

TITLE

IX TODAY

Helping colleges, universities
& schools ensure gender equity

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The NCHERM Group, LLC., a law and consulting firm offering systems-levels solutions to create safer campuses, and the Association of Title IX Administrators, which provides networking and professional development for Title IX coordinators, publish *Title IX Today* and its companion e-newsletter.

THE LEAD | LIABILITY

Understand protections from liability for defamation related to Title IX cases

By Erin Buzuvis, J.D., Contributing Editor

Given the high level of concern about sexual assault on college and university campuses from the general public, legislators, and others, Title IX administrators face simultaneous and conflicting pressure to be both transparent about their institution's response and respectful of the privacy of those involved in cases. One recent case highlights the risk of publicly revealing too much about an institution's ongoing response to sexual assault.

In *Ludlow v. Northwestern University* (No. 14C 4614, 2015 WL 508431 (N.D. Ill. Feb. 5, 2015)), a professor who was accused of sexual misconduct sued university officials for defamation (among other claims) for certain public comments they made about the institution's response to the sexual misconduct complaints. A federal district court in Illinois dismissed the case, proving that there is room for administrators to maneuver competing concerns about transparency and privacy.

Campus officials determined in 2014 that a male faculty member violated the institution's sexual harassment policy by making an unwelcome sexual advance on a female undergraduate student. Due

to the quality of the evidence against him, they decided not to terminate or suspend him from teaching. In the wake of that decision, a second student came forward with more allegations against the professor, provoking student outcry over the professor's uninterrupted

'In this litigious era, potential whistleblowers may be deterred from reporting by the threat of retaliatory litigation.'

— Buzuvis

presence in the classroom. Officials at the university and the faculty member came to a mutual decision that he would not teach during the spring term. Campus leaders conveyed to students that the decision was "in response to" their Title IX concerns. Similar statements were made to the press. The professor then sued the officials over those statements, claiming they were liable for defamation.

Consider context when talking about interim measures

The defamation doctrine considers some false statements to be inherently harmful, including a statement declaring or implying that an individual has committed a crime or an act of sexual misconduct, or has engaged in unprofessional conduct. Because of this, administrators may worry about the risk of offering public reassurances about steps being taken to address

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FROM THE FIELD

Title IX, state laws increasingly collide

While many colleges struggle to comply with Title IX, some states may be making compliance more difficult with legislation that intersects with, and sometimes contradicts, Title IX. Here are some examples:

Oregon bill addresses victim privacy

In Oregon, legislation that aims to keep college officials from accessing students' therapy records was approved unanimously by the House. The bill was introduced after University of Oregon officials accessed the therapy records of a student who sued UO, alleging that it failed to take action after she was raped. Following the bill's introduction, the Association of Title IX Administrators, the National Behavioral Intervention Team Association, and The NCHERM Group, LLC., issued a statement calling on colleges to clarify policies on the confidentiality of such records. ♦

introduced a bill that would require schools to limit the use of restrooms and locker rooms on the basis of students' "biological sex." ♦

North Dakota lawmakers consider 'right to counsel'

The North Dakota bill that would allow attorneys to represent responding parties in campus sexual misconduct hearings is moving closer to becoming law. In February, following Senate approval, the bill proceeded to a House committee hearing. That committee recommended the bill's passage with an amendment, and last month, the amendment was adopted by the House. ♦

Various states grapple with anti-LGBTQ bills

Following the passage of Indiana's Religious Freedom Restoration Act, and as Arkansas considered a similar bill, a Minnesota Senate committee rejected legislation that would repeal transgender-inclusive school policies. Despite that, new supporters have signed onto the bill, including Republican Majority Leader Joyce Peppin. And Nevada

Delaware legislators weigh mandatory reporting

Delaware is the latest state to consider mandatory reporting. A current bill would require institutions to forward reports involving sexual violence to the state's Department of Justice and municipal police authorities. The bill would also require the state's DOJ to publish statistics on campus sexual assault in the state on a yearly basis. ♦

— Compiled by Cynthia Gomez, Editor

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sexual misconduct complaints, in case that accusers' claims do not turn out to be substantiated by campus investigations.

Fortunately, the court's dismissal of these defamation claims provides some guidance on how to manage that risk. For one, the court emphasized that acknowledging that the professor's absence from the classroom was "in response to" Title IX concerns was factually true, and did not by itself imply that the professor had committed sexual misconduct. Additionally, the court rejected the professor's argument that other statements — such as one that the professor "should not teach," and another that keeping the professor in the classroom "wouldn't be the right thing to do" — falsely implied that the professor posed a threat to students. Reading those statements in context implied only that officials saw the probability of student unrest and distraction rather than a threat posed by the professor.

As illustrated here, it is sometimes desirable for institutions to be transparent about interim measures taken to ease students' and the public's concerns. But officials should avoid express and implied statements on matters that could later prove to be false. They can minimize the risk of defamation liability by clarifying that interim measures are responsive to the filing of complaints, and are not a judgment on allegations.

Qualified privilege protects reporting parties

In the Northwestern case, the professor not only sued administrators for defamation, but also brought a similar claim against one of the students who had accused him of sexual misconduct. When a statement is covered by the qualified privilege exception, the speaker is not liable for defamation even if it turns out that the

statement was false, unless the plaintiff can prove that the defendant was maliciously lying, the court explained.

There is not a uniform standard for determining when a statement is covered by the qualified privilege exception, but generally, courts apply it to situations where policy considerations favor unencumbered speech. They usually require, first, that the person making the statement was motivated by a personal interest or a legal or ethical duty; and second, that the statement was made to someone with an interest in or duty to receive it. Most reporting of sexual misconduct will satisfy this test. Individuals making such reports are likely motivated by either a personal interest in their own safety or an ethical obligation to the safety of others, if not both. Campus officials receiving such reports have either a legal or ethical duty to receive them.

Consistent with that, the court in this case determined that the student's statement alleging the professor's sexual misconduct, which she made to the university counsel, was subject to qualified privilege. In support of this conclusion, the court expressly recognized the strong public interest in encouraging the reporting of sexual misconduct. As a result, the professor could not continue to litigate his defamation claim because his complaint did not contain the allegations of malicious intent that are required when qualified privilege applies.

In this litigious era, potential whistleblowers may be deterred from reporting by the threat of retaliatory litigation. To this end, Title IX administrators should be ready to offer appropriate reassurances that defamation law will not likely apply to statements made in good faith, even if, in the end, complainants lack enough evidence to convince their institution that their statements are true. ♦



ERIN BUZUVIS, J.D.

Erin Buzuvis is a professor at the Western New England School of Law. She also serves as the director of the Center for Gender & Sexuality Studies.

KEY TAKEAWAYS

» Be mindful in balancing the need to provide transparency regarding institutional actions with the need to respect the privacy of those involved in Title IX-related complaints.

» It's OK to offer the public reassurance about interim steps being taken by the institution, as long as you avoid implying anything that could later turn out to be false.

» Reassure members of your campus community that possible defamation claims against individuals making reports of sexual misconduct are unlikely to succeed in court. ♦



BRIAN VAN BRUNT, ED.D.

Brian Van Brunt serves as the senior executive vice president for professional program development at The NCHERM Group, LLC. For more information, you may reach him at Brian@nchem.org.

KEY TAKEAWAYS

- » Your instincts in responding to a person experiencing sexual trauma may not always be right, so develop a response plan and practice it.
- » A sense of calmness, confidence, and hope for the future can be very helpful to survivors dealing with the aftermath of sexual violence.
- » Advise students away from actions that may lead to a loss of evidence that they could later regret, and know how to handle evidence.
- » Be mindful of the effects of others' trauma on the lives and work of first responders.
- » Consider why you send certain staff members in to work with certain survivors. ♦

Provide a better first response to survivors of sexual violence

By Brian Van Brunt, Ed.D.

Helping those who have been harmed by sexual violence has been an important part of my work for the past two decades. My first job out of college involved supervising staff at a group home for children who had been sexually abused. After that, I worked as a case manager for the Massachusetts Department of Mental Health, where I assisted children recovering from traumatic abuse and struggling with mental health disorders. I also had the opportunity to aid children and families recovering from the trauma of sexual violence through my counseling practice in the community, and later as a private practitioner. Given that background, when I moved onto the college setting, helping student-survivors of sexual trauma, rape, abusive relationships, stalking, and threats of violence became an area of focus for me.

Addressing the effects of sexual violence is a key requirement of Title IX. Doing so well can make a huge difference in the lives of impacted students. I am often asked to provide training and direction for those who are called to respond in the immediate aftermath of campus sexual violence. Those individuals may include resident advisors, police and campus safety officers, counselors and psychologists, medical and health center staff, women's center advocates, and student activity and orientation advisors.

Individuals in those roles often find themselves unsure of how to effectively work with students who

may be in shock, experiencing a medical emergency, or recovering from alcohol or other substance intoxication. Survivors of sexual violence may express disbelief about what happened, regret or self-blame, fear, anger, shame, worry, etc. That can be overwhelming for first responders who aren't trained in crisis response.

In the vacuum of knowledge or experience, some may turn to their instincts in responding. But some instinctual responses can be way off base. Here are some don'ts to remember:

- » **Don't panic.** It is essential to remain calm. Falling into panic mode or becoming hysterical upsets the survivors and gives them the impression that the situation is even worse or more out of control than they already feel it is.
- » **Don't become a crime scene investigator.** Many times, first responders may be tempted to become overly factual and fall into evidence-gathering mode by only explaining policies and procedures to the survivors. That's not what they need, at least initially. While gathering evidence is certainly important, the first response needs to be a compassionate one.
- » **Don't overwhelm survivors with help.** Some staff members may be tempted to give students all the help they have to offer, all at once. It's simply too much. Instead, take small steps at first, making simple gestures like offering water, and ensuring the person is warm, feels safe, and is comfortable.

» **Don't freeze up.** This is the opposite of giving all the help. Staff members may freeze and give none of the help they're able to offer. Having a response plan, and role-playing to practice the plan, can help staff members avoid freezing up when faced with the task of helping a traumatized student.

» **Don't pass a student along badly.** Ensure that any referral is done with the student's full knowledge and agreement. In addition, it's a good idea to make sure that the individuals you are connecting the student-survivors with understand what is going on. Take the time to provide introductions. For example, if emergency medical technicians are called, take the time to introduce them and explain why they are there.

» **Don't touch.** In the aftermath of sexual violence, it is common for the traumatized individuals to become very sensitive to touch and their personal space, since that has just been violated. While you might be a hugger, you just don't know how the other person will respond. Adopt a conservative approach to touch when working with survivors.

» **Don't offer predictions.** Be careful about offering advice about what to do or related to what may happen next. Provide options, but don't launch into personal stories or predictions about the future. Stay in the moment.

Once first responders have a good understanding of what not to do, the next training stage involves giving them some more specific tools and advice on how to move forward based on their positions and responsibilities. Regardless of

what job first responders may be performing, the central concept of remaining calm and confident in managing the situation is absolutely paramount.

Controlling their breathing, remaining mindfully in the present moment, and offering support and reassurance can go a long way toward both aiding student-survivors in their recovery and helping first responders feel good about their helping roles.

Hope is a very powerful offering. In the therapeutic world, offering hope involves aiding traumatized clients to normalize their often-extreme emotional reactions. First responders should offer a confident sense that survivors will be OK. Discuss resources as choices that are waiting to be put to use by survivors when they are ready.

In terms of more pragmatic concerns, first responders are in a good position to protect evidence and explain the available options for moving forward. Whether or not student-survivors choose to press charges or bring a criminal case against the perpetrators, staff members should remember that evidence is fragile and can be lost if it is not protected. Help affected students make evidence-related choices that give them the widest range of options in the future, without overwhelming them more in the present.

For example, students who have just been victimized sexually may want to take a shower or wash themselves. That makes perfect sense given the trauma they have experienced. They may also want to throw away soiled items that remind them of what they've just been through. In both of those scenarios, valuable evidence may be lost. It is advisable to carefully and gently direct survivors away from such

actions, which they may later regret.

Likewise, staff should avoid placing any evidence in plastic bags, which can degrade some types of evidentiary materials, and use paper bags instead to retain what has been collected. And remember that many rape drugs leave the system quickly, so getting survivors to a hospital swiftly for evidence collection is important as well.

Recognize that helping those who have been harmed by sexual violence is difficult and emotional work. First responders should take care of themselves by seeking support from supervisors, clinical staff, and appropriate resources. Be aware that secondary trauma or compassion fatigue from working with student-survivors can lead to major disruptions in eating, sleeping, maintaining friendships, and keeping up with work.

Finally, a word about gender. As a male who has worked with sexual violence survivors, I have been in some odd situations, such as having interns who happened to be female called in to assist a survivor before me because that survivor happened to be a female. I'd like to make the case that men can be very effective in this role regardless of the survivor's gender if they have the experience and willingness to match their intervention style with the survivor's state of mind. Simply choosing a female first responder because the person who has been attacked is female isn't necessarily a best practice.

Experience, ability, and technique in responding should be taken into account when choosing a staff member to respond to an incident. While respecting survivors' wishes in who they talk to following an attack is critical, we should not assume that victims' and first responders' genders should always match. ♦

PROFESSIONAL PERSPECTIVE | INVESTIGATIONS



DAVID PACHECO, J.D.

David Pacheco serves as a Title IX investigator at the University of Colorado, Boulder, where he handles cases involving both students and employees.

KEY TAKEAWAYS

- » Know the key differences between cases involving students and employees, and what those differences mean in terms students' concerns and your response.
- » Understand the interplay between Title IX and other federal laws, as well as state laws and campus policies, to ensure everyone's rights are upheld during the investigation and resolution of Title IX cases.
- » Monitor your college's Title IX-related processes continually, and be willing to modify them as changes in the law are made, guidance from regulatory agencies is issued, and best practices evolve. ♦

Tailor case response to recognize differences between students, employees

By Leslee Morris, J.D., Contributing Editor

David Pacheco has served as a Title IX investigator at the University of Colorado, Boulder for the past eight years. Historically, his office has resolved Title IX complaints involving staff and faculty members as responding parties. Within the past year, it has also started resolving Title IX complaints involving students as responding parties.

Q Could you briefly describe your experience investigating Title IX claims for the university?

A In 2004, I began working in the Office of the University Counsel. In that role, I helped gather information and drafted responses on behalf of CU-Boulder for complaints filed with agencies such as the Office for Civil Rights and the Equal Employment Opportunity Commission. In 2006, I was recruited to the Office for Discrimination and Harassment, which had recently begun investigating protected class discrimination complaints in addition to sexual harassment complaints. The ODH served the Title IX role for employees as responding parties until August 2014, when CU-Boulder merged the employee and student investigative offices under a single office and renamed it the Office of Institutional Equity and Compliance.

Q Some see student and staff cases as being fundamentally different. Do you?

A I do see some major differences. Employee cases often involve workplace conflict with supervisors or colleagues, or complaints about

things like performance evaluations, promotions, etc. But for students, cases tend to arise out of far different circumstances. Students are living and socializing in the residence halls and around campus 24/7. Often, student cases involve the use of alcohol, which brings up issues of consent and incapacitation. For employees, if there is a Title IX complaint, it is more likely to involve hostile environment sexual harassment or gender-based discrimination.

Q Are there differences between students and employees as reporting parties, in terms of how they participate in investigations?

A In general, both are concerned about their own futures at the university, want the issue resolved, and worry about retaliation. The specific details are obviously different, but in the long run, both groups do not want to see themselves subjected to any further harm by filing a complaint.

Our investigators spend a great deal of time trying to develop trust and comfort with student-complainants so that they fully understand the process and feel comfortable moving forward. They are often hesitant to move forward because the type of incident is very traumatic. For employee-complainants, the events in the complaints are usually not as traumatic, although still highly important to them. By the time they reach our office, employee-complainants are usually aware of our office and have already made decisions about moving forward.

Q Do you see any differences between these groups as respondents, in terms of how they

participate in investigations?

A Based on the types of cases involving students, there is more of a chance of a criminal investigation occurring at the same time, so student-respondents are much more likely to have attorneys involved in the process, or even decline to participate at all. Student-respondents are also more likely to have their parents involved.

Q Do you do anything differently to prepare for interviews if the parties in a case are students, as opposed to employees?

A For students, if there is a police report or incident report, I will review that beforehand, or look at social media to see if there is any relevant information. Otherwise, the preparation involves ensuring that students understand the process and making them feel comfortable. For interviews of employees, I generally have much more information available beforehand. I will refer to personnel files and performance evaluations, and consult with Human Resources to get as much background information as possible before meeting with employees.

Q What are some challenges you see as being unique to working with either group in Title IX cases?

A We have a longer time to make employees aware of our office and what we do. They are required to take an online or in-person training and so have at least been informed of our office. With students, the population changes every few years, so it's challenging to educate them about the office.

Q Are there differences between students and employees as witnesses?

A In my experience, both student- and employee-witnesses want to try to do the right thing and be helpful.

Employee-witnesses are often trying to recall events that happened months and sometimes years ago. With student-witnesses, there can be concerns over revealing information about alcohol and drug use, and the alcohol and drug use itself can make memories unreliable. Student-witnesses also have more concerns about retaliation on a social level, since the parties and witnesses involved are people who they may live and attend class with.

Q Do different laws or policies create differences in how the university resolves cases depending on whether students or employees are involved?

A There are few differences. The Colorado Open Records Act protects personnel records. For students, the CORA protection still applies, and student records are also protected by the Family Educational Rights and Privacy Act. However, FERPA provides for inspection of student records by students, so our office is working with

university counsel to determine what level of disclosure is required while maintaining the rights of everyone involved. As far as policies go, the same sexual harassment and protected class discrimination and harassment policies apply to both groups. However, under the student code of conduct, there are specific violations that students can be charged with, like sexual exploitation.

Q Your office uses one process for any Title IX case regardless of whether the parties are employees or students. How has that been working for you?

A We are constantly monitoring our process and making changes when necessary. ♦

About the Author

Leslee Morris serves as an associate at The NCHERM Group, LLC. She was previously the Title IX compliance and grievances coordinator for National University. You may contact her at Leslee@nchem.org.

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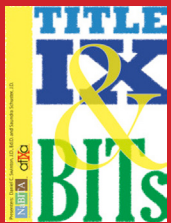
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RESOURCE ALERT

Learn to navigate the intersection of Title IX and work of BITs



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Get “Title IX and BITs” to train campus BIT members and gain a better understanding of how the law intersects with the work of behavioral intervention teams. Just go to www.ncherp.org/online-trainings/recent-online-trainings/#ixbits. ♦

By Cynthia Gomez, Editor

Behavioral Intervention Teams can help identify and address concerning behavior before it escalates into conduct that can lead to serious harm. Often, BITs deal with reports of students who are self-isolating, self-harming, and engaging in speech that indicates emotional distress and a desire to commit violence.

But what happens when a BIT learns of a student or employee who is engaging in sexual misconduct? Must

the BIT initiate an inquiry, and must it take steps to remedy the situation? Or can the BIT pass those responsibilities on to the Title IX administrator?

Members of BIT teams share reporting requirements and a responsibility to comply with Title IX, explain Sandra K. Schuster and Daniel S. Swinton, partners at The NCHERM Group, LLC., during “Title IX and BITs,” an on-demand, Online Training co-sponsored by the Association of Title IX Administrators and the National Behavioral

Intervention Team Association.

Title IX administrators would be wise to ensure that members of their BITs understand Title IX and their responsibilities under the law, and foster collaboration between their offices and BITs, according to Schuster and Swinton, who have both served in student conduct roles and BITs. Because BITs are also in a good position to support both those affected by sexual misconduct and those who are accused, BITs can play a part in ensuring equity throughout Title IX related processes.

This training addresses what BITs need to know about Title IX, whether the Title IX coordinator and/or investigator should be part of the campus BIT, the reporting requirements BITs must adhere to, and more. ♦