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In this chapter, we describe the legal parameters in which sexual misconduct adjudication processes take place and highlight both noteworthy pitfalls and promising practices.

Adjudicating Student Sexual Misconduct: Parameters, Pitfalls, and Promising Practices

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Student conduct practice has long been guided by well-established legal precedent regarding due process and fundamental fairness (Pavela & Pavela, 2012). Those principles and parameters remain as important today as they were in 1986 when the field of student conduct took shape under the Association for Student Judicial Affairs, now the Association for Student Conduct Administration. In light of the unique way in which sexual violence impacts students and surrounding communities, however, business as usual in student conduct practice is no longer an option. Neither is antiquated reliance on just enough notice and just enough hearing to meet due process requirements.

Adjudicating sexual violence matters, including investigations, hearings, and other resolution processes, requires practitioners to navigate the labyrinthine morass of legislation, case law, and federal guidance pertaining to Title IX to the Educational Amendments of 1972 with sophistication and precision rarely required in nonsexual violence matters. Students deserve, and the federal government demands, impeccable institutional performance from initial report through final appeal and sanctioning. Anything less provides fertile ground for complaints, lawsuits, media scrutiny, and the potential loss of federal funds, repercussions that sometimes befall even the best processes.

To assist student affairs practitioners with compliance, response, and adjudication efforts, we review the legal parameters in which sexual misconduct adjudication processes take place, provide an overview of common pitfalls experienced by institutions in those processes, and describe some promising practices intended to enhance service to students affected by, or involved in, these difficult matters.

Legal Parameters Guiding Adjudication Processes

There is a complicated network of federal laws, regulations, guidance documents, and court decisions shaping how campus administrators adjudicate sexual misconduct. Adjudication efforts can be further complicated by state law. Critics of higher education institutions' adjudication of sexual misconduct allegations often question whether institutions should be engaged in these efforts at all, suggesting that these issues are best left to the criminal justice system (Shibley, 2016). What these critics fail to understand is that virtually all colleges and universities are required to address allegations of sexual misconduct as part of Title IX's prohibition against discrimination on the basis of sex (*Davis v. Monroe County Board of Education*, 1999). Absent a Title IX requirement, institutions have an educational responsibility to provide an environment in which all students can learn. As such, campus processes that address sexual misconduct are intended to supplement rather than replace the criminal justice system, while also keeping institutions in compliance with their Title IX obligations.

Due Process and Adjudication Processes. Prior to the 1960s, courts generally refused to intervene in college and university disciplinary processes. This changed with the landmark decision in *Dixon v. Alabama State Board of Education* (1961), in which the U.S. Court of Appeals for the Fifth Circuit ruled that the Due Process clause of the 14th Amendment applied when public institutions suspended or expelled students. The Supreme Court upheld this decision in 1975 with their ruling in *Goss v. Lopez* (1975), which required that students “be given some kind of notice and afforded some kind of hearing” (p. 579) in cases involving suspensions of 10 days or longer. Although courts have not consistently established specific elements of due process that must be met (Kaplin & Lee, 2014; Stoner & Lowery, 2004), they have outlined a series of procedural protections for students facing suspension or expulsion for behavioral violations, including sexual misconduct.

The Supreme Court, for example, requires that students be afforded notice “of what they are accused of doing and what the basis of the accusation is” (*Goss v. Lopez*, 1975, p. 582). However, the courts have differed on how many days of notice are required. In addition to notice, courts have addressed specific elements of how hearings must be conducted. Fundamentally, the hearing must afford accused students “an opportunity to speak in their own defense and explain their side of the story” (Kaplin & Lee, 2014, p. 594). The institution must also select decision-makers who can perform their responsibilities in an unbiased manner (*Nash v. Auburn University*, 1987).

The court in *Osteen v. Henley* (1993) described the limited right of accused students to consult an attorney:

We don't think he is entitled to be represented in the sense of having a lawyer who is permitted to examine or cross-examine witnesses, to submit and object to documents, to address the tribunal, and otherwise to perform the traditional function of a trial lawyer. (p. 225)

This right was codified in some respects by the 2013 Violence Against Women Act (VAWA) Amendments to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act, 1990). These amendments require that both parties be allowed to be accompanied to any meeting by the advisor of their choice, including an attorney. The amendments do not, however, guarantee a right to cross-examination and current OCR guidance requires only that the opportunity to cross examine parties or witnesses be afforded equally (Jackson, 2017b). Court rulings support this position. For example, the court in *Nash v. Auburn* (1987) observed, "There was no denial of appellants' constitutional rights to due process by their inability to question the adverse witnesses in the usual, adversarial manner" (p. 664). Along with limits on cross-examination, some courts specifically endorsed the use of visual screens intended to prevent complainants from having to look directly at the accused (*Cloud v. Trustees of Boston University*, 1983; *Gomes v. Univ. of Maine Sys.*, 2004).

Beyond those rights afforded to students at public universities by federal and state constitutions, students at private and public institutions have a contractual relationship with their institutions. Contractual agreements such as student handbooks and conduct policies are a "source of meaningful rights for students, particularly when faculty or administrators either fail to follow institutional policies or apply those policies in an arbitrary way" (Kaplin & Lee, 2014, p. 348). Many private institutions have outlined students' rights which parallel those required by the courts or public institutions. In establishing the legal framework for campus adjudication processes, the courts have been primarily focused on the rights of accused students. The rights afforded to complainants flow instead from federal legislation, regulations, and guidance.

Federal Requirements for Adjudication Processes. The federal requirements governing adjudication processes in sexual misconduct cases flow primarily from Title IX, the Clery Act, and guidance issued by the U.S. Department of Education's Office for Civil Rights (OCR). OCR, for example, maintains that the grievance procedures for resolving sexual harassment and sexual violence must be "prompt and equitable" (Jackson, 2017b, p. 2) and allows institutions to use the student disciplinary process for this purpose as long as this standard is met. A fundamental expectation of OCR is that the resolution process must afford both parties the same rights.

In September 2017, Candice Jackson, Acting Assistant Secretary for Civil Rights, issued a new *Dear Colleague Letter* on Campus Sexual Misconduct, withdrawing the 2011 *Dear Colleague Letter* (Ali, 2011) and the 2014 Questions and Answers on Title IX and Sexual Violence (Lhamon, 2014).

In comments similar to those made by Secretary of Education DeVos earlier in the month, Jackson (2017a) criticized the previous guidance from the Obama Administration for resulting in “the deprivation of rights for many students—both accused students denied fair process and victims denied an adequate resolution of their complaints” (p. 2). The U.S. Department of Education also announced plans to undertake a formal rulemaking process to develop new Title IX guidance, which includes an opportunity for public comment.

In the interim, institutions were urged to rely on the 2001 *Revised Sexual Harassment Guidance* (Cantu, 2001) and a new *Q&A on Campus Sexual Misconduct* (Jackson, 2017b) issued with the letter. This document addressed several significant issues relevant to the adjudication of sexual violence, including:

- OCR abandoned the 60-day time frame for the resolution of complaints and instead indicated that institutions would be judged on their “good faith” (Jackson, 2017b, p. 3) efforts to resolve the investigation in a timely manner.
- OCR repeatedly stressed the need for fair and impartial process.
- Regarding training, OCR warned, “Training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially” (Jackson, 2017b, p. 4).
- OCR specifically stated that upon opening an investigation which may lead to disciplinary action that the responding party should be notified in writing of their alleged misconduct “including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident” (Jackson, 2017b, p. 4).
- OCR indicated that institutions had the ability to resolve cases using informal resolution models, including mediation. However, mediation is still explicitly prohibited in sexual assault cases under the 2001 *Revised Sexual Harassment Guidance*. This does seem to offer greater latitude to institutions wishing to pursue some of the practices described later in this chapter.
- OCR also allowed institutions to use either a preponderance of the evidence or a clear and convincing evidence standard in sexual violence cases and further prohibited institutions from using a lower standard for sexual violence cases than other student misconduct cases.
- OCR stressed that both parties must have equal access to information to be used in the hearing and that those involved in the investigation should be “free of actual or reasonably perceived conflicts of interest and biases for or against any party” (Jackson, 2017b, p. 4).

- OCR also offered institutions several options regarding appeals. Institutions could limit appeals to just the responding party or allow both parties to appeal in which case the right to appeal would need to be equal. However, the option for responding party appeals only seems to contradict some of Department of Education’s guidance under the Clery Act.

Although most institutions will not be required to change policies in response to this new guidance, the final outcome of the rulemaking process may ultimately have implications for the adjudication of sexual violence cases in higher education.

In addition to OCR guidance, the Clery Act has included specific provisions related to sexual violence since 1992 and was significantly amended by the reauthorization of VAWA in 2013 to expand the requirements and broaden their scope to include dating violence, domestic violence, and stalking. Many of these provisions mirror those in the now withdrawn 2011 OCR *Dear Colleague Letter*. Key requirements of the Clery Act regarding the adjudication of student-on-student sexual misconduct complaints include:

- The institution’s Annual Security Report (ASR) must list all possible sanctions which may be imposed after a disciplinary proceeding resulting from a complaint of sexual assault, dating violence, domestic violence, and stalking.
- The institution’s ASR must describe the protective measures that the institution may offer to a victim after an allegation of sexual assault, dating violence, domestic violence, and stalking.
- Institutions must provide “annual training on the issues related to dating violence, domestic violence, sexual assault and stalking and on how to conduct an investigation and hearing process that protects the safety of the victims and promotes accountability” (U.S. Department of Education, 2016, pp. 8–19).
- Institutions must allow both parties to be accompanied to any meeting by the advisor of their choice and may not limit, in any way, who can serve as an advisor, including attorneys. However, institutions may limit the role of an advisor as long as those restrictions are applied equally to both parties.

Collectively, this maze of legal requirements and guidance gives rise to a variety of challenges in adjudicating sexual violence matters.

Common Pitfalls of Adjudicating Sexual Misconduct Matters

Colleges and universities currently face significant external pressures regarding adjudication of sexual violence complaints with claims of mishandled cases frequently featured in the press, under investigation by OCR, and detailed in lawsuits against colleges and universities. Currently, the OCR has almost 300 open investigations at more than 220 institutions of higher education arising from Title IX and sexual violence (“Title IX Tracker,”

2017). In addition, an estimated 100 students suspended or expelled for sexual misconduct have active lawsuits against colleges and universities with more than 20 of those students prevailing at some level in the legal process (Pavela, 2016). Several key lessons can be learned from these cases regarding common pitfalls that colleges and universities should work to avoid or minimize to avoid harm to both accused students and complainants.

One issue that the U.S. Department of Education emphasized in its resolved complaints with campuses is the vital importance of training for the broader institutional community and those directly involved in the complaint resolution process (Lhamon, 2015). Recruiting, hiring, and training qualified personnel is critical. Equally important is providing sufficient resources for these individuals to fulfill their responsibilities efficiently and effectively. The issue of resources becomes even more significant as institutions often experience a substantial increase in complaints when policies and communication about the institution's efforts to address sexual violence are improved and expanded; and no one is well served when institutions fail to meaningfully respond to complaints.

Investigations are particularly difficult when the reporting party requests confidentiality and that no action be taken. Institutions should establish a clear practice for how these requests for confidentiality will be handled. The University of Michigan, for example, established a trained review panel to advise the Title IX Coordinator in cases of requests for confidentiality.

Accused students have brought a variety of claims against institutions arising from their suspension or expulsion: the failure to publish policies, the denial of constitutional rights under the 14th Amendment, failure to provide a fair process, allegations that university administrators were biased against accused students, and claims that the institution's disciplinary process discriminates against male students under Title IX. When institutions deviate from established policies, courts are often willing to address the issue and overturn institutional decisions (for example, *Doe v. Brown University*, 2016; *Prasad v. Cornell University*, 2016). With many institutions fundamentally altering their processes for addressing sexual violence in the wake of the 2011 *Dear Colleague Letter* (Ali, 2011) and subsequent OCR enforcement efforts, the constitutional due process and fundamental fairness claims brought by accused students who have been suspended or expelled are also being well received by the courts in many cases (for example, *Doe v. Alger*, 2016; *Doe v. University of Southern California*, 2016). Given sufficient facts, the courts have also accepted students' claims that administrators were specifically biased against them (for example, *Doe v. Brown University*, 2016) or against students accused of sexual misconduct in general (for example, *Doe v. The Ohio State University*, 2016).

Accused students have been far less successful with their Title IX discrimination claims. No court has specifically found sex discrimination in one of these cases, but several courts have allowed students' suits to survive

preliminary challenges (for example, *Prasad v. Cornell University*, 2016). Because many of these cases are still early in the legal process, care must be taken not to place too much weight on any individual decision. However, taken overall, these cases do give a clear indication of issues that institutions must be attuned to in writing policies and adjudicating individual cases.

Promising Adjudication Practices

Given the parameters and pitfalls described above, it is easy to understand why institutions have difficulty navigating the environment in which student sexual misconduct cases now transpire. Fortunately, there are promising practices that can help institutions stay out of the spotlight as they adjudicate these exceedingly difficult matters. They include, but are not limited to: a proactive investigation model, specialized training for investigators and other decision-makers, research-informed sanctioning methods, restorative justice options, and standardized practice involving service indicators and transcript notations.

Proactive Investigation Model. One of the most dramatic shifts in the field of student conduct in the last 30 years followed OCR's issuance of their 2011 *Dear Colleague Letter* (Ali, 2011). Although lacking the force of binding law and though now withdrawn and replaced by new guidance, that document moved institutions away from complainant-driven practices which mimicked civil litigation procedures in basic design (for example, by creating the campus equivalent of plaintiffs, defendants, and juries) and toward investigative models that have long been used by campus Human Resources and Equal Opportunity personnel in the staff, and sometimes faculty, context. That model, referred to variously as the "single-investigator model" or "civil rights investigation model," is now preferred in student sexual misconduct cases despite variations in who performs the investigations and whether investigators issue a factual determination or turn that responsibility over to a separate decision-making body (Association for Student Conduct Administration, 2014). According to OCR, "the burden is on the school - not on the parties - to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred and, if so, whether a hostile environment has been created that must be redressed" (Jackson, 2017b, p.4).

In its most basic form a proactive investigation model means after the university receives a report of sexual violence, an official is charged with locating, uncovering, and analyzing the facts through witnesses, police reports, medical exams, photos, and any other available information. This differs from complainant-driven practices which typically require the complaining party to produce relevant information, provide it to the institution, and participate in a hearing of some sort. Under the emerging model, investigators can work alone, as noted by the term "single-investigator model," or in teams of two in which one person takes notes, while the other person

asks questions of parties or witnesses. Investigations may also be completed by nonuniversity personnel hired to work for the institution on a particular matter, an approach that has become increasingly common in high-profile matters where public scrutiny casts doubt on processes conducted by internal personnel. Whether conducted by internal or external personnel though, most investigations result in a report which summarizes the facts, findings, and applicable policy, and which can be acted upon to reach a factual determination regarding responsibility or a subsequent and separate decision regarding the appropriate sanction for a particular student matter.

This proactive investigation approach, in contrast to complainant-driven models which place inappropriate responsibility on victims in the adjudicative process, places the investigative burden on institutions and permits them to proactively fulfill their Title IX obligations, while also creating processes that are trauma-informed (see Monahan-Kreishman and Ingarfield's Chapter 6) and protective of the various rights afforded to each party involved.

Specialized Training. To perform the investigative functions with any reasonable degree of diligence requires specialized training in matters unique to student sexual violence in higher education (Lhamon, 2015). Provided by a cottage industry of agencies, advocacy groups, consultants, and associations, this training is available in online modules or in-person conferences, institutes, and workshops. Trainings vary significantly in depth and duration, lasting anywhere from 90 minutes to five days. Agendas can include background information on the legal landscape surrounding student sexual violence; how-to information regarding investigation processes, techniques, strategies, and record-keeping practices; information regarding the prevalence of sexual violence, rape myths, and trauma-informed care; model policies, template letters, and checklists; recommendations regarding note-taking, the number of investigators required, and how and when to render a decision; and advisory information concerning reporting guidelines, memorandums of understanding with local police, and more. Training can also be acquired through less linear or more extended means, including independent study, work experience, or formal education in a relevant field.

Gone are the days of student affairs administrators relying on good judgment and basic training alone to address all varieties of student misconduct. Fortunately, specialized training is easy to find and can quickly improve the student experience, while simultaneously reducing risk for institutions. In selecting training opportunities, institutions should be mindful of the experience and expertise offered by the trainer(s), the trainer's familiarity with sexual misconduct issues in the higher education context, how the curricula will complement existing skills or knowledge among attendees, and the overall cost of participating.

Research-Informed Sanctioning Methods. As sexual misconduct adjudication processes increased on campuses after 2011, so too did the number of students found responsible for sexual violence. This created a

unique issue for campuses: what do we do once the student has been found responsible? Obvious options include suspension and expulsion, but what if the behavior (which may fall anywhere along a wide continuum of behavior defined broadly as “sexual misconduct”) is not severe enough to warrant that response? Or what if that response alone seems insufficient?

In 2013, the University of Michigan partnered with the Association for Student Conduct Administration and the Center for Effective Public Policy to conduct a nationwide survey concerning the sanctioning practices at postsecondary institutions in sexual violence cases. The results showed wide-ranging practices that were not grounded in literature. Institutions reported using institutional precedent and their best judgment on a case-by-case basis to determine which sanctions should apply to which students and which types of behavior (University of Michigan, Office of Student Conflict Resolution, Association for Student Conduct Administration, & Center for Effective Public Policy 2014). Small interest groups developed thereafter searching for sanctioning methods more adequately informed by current research and available evidence.

One example of this effort includes a handful of institutions that, as of publication, are piloting a set of research-informed products developed under a multiyear grant (Number: 2014-AW-BX-K002) from the U.S. Department of Justice, Office of Justice Programs. Those products currently include: (1) a checklist of factors associated with increased sexual aggression, which institutions can utilize after a factual determination is issued, yet before sanctioning, as a way of providing decision-makers with additional information regarding what type of sanction might be most appropriate for a student; (2) a clinical assessment of risk factors and treatment needs associated with sexual misconduct; and (3) two corresponding programs designed to target risk factors associated with sexual misconduct and facilitate healthy, consensual, and safe intimate relationships in the future (Prentky et al., 2017). If the project proves successful, the products may be made available to other institutions in the future.

Restorative Justice Practices. Another promising practice in the realm of sanctioning and adjudication revolves around the application of restorative justice principles to sexual violence matters. Restorative justice, at its core, is a criminal justice theory asserting that the purpose of the process should be to repair the harm created by the behavior at issue (Zehr, 2002). Restorative justice processes are *not* fact-finding processes. Rather, they are processes in which the individual accused of wrongdoing has accepted responsibility for their actions and now seeks to repair the harm they created (Zehr, 2002).

This concept was first applied to student sexual violence matters by Koss, Wilgus, and Williamsen in their 2014 work, “Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance.” Restorative justice has gained greater traction in the time since with the formation of the Campus Promoting Restorative

Initiatives for Sexual Misconduct (PRISM) project, which promotes restorative initiatives for sexual misconduct on college campuses. Coordinated by the Skidmore College Project on Restorative Justice and collaboratively led by professionals across the nation, the group advocates for appropriate use of restorative practice in sexual violence prevention efforts, as a resolution option, and during the reintegration phase once a student has returned from a suspension period (Campus PRISM, 2016). Campus PRISM and others agree that mediation is not an appropriate method of resolving sexual assault matters, however, they argue that restorative justice practice differs from mediation in important ways (for example, it requires acceptance of responsibility from the offender) and should be considered a viable option in responding to sexual misconduct (Campus PRISM 2016; Coker, 2017; Koss, Wilgus, & Williamsen, 2014). Although in its infancy with respect to practice models and still pending, as of publication, explicit endorsement from OCR, these practices show promise in more effectively serving the needs of students: both victim and offender.

Standardized Notation Practices. A final practice worth noting as promising addresses the administrative use of service indicators and transcript notations during and after adjudication processes. In the context of sexual misconduct adjudication, a *service indicator* is a hold placed on a student's account, which has various service impacts. Those impacts might prevent registration, use of campus facilities, the delivery of grades, or even the issuance of a final diploma. The term *transcript notation*, in contrast, refers to temporary or permanent language placed on a student's official transcript indicating that they were suspended or expelled from the institution as a result of behavioral misconduct.

Service indicators are increasingly important as institutions deal with accused students in their final year of enrollment. Given the length of time required for some investigations, numerous instances exist in which an institution found a student responsible for sexual violence, yet were unable to provide any meaningful sanction because the student graduated during the investigation. An appropriate service indicator on the student's account may prevent conferral of the student's degree or, minimally, delivery of the student's diploma. This action provides the institution with leverage to sanction a student even if all coursework has been completed. Without it, the student and accountability slip away.

Relatedly, institutions are becoming increasingly concerned with passing on students who have been found responsible for sexual misconduct to other institutions. To make sure the next institution is appropriately informed of a student's prior misconduct, the Association for Student Conduct Administration (n.d.) recommended placing a notation on the student's transcript whenever the sanction includes suspension or expulsion. The approach has gained emerging support from both the American Association of Collegiate Registrars and Admissions Officers and in certain provisions of the Safe Transfer Act proposed in December 2016. Both

transcript notations and service indicators can be incredibly helpful as institutions try to fulfill their Title IX obligations, while simultaneously protecting and serving all students involved in these complex matters.

Conclusion

Sexual misconduct cases are the most challenging student conduct issues that institutions of higher education address. This chapter examined the complex web of due process requirements, federal laws, and administrative guidance that shape and constrain institutional responses. It also described common pitfalls experienced by institutions as part of their adjudication processes and provided several promising practices as institutions continue revising their policies and procedures to more effectively address student sexual misconduct.

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