement of policy regarding:
 - Prevention programs; and
 - Response procedures

Clery Act: Prevention

- Prevention program specifics, 20 U.S.C. § 1092(f)(8)(B)
 - Education programs to promote the awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking
 - Offered to all incoming students and new employees
 - (aa) Prohibitions against gender violence;
 - (bb) the definition of gender violence;
 - (cc) the definition of consent, in reference to sexual activity;
 - (dd) safe and positive options for bystander intervention;
 - (ee) information on risk reduction;
 - Ongoing campaigns for students and faculty
 - Possible sanctions or protective measures that such institution may impose following a final determination of an institutional disciplinary procedure

Clery Act: Response - Victim Rights

- Written victim rights for student or employee who reports domestic violence, dating violence, sexual assault, or stalking occurring on or off campus, 20 U.S.C. § 1092(f)(8)(C)
 - Importance of preserving evidence
 - To whom the alleged offense should be reported
 - Options regarding law enforcement and campus authorities
 - notify proper law enforcement authorities
 - be assisted by campus in notifying law enforcement authorities;
 - decline to notify such authorities; and
 - Information on orders of protection, no contact orders, etc.

Clery Act: Response - Victim Rights

- Written victim rights for student or employee who reports domestic violence, dating violence, sexual assault, or stalking occurring on or off campus, 20 U.S.C. § 1092(f)(8)(c)
 - Information about protecting confidentiality
 - Existing counseling, health, mental health, victim advocacy, legal assistance, and other services available on and off campus
 - Options for, and available assistance in, changing academic, living, transportation, and working situations,
 - if so requested by the victim and if such accommodations are reasonably available
 - regardless of whether the victim chooses to report the crime to campus police or local law enforcement

Clery Act: Campus Proceedings

- Response policy requirements setting minimum standards for institutional disciplinary proceedings, 20 U.S.C. § 1092(f)(8)(B)
 - provide a prompt, fair & impartial investigation & resolution
 - conducted by officials who receive annual training
 - issues related to gender violence
 - Protection of victim safety and promotes accountability
 - Accuser and the accused are entitled to the same opportunities to have others present
 - advisor of choice at proceedings and related meeting
 - Accuser and the accused shall be simultaneously informed in writing
 - the outcome; procedures to appeal; any change to the results; and when such results become final



Clery Act: Retaliation

- Prohibition against retaliation by school officials
 - “No officer, employee, or agent of an institution . . . shall retaliate, intimidate, threaten, coerce, or otherwise discriminate against any individual with respect to the implementation of for exercising their rights or responsibilities under any provision of this subsection.” 20 U.S.C. § 1092(f)(17)



Clery Act

- Enforcement options under the Clery Act
 - No private cause of action for civil lawsuits or other use of compliance evidence within lawsuits, 1092(f)(14)
- Administrative enforcement
 - Secretary reports to Congress and monitors noncompliant institutions, 20 U.S.C. § 1092(f)(11) & § 1092(f)(15)
 - Secretary can impose a civil penalty of \$35K max per violation, 20 U.S.C. § 1092(f)(13)
 - Email complaint in any format to CleryComplaints@ed.gov; no statute of limitations

FERPA



FERPA, 20 U.S.C. § 1232g
34 C.F.R. Pt. 99 & App. A
Case law

FERPA: Privacy

- FERPA ensures privacy of a student's education record
 - includes records, files, documents, or other materials when the materials
 - directly related to the student and
 - is maintained by the school or on its behalf
 - Not include law enforcement or treatment records
- Standard practice is for student to enter educational institution at designated time and location for review while monitored by school faculty
 - Student may receive copies or have another arrangements to review when circumstances prevent the right to inspect or review (ex: distance)



FERPA: Student Rights

- Right to inspect and review education record within reasonable time (45 day max)
 - Prohibits school policies that deny this right or practices that effectively prevent access
 - limited right when another student's education record is involved so can have information relayed or redacted
- Student may release record through written consent specifying what records to release, the reason for the release, and to whom it is being released
 - Student is entitled to a copy of what is released if desired
 - Release does not prohibit re-disclosure of records



FERPA: Victim Rights

- Schools may disclose sex offender registry information (required by the Clery Act)
- A victim of “any crime of violence” may access the final results of the disciplinary hearing regarding that crime or offense (required by the Clery Act and an amendment to FERPA)
 - It is a violation of the Clery Act for a school to put a gag order on the victim to receive the results
 - Some limitation regarding sanction disclosure to only release portion related to the offense



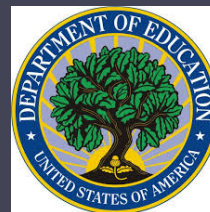
FERPA: School Rights

- Schools may include “disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community” inside educational records
 - May be disclosed internally and to other schools when there is a *legitimate educational interest* in behavior of student
 - Schools may annually define legitimate educational interest in their FERPA policy disclosure



FERPA: Enforcement

- No private cause of action, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)
- 20 U.S.C. § 1232g(f) Enforcement
 - “The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section . . . except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.”



Due Process

U.S. Const. amend. XIV, § 1
34 C.F.R. Pt. 99 & App. A
Case law

Due Process: Constitution & Case Law

- Due process of law is required by a State before “depriv[ation] . . . of life, liberty, or property,”
U.S. Const. amend. XIV § 1
 - Unlike criminal due process, administrative due process is a balancing test of (1) private interest affected; (2) risk of an erroneous deprivation and probable value of additional procedural safeguards; & (3) Government’s interests
 - *Goldberg v. Kelly*, 397 U.S. 254 (1970)
 - *Mathews v. Eldridge*, 424 U.S. 319 (1976)

Due Process: Case Law

- U.S. Supreme Court has set a minimum due process requirement of notice and opportunity to be heard for school disciplinary action of suspension, *Goss v. Lopez*, 419 U.S. 565 (1975)
 - Standards may be higher if expulsion
 - *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961)
 - but not likely given consumer relationship between school and student to disincentives abuse
 - *Osteen v. Henley*, 13 F.3d 221 (7th Cir. 1993)

Osteen v. Henley

- “We are reluctant to encourage further bureaucratization by judicializing university disciplinary proceedings, mindful also that one dimension of academic freedom is the right of academic institutions to operate free of heavy-handed governmental, including judicial, interference.”
- “The danger that without the procedural safeguards deemed appropriate in civil and criminal litigation public universities will engage in an orgy of expulsions is slight. The relation of students to universities is, after all, essentially that of customer to seller. That is true even in the case of public universities, though they are much less dependent upon the academic marketplace than private universities are.”
- “a nonpermanent expulsion that did not prevent him from enrolling in another college—is not so grave as to entitle him to the procedural protections thought necessary in litigation because large interests of liberty or property may be at stake.”

Navigating the Campus Disciplinary Process

Opportunities for Victim Advocacy

Reporting
Accommodations
Interim Measures & Investigation
Hearing & Appeal



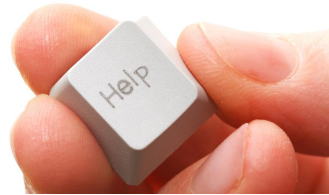
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Reporting

- **Campus officials**
 - **Confidentiality Reporting**
 - Ensure school lists confidential resources
 - Have initial report goes straight to Title IX Coordinator
 - Request retaliation protections and other safety measures
 - **Non-confidentiality Reporting**
 - Consent required from a victim to begin formal process
 - Request single, thorough interview
 - Allow one follow up options for questioning
 - Without consent, school has independent obligation to determine if it must take formal action or other indirect remedies to address a hostile environment
- **Police Reporting**
 - Campus must facilitated report to police if requests
 - Victim has a right not to report to police under federal law
 - complaint option with \$35K fine maximum per violation

Interim Measures and Accommodations

- Student right to be free from a hostile environment, therefore schools must provide interim remedies that
 - (1) eliminates hostile environment; (2) prevent its recurrence; & (3) address its effects
- Reasonable accommodations required:
 - Academic
 - Moving Class Sections
 - Requires Institution Wide-Policies
 - Departmental Protocols
 - Living
 - Changing Residence Halls
 - Housing Contract Termination
 - Work
 - Moving to Secure Location
 - Office Protocols
 - Transportation
 - Parking pass
 - Escort service



Adjudications

PROMPT, FAIR, THOROUGH & IMPARTIAL

- Description of process with timelines
 - Only “good cause” delay allowed in writing per Clery Act
 - 60 day window standard under Title IX
- Equal hearing rights (Title IX & Clery Act)
 - Advisor of choice (includes lawyers)
 - Same right to call witnesses and participate
 - Timely access of hearing information
- Identify standard of evidence
 - Title IX requires preponderance per guidance
- Sanctions
 - Must remedy hostile environment
- Simultaneous written notification of:
 - Outcome
 - reason for finding and sanction (FERPA permits)
 - Appeal rights & process
 - Equally provided to both parties
 - Any change in results & finalization of results



Retaliation

- Prohibition on institutional or officer retaliation
 - Covers “intimidating, threatening, coercing, or in any way discriminating against the individual”
 - Discrimination could be lack of enforcing protective measures or taking disciplinary action
 - Protects can be broadly requested under Title IX against students and student organizations
 - Non-student perpetrators can receive no trespass orders

Worst Trends on Campus

SurvJustice Tips for Responding

Simultaneous Written Notification
Settlements Changing Results
Greek Life Retaliation
No Contact Orders Off-Campus
Mutual No Contact Orders





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