

TITLE

IX TODAY

Helping colleges, universities
& schools ensure gender equity

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ABOUT US

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*, its companion website, www.TitleIXToday.com, and subscriber e-newsletter.

THE LEAD | POLICIES AND PROCEDURES

Offer accommodations in your processes, interim measures, and remedies

By Jennifer L. Ball, Ph.D.,
Contributing Editor

As more attention is devoted to the effects of sexual trauma on the brain, those of us in Title IX should be becoming more mindful about the need to consider mental health issues when working with parties in sexual misconduct complaints. However, attention to disability issues and collaboration with disability services staff should go beyond that. Unfortunately, despite the fact that many Title IX Coordinators are often designated as their institutions' Americans with Disabilities Act/Section 504 Coordinator, Title IX and disability services processes often remain siloed. However, to truly ensure equity and accessibility, Title IX offices should collaborate closely on interim measures and remedies related to Title IX matters, and disability accommodations from preexisting conditions as well as mental health issues that may be triggered or exacerbated by Title IX matters. By doing this, we help students who are struggling access the help they need in a streamlined manner, and also avoid duplicating processes and work within our offices.

First, the potential need for disability accommodations and modifications to your processes — whether directly related to Title IX matters or not — should always be at the forefront of

Title IX staff members' minds. For instance, when a party comes in to make a report or to meet with us regarding a previously made report, we should take an initial moment to consider their needs related to any disabilities that may be present. Does the party have an impairment that requires accommodation to make the Title IX process fully accessible? Is a sign-language interpreter needed for an investigation interview? If so, how do we ensure that one can be available in a timely manner so as not to hold up our processes? And do our protocols afford us the flexibility to allow for a party to have an advisor of the party's choosing *and* a sign-language interpreter present, when normally parties may be accompanied by only one individual? If you only allow for the review of investigation reports in person, is an assistive device needed to ensure the content can be read and understood?

Don't simply assume that Title IX staff will know to ask about the need for accommodations. Have a process to ensure they do. While these accommodations may be offered directly by the Title IX team, consulting with your institution's Disability Services Director will ensure that you are following campus policies and best practices regarding accommodations.

With regards to interim measures,

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FROM THE FIELD | LIABILITY

Cornell case serves as reminder of importance of equitable treatment

By Cynthia Gomez, Editor

The case of *Prasad v. Cornell University*, decided earlier this year, should serve as a reminder of the importance of treating both reporting and responding parties equitably at every step of your Title IX process.

Two Cornell University seniors majoring in Chemical Engineering went out to celebrate the end of the semester with classmates, teaching assistants, graduate students, and professors. After having dinner and drinks, “Jane Doe” and Vito Prasad attended an after-party at a nearby residence. While Doe consumed more alcohol, witnesses indicated that she wasn’t “messy drunk.” Doe and Prasad played beer pong and conversed, and witnesses said they also flirted and danced together. The two then walked with four others to Doe’s apartment. Prasad stayed at Doe’s apartment after the others left, and Doe agreed to let him spend the night. Sexual activity ensued, which Prasad maintains was consensual.

A couple of days later, Doe reported that she had been sexually assaulted. The investigative report concluded, using Doe’s self-report about her drinking, that she had been incapacitated. It recommended Prasad’s dis-

missal, which was upheld on appeal.

He sued, claiming that the investigation ignored eyewitness accounts and relied on improper evidence. He also claimed that the investigative report was biased against him individually and against males as respondents. Finally, he said he was denied due process. The school asked the court to dismiss the action. His selective enforcement, breach of contract, negligence, breach of the covenant of good faith and fair dealing, and New York State Civil Rights Law claims were all dismissed, but his Title IX erroneous outcome claim and New York Human Rights Law claim survived.

“Given the totality of the circumstances, including that Jane Doe was treated more favorably than [the] plaintiff, that the investigators seemingly slanted the Investigative Report against [the] plaintiff, a drastic change in position of one investigator in the closing weeks of the investigation, and the possibility that male respondents in sexual assault cases are invariably found guilty at Cornell, [the] plaintiff plausibly establishes a causal connection between gender bias and the outcome of his disciplinary proceeding,” the court stated. ♦

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be aware that students who could benefit from disability accommodations — for depression or post-traumatic stress disorder, for instance — may not realize it because they have never experienced such conditions in the past and thus do not recognize them as disabilities. While it is well within the authority of the Title IX Coordinator to excuse absences, we need to offer access to appropriate support as well. The office best positioned to meet such accommodation needs is disability services. And since providing reasonable accommodations is what the disability services office does best, why not let it do so rather than taking on a task you may not be as adequately prepared to carry out?

The tricky part comes when an individual reports to a confidential source and is then sent to disability services for some interim accommodation. Disability services staff are responsible employees under Title IX and need to make those coming to them for assistance aware that they have to report sexual violence to the Title IX Coordinator so that there are no accidental disclosures. Having a collaborative relationship in place can help ensure that everyone understands this.

As the investigative process ramps down, mental health conditions that require transition from interim measures to permanent remedies can fall through the cracks if not properly accounted for in the process. Students with PTSD or anxiety may need specific accommodations over the course of their time at your school. Again, collaboration with the disability services office is essential to ensure that students understand what is required to make accommodations permanent. For instance, is a formal diagnosis required?

As you develop procedures for handling overlap, start by having a meet-

ing with disability services to discuss potential issues. Get on the same page on key issues, such as confidential versus non-confidential employees, reasonable accommodations, and primary responsibility. Then start talking through scenarios. Debrief old or hypothetical situations. Decide within which categories an issue under discussion fits best and who should take the lead based on that categorization.

Don't trust that what you train for through the use of scenarios will carry over into people's daily work. Make how you want your procedures to play out actually part of your written procedures, and train key staff on those procedures. Consider developing resources for the parties and employees who may have a role in supporting measures and remedies. Also, just as we want people to know their Title IX rights and reporting options, we should help them understand their options under the ADA and Section 504. Achieving this could be as easy as placing links to the ADA/Section 504 on your disability services website.

Finally, it's important that everyone is aware that some issues covered under Title IX are not often handled by the Title IX office, including pregnancy, parenting, and medically-related transition issues of trans-identifying individuals. While all of these situations would be protected under Title IX, they may also be covered by the ADA and Section 504, and are best addressed by the disability services office. You are unlikely to be needed unless someone resists reasonable accommodations for one of these issues. Ensure your Disability Services Director or ADA/504 Coordinator knows how you can help if discrimination or resistance to compliance occurs.

If you'd like to learn more, I will be co-presenting on this topic at the ATIXA/SCOPE Joint National Conference in October. ♦



JENNIFER L. BALL, PH.D.

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KEY TAKEAWAYS

- » The Americans with Disabilities Act/Section 504 of the Rehabilitation Act and Title IX have some areas of overlap. Make sure to consider them in your policies and procedures.
- » Focus on cultivating collaboration with those in charge of providing disability accommodations on your campus and on providing appropriate oversight to avoid duplicating efforts.
- » Make sure not to let needed support slip through institutional cracks due to a lack of collaboration.
- » Bring your ADA/Section 504 Coordinator and/or the Director of Disability Services into the Title IX fold. ♦

ABOUT THE AUTHOR

Nedda Black, J.D., LMSW is an Attorney in California whose practice focuses almost exclusively on higher education, with particular emphasis on Title IX, including compliance and investigations. She is also an Associate Attorney with The NCHERM Group, LLC.

KEY TAKEAWAYS

- » Individuals' perceptions are colored by their own unique personal, social, and psychological histories.
- » Many psychological conditions and prior traumas may impact how individuals perceive a particular set of facts, limiting their ability to provide an "objective" truth of what occurred.
- » Exercise caution in pursuing any line of questioning about psychological conditions and prior trauma, as information about mental health diagnoses could lead to bias or the perception of bias; it can also serve as fodder for abuse by responding parties and can stigmatize a reporting party.
- » Separate out emotional content to determine whether parties' reporting truths are consistent with what is objectively known and other evidence presented. ♦

What should you do when Title IX investigations and mental health concerns clash?

By *Nedda Black, J.D., LMSW*

Investigations, like trials, often come down to a question of whom to believe. Whether we believe someone — whether we find them “credible” — is, in part, about whether we think that person is being honest with us. But, credibility is about more than honesty. Sometimes, we can feel certain that a witness or party is being honest with us, but we can nonetheless find ourselves questioning the *reliability* of that testimony for other reasons.

Unfortunately, as Title IX Investigators, we are all too often dealing with complicated human dynamics that are compounded by the complex psychological histories of the people involved. Those psychological histories may include any number of traumas that impact how the people we interview perceive and respond to their environment. Individuals' very ability to tell us the “truth” of what occurred (an “objective” truth) may be profoundly limited as a result of their inability to get past the deeper truth of what they internally experienced (their “subjective” truth). While this can certainly be the case with someone who is suffering from auditory or visual hallucinations, one need not be actively hallucinating to perceive and experience a reality that is not consistent with the reality of others.

To a certain extent, we are all guilty of this. We all experience reality through the filter of our own minds. What we hear, see, smell, taste, and touch is colored by our own unique personal, social, and psychological histories. So, too, are our memories and what we hold onto from our experiences. Science has long ago debunked the myth that our memories operate

like video recorders. One of my favorite films to ever delve into this topic is the 1950 Japanese classic, *Roshomon*, in which four characters each provide their own account of an incident involving rape and murder. The film raises unanswerable questions about justice and the limitations of human testimony. As Investigators, we are often confronted with such contradictory testimony — sometimes all equally compelling — and it is our herculean task to get to the bottom of what “actually” occurred.

In the clinical setting, the question of what *actually* occurred is given equal importance to the question of what *subjectively* occurred. Patients' subjective experiences provide critical information to therapists about the patients' inner world — information that therapists can use to better understand their patients and better work with them in healing past trauma and correcting the negative effects of those traumas on the patients' reality perception in the present. Again, we all suffer from this to a certain extent; it's really a question of degree.

In the investigatory setting, however, all that matters is what *actually* occurred (“Just the facts, ma'am, just the facts”). What the parties and witnesses subjectively experienced is irrelevant to our fact-finding duties. We are not therapists. We are fact-finders. But is it really that simple?

We are all familiar with the dilemma of “he-said-she-said” situations, where two people are claiming contradictory truths. This is usually understood as one person lying while the other is not. What happens when they both appear to be telling

the truth? What if there is a slew of corroborating testimony to support the reporting party's story (because s/he involved many people in it), but physical and other evidence suggests something else might be going on? In other words, what if we believe the reporting party *genuinely believes* the story told to us, but that individual's version of events is not believable in its own right, and we find ourselves questioning that person's grasp on reality in general? The presence of outcry witnesses and other corroborating testimony, alone, is not confirmation that something occurred, since it would not be at all unusual for people who *genuinely believe* their story to involve many people in the telling of that story, even while events may never have occurred as they say.

There are many problems with going down this road, not the least of which is that investigators are not in the business of evaluating for mental illness. Moreover, whether individuals have a diagnosed or diagnosable mental illness is not helpful, in and of itself, in evaluating whether their testimony regarding an incident is reliable. People who suffer from schizophrenia, bipolar disorder, autism spectrum disorder, or any number of diagnoses, can be (and are) victims of sexual harassment and/or violence, as can be anyone else. If anything, information about mental health diagnoses could lead to bias in those who do not possess the education and training to understand the limitations of such diagnoses and the psychological and behavioral tendencies they do and do not describe. Information about mental health diagnoses can backfire in an investigation by undermining objectivity and leading to discriminatory findings. It can also serve as fodder for abuse by those who are found responsible and are desperate for a reason to appeal the findings. The stigmatization suffered by

those who have been diagnosed with mental illness throughout history has been well-documented. For this reason, it is important to be cautious in pursuing any line of questioning that heads in this direction.

However, while diagnoses per se are not particularly helpful, is psychosocial history entirely irrelevant? What if your investigation reveals that a reporting party has a history of perceiving injury where none was intended or even objectively observable? In tort law, the concept of the "eggshell skull" describes the idea that plaintiffs come in all shapes, sizes, and vulnerabilities, so the law does not give defendants a free pass just because the person harmed was exceptionally fragile. As Investigators, we are often confronted with eggshell-skull reporting parties, and it is up to us to determine the weight of their testimony. It is our job to separate out the emotional content and determine whether the underlying facts are: 1) consistent with what we know about reality; and 2) consistent with the other evidence before us. With eggshell-skull reporting parties, we should be wary of the risk in overcompensating and giving those persons a free pass (by looking past problems and contradictions in the evidence) on the basis of their exceptional fragility.

In some circles, even asking these questions is taboo, because it can feed into the ideological agendas of those who are opposed to civil rights and the protection of society's most vulnerable. However, it is a necessary question to ask in the context of a Title IX investigation, because on the other side of every report is a respondent whose life is likely to be permanently changed by a finding of responsibility. I would argue that we are not helping the cause of civil rights by tipping the scales of justice in favor of either party

in a Title IX claim. As Investigators, if we tip the scales of justice now in the name of righting a historical imbalance suffered by a particular group of people, whoever that group may be, we are committing the fatal sin of acting with bias, and we have shed the cloak of the neutral fact-finder. It is the responsibility of our legislators and policymakers, not Title IX Investigators, to right historical wrongs.

As uncomfortable as it makes us, we have an obligation to ask the hard questions, including whether Title IX claims ought to be a viable avenue of recourse for people who seem to possess an injury that extends far beyond the case at hand into something that may be much better dealt with in the therapeutic arena. The ability of Title IX mechanisms to address such deep-seated needs is quickly overwhelmed. When that happens, staff can experience burnout, which can have ripple effects on other cases. Perhaps the Title IX team would be doing more for these individuals, and for the system in general, by helping these individuals identify that they may have unresolved trauma that would best be addressed through other means. Such a message, delivered with compassion and humanity, by the right person (not the Investigator), need not be a blow to the reporting party. Done the right way, it might even be a therapeutic response to a thinly veiled cry for help. Unfortunately, like many mechanisms that are put in place by the law and social policy, Title IX does sometimes become the unwitting venue for people suffering from all kinds of ailments that would be better addressed elsewhere. It's our job not to blame or resent those people, but simply to learn to recognize what we are seeing and help redirect those individuals to venues that can better help them. ♦



GENTRY MCCREARY, PH.D.

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KEY TAKEAWAYS

- » Cultivate relationships with sorority and fraternity advisors to collaborate on protocols, prevention programming, and on issues related to organizational culture.
- » Education geared to Greek organizations on sexual violence and bystander intervention should begin with an understanding of what constitutes sexual misconduct, and should differentiate between intoxication and incapacitation.
- » While requiring that all student groups have on-campus faculty or staff advisors designated as Campus Security Authorities is a good idea, non-employees such as alumni advisors do not need to be designated as CSAs. ♦

Special strategies are needed to prevent sexual violence with fraternities, sororities

By Amy Murphy, Ph.D., Contributing Editor

Gentry McCreary, the CEO and Managing Partner of Dyad Strategies, and an Affiliated Consultant at The NCHERM Group, has 14 years of professional experience working in fraternity and sorority life, including as the previous Director of Greek Affairs at the University of Alabama, which has one of the largest Greek communities in the nation, and most recently as Associate Dean of Students and Deputy Title IX Coordinator at the University of West Florida, where he also served as a clinical faculty member in educational research and advanced studies. McCreary, who has conducted in-depth research into such organizations, discussed the intricacies of Title IX work when fraternities and sororities are involved in reports.

Q Can you tell us about your research related to Title IX?

A Much of my current work focuses on the intersection of hazing and Title IX. We are seeing more hazing cases that are sexualized or cross-organizational. For example, a fraternity and sorority organization or a men's and women's sports team may be involved together in the hazing of new members, with requirements related to sex. My recent work also looks at the intersection of sexual assault, chapter culture, and social culture. For instance, how does the social culture within a sorority and sisterhood impact how members respond to a sister who reports an assault? We like to think that sisters would rally around her, but that is not always the case.

Q Fraternities are often considered high-risk groups related

to sexual assault. Do you agree?

A Brett Sokolow often says, "Anywhere that privilege and alcohol intersect is going to be a place where sexual violence is a risk." Most times, fraternities sit at that intersection. We consider them high risk and worthy of additional time and consideration related to prevention and environmental management around these issues.

We see as much, if not more, sexual violence coming from student-athlete communities, but at Ohio State University, it was the marching band. On another campus, it might be a performing arts group. Consider that student-athletes often live together and host social events together. They are indistinguishable from fraternities and sororities, but they may be getting nothing related to social event hosting and prevention. Title IX Coordinators would be wise to spend some time with athletic departments thinking about how team culture looks outside the locker room.

Q What are some risk factors related to Title IX in fraternities and sororities?

A Brotherhood often includes the idea of solidarity and the mentality of, "I've got your back." That notion of being there for one another may be integrated into organizational rituals, and can trump other ideas related to accountability when a fraternity brother is accused of sexual violence. The default position is to rally around this member, which can result in victim blaming.

Q Where are our prevention programs missing the mark?

A The biggest mistake we have made with fraternities is in how we talk about alcohol and consent.

Some educators say that a person who has consumed one beer cannot consent to sexual activity. While such statements are well intentioned, they can be counterproductive. First, there is a difference between intoxication and incapacitation. But more importantly, this is inconsistent with the lived experiences of many students. Instead, we should talk about the difference between drunk sex and incapacitation.

Also, many bystander intervention trainings only focus on diffusion of responsibility. However, to intervene, bystanders first have to interpret what is happening as an emergency worthy of intervention, and we often fail to give students a fundamental understanding of what constitutes sexual misconduct. Most students understand stranger rape as being traumatic, but do not see non-stranger rape as equally traumatizing. More men need to understand the harm caused by incapacitated assault to make bystander intervention more effective. We can't start with bystander intervention; we end there.

Q What can you share about the North-American Interfraternity Council and the National Panhellenic Conference and activities related to Title IX?

A These two national associations remain involved in legislative efforts related to the interests of their member organizations. While much of their efforts stalled in November with the defeat of the Safe Campus Act, NIC recently hired a new Director of Legislative Outreach, who will work closely with the Fraternity and Sorority Political Action Committee. One area of particular concern relates to due process. Many share this concern, especially as you see more cases being overturned for not affording students due process.

Another area of concern relates to

campuses trying to make Alumnus Chapter Advisors Campus Security Authorities under the Clery Act. It's a terrible idea because these are not employees. This would also impact the ability to recruit Chapter Advisors, and alumni involvement in these organizations has various positive outcomes. Institutions should require that all student organization have on-campus faculty or staff advisors, who should be designated as CSAs, but we do not need to name non-employees CSAs or create barriers to alumni involvement in these groups.

Q Do you have any tips for addressing incidents of sexual violence in a fraternity or sorority?

A We should consider the efficacy of our protocols and think beyond traditional approaches to ensure the safety of the community. Imagine that a student accused of sexual assault is barred from campus on an interim basis by the institution, but continues to live in the fraternity's off-campus house and interact with students who visit the house. Or, consider how to handle

confidentiality when an organization's membership is aware of misconduct and wants to take action before the completion of the school's investigation. Protocols can establish how we work with organizations, communicating to keep them in the loop and not violate FERPA, while providing for the safety of all involved.

Q What advice can you give Title IX Coordinators who are new to working with fraternities and sororities?

A Build relationships with your Greek Life Advisor. Spend time together thinking about protocols and prevention. There are many opportunities to work together. Consider climate surveys, where most of our data is on individual-level experiences. We don't often talk about group culture. Title IX Coordinators should ask questions about students' involvement in organizations and group culture. Fraternity and sorority advisors are integral to helping with those conversations and understanding individual organization climates. ♦

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Use these 5 tips for building stakeholder relationships



JACQUELINE ANCHONDO

Jacqueline Anchondo is the Title IX Coordinator and Director of Title IX/Nondiscrimination Initiatives at Wellesley College in Mass.

Here, she offers advice for cultivating relationships with key stakeholders:

1. Get to know the key players on campus as people, not just as colleagues. Have some of your meetings over lunch and catch up with them after meetings. Solicit feedback on your work. They'll be more honest if you've built a solid relationship and they know you really care about their thoughts. Then, hear out their concerns and let them know about any changes you've

implemented based on their feedback.

2. Involve campus police early and often in your work. Police are looking at the same problems through what often feels like a different lens. Learn more about their approach. Let officers know you want to learn from them and that you respect what they do. Get to know folks at all ranks, and thank them for their work. Consult them (with non-identifying information if necessary) on tricky situations. Don't underestimate their expertise; and invite them to train on certain issues.

3. Don't forget your off-campus partners, such as local rape crisis centers and domestic violence agencies. They are a wealth of information, and are often eager to be included in the work you are doing. Invite them to

relevant events on campus, attend their outreach events, encourage your students to pursue volunteer opportunities with them, and seek their opinions.

4. Connect with your counterparts at other institutions. Go to each other's campuses (if feasible) to meet and learn from each other. Consult other Title IX Coordinators when you're troubleshooting, and make an effort to help them problem-solve.

5. Engage the skeptics on campus. The goal isn't to change their minds, and that's unlikely to happen. Rather, hear out their criticisms with an open mind. Use the conversation as a way to show them you are a thoughtful, good person trying to do the right thing. If they get to the point where they respectfully disagree, that's a win. ♦