

# Title IX Reporting and Investigations: Avoiding Pitfalls

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# Title IX Litigation Theories and Background

- ◆ Deliberate Indifference: “A plaintiff may demonstrate [a school’s] deliberate indifference to discrimination ‘only where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.’”
  - Decision must motivated by gender.
  - Generally applied to student-on-student sexual harassment

# Title IX Litigation Theories and Background

- ◆ Erroneous Outcome: “In a typical erroneous outcome case, the plaintiff attacks the [school’s] disciplinary proceeding on ground of gender bias by arguing that the plaintiff was innocent and wrongly found to have committed the offense.”
  - Causal connection between the flawed outcome and gender bias.
    - Failing to consider relevant testimony
    - Prior litigation adversely affected the outcome
    - Statistical pattern of males being found to have violated campus policies.

# PITFALL 1

“We receive a number of complaints that would not be a violation of the school’s sexual misconduct policy but our policy requires that we investigate. This is significantly draining our time and resources....”

## Pitfall 1

- ◆ Provide flexibility in policies and procedures
- ◆ Maintain expertise on the policies and procedures
- ◆ Follow-up with complainant in writing
- ◆ Offer counseling services, even if complaint would not result in violation if true.

## PITFALL 2

“We had an issue where a cafeteria worker did not report a conversation she overheard concerning an alleged rape. The cafeteria worker is a responsible employee. It’s hard sufficiently training all contract workers and part time employees to adequately handle reporting”

## Pitfall 2

Issue here is an overly broad “responsible employee” definition maintained by the institution.

# Pitfall 2

## Federal Law Requirements – Responsible Employee

- ◆ A school is on notice if a responsible employee **knew or should have known** about harassment that creates a hostile environment
- ◆ Responsible Employee
  - Has the **authority** to take action to redress harassment
  - Has the **duty** to report sexual harassment or other misconduct
  - Is someone an individual **could reasonably believe** has this authority or responsibility
- ◆ Whether employee is a responsible employee or whether it would be reasonable for a student to believe the employee is, even if the employee is not, will vary depending on factors:
  - Age and education level of the student,
  - The type of position held by the employee
  - School practices and procedures, both formal and informal.
- ◆ A responsible employee **must** report incidents of sexual violence to the Title IX coordinator or other appropriate school designee
- ◆ Title IX coordinator **must** be informed of all reports and complaints raising Title IX issues
- ◆ A responsible employee **must** report *all relevant details* about the alleged sexual violence that the student or another person has shared and that the school will need to determine what occurred and to resolve the situation

## Pitfall 2

Example of overly broad institutional policy:

***All full and part time employees, including adjunct faculty, of University, the Group ( Dining Services), and Facilities Management to be considered a Responsible Employee for the purposes of the school's policy.***

- ◆ ***Graduate Students***
- ◆ ***Resident Assistants***
- ◆ ***Peer Mentors***
- ◆ ***Peer Educators***
- ◆ ***Welcome Delegates***

## Pitfall 2

- ◆ A responsible employee **must** report *all relevant details* about the alleged sexual violence that the student or another person has shared and that the school will need to determine what occurred and to resolve the situation, including:
  - The names of the alleged perpetrator (if known)
  - The student who experienced the alleged sexual violence
  - Other students involved in the alleged sexual violence
  - Relevant facts, including the date, time, and location

## Pitfall 2

- ◆ In evaluating whether an employee is a responsible employee, consider school policies and procedures to:
  - Determine if employee has the general authority to take action to redress misconduct or the duty to report misconduct to appropriate school officials, as well as whether students could reasonably believe that employee has this authority or duty
  - Determine whether school has informed students employee is generally available for confidential discussions and do not have the authority or responsibility to take action to redress any misconduct or to report any misconduct to the Title IX coordinator or other appropriate school officials
  - Determine if employee has an obligation to report other student violations of school policy (e.g., drug and alcohol violations or physical assault)
- ◆ If an employee is required to report other misconduct that violates school policy, then the employee would be considered a responsible employee obligated to report incidents of sexual violence that violate school policy

## PITFALL 3

“Our football assistant coach received information regarding a potential assault and reported the information to his supervisors in athletics prior to reporting to the Title IX office”

## Pitfall 3

- ◆ Reporting customs in athletics are uniquely difficult to buck: Culture of obeying the chain of command
- ◆ Problematic: Information should be reported directly to Title IX office
- ◆ Additional education and communication of expectations to subordinates in athletics department is necessary
- ◆ Student-athletes often report sensitive information to assistants
- ◆ Additional Athletics Issues:
  - Don't handle it internally!
  - Don't pry or retaliate!

## PITFALL 4

“Our institution is considering revising our evidentiary standard to ‘beyond a reasonable doubt.’ Would this be a beneficial change?”

# Pitfall 4

## Preponderance of the Evidence

- ◆ **Exposure to lawsuits by policy violators who claim innocence**
- ◆ **Public Relations**
- ◆ **Reduction of exposure to lawsuits filed by students who are not-guilty in criminal proceedings**
- ◆ **Reduction of exposure to repeat offenses by providing institution with flexibility to remove dangerous individuals**

## Beyond a Reasonable Doubt

- ◆ **Protection against lawsuits from policy violators who claim innocence.**
- ◆ **Public Relations**
- ◆ **Exposure to liability if found in violation of school policy, but found not guilty in criminal proceeding**
- ◆ **Exposure to liability for keeping potentially dangerous individuals on campus whose past complaints could not be substantiated to BRD.**

## PITFALL 5

“We have a limited staff and are backlogged on investigations. Our dilemma is we have to ‘get it right’ but simultaneously meet our defined timelines in the investigatory policy.”

## Pitfall 5

- ◆ Review policy and procedure to provide for flexibility in investigations.
- ◆ Hire outside counsel or investigatory assistance.
- ◆ Ensure that investigators do not have other job responsibilities that could create a conflict
- ◆ Ensure that your dedicated investigators are properly identified
- ◆ Update parties regularly on the progress of the investigation.

## PITFALL 6

“We received what we believe to be most likely an unsubstantiated complaint. Imposing interim remedies would substantially burden the accused. We are afraid the accused may sue us if we impose them, what do we do?”

## Pitfall 6

- ◆ Always offer interim remedies.
- ◆ Remove interim remedies following resolution of the case.
- ◆ Properly define and implement “no contact” orders.

# Pitfall 6

- ◆ Remedies-based:
  - Voluntary; cannot compel cooperation
  - Complainant may end at any time
  - May not use mediation for sexual assault
  - Does not result in disciplinary action against the respondent
  - Can be an effective means of eliminating, preventing, and addressing harassment

## PITFALL 7

“We educate our student-athletes in the same manner as our general student body. We believe we have a good training video, but for some reason we still have a higher percentage of issues involving student-athletes.”

# Pitfall 7

## NCAA institutions have additional educational obligations:

NCAA member school's president or chancellor, athletics director and Title IX coordinator — must attest annually that coaches, athletics administrators and student-athletes were educated in sexual violence prevention. The school must declare that:

- ◆ The school's athletics department is knowledgeable about, integrated in, and compliant with institutional policies and processes regarding sexual violence prevention and proper adjudication and resolution of acts of sexual violence.
- ◆ The school's policies regarding sexual violence prevention and adjudication — plus the name and contact information for the campus Title IX coordinator — are readily available in the athletics department and are distributed to student-athletes

# Pitfall 7

## College Athletics and Sexual Assault

- ◆ Of the 46% of participants who engaged in sexually coercive behaviors on campus, over ½ were intercollegiate or recreational athletes (Young, Desmarais, Baldwin, and Chandler 2016)
- ◆ On average, college athletes are more likely to identify with hypermasculinity (Murnen and Kohlman)
- ◆ Student-athletes are more likely to misunderstand “consent” (McGovern and Murray)
- ◆ Some sports disproportionately represented in sexual assault cases (Laura Finley):
  - Football
  - Basketball
  - Hockey
  - Wrestling

# Pitfall 7



## SEXUAL VIOLENCE PREVENTION

An Athletics Tool Kit for a Healthy and Safe Culture

## **PITFALL 8**

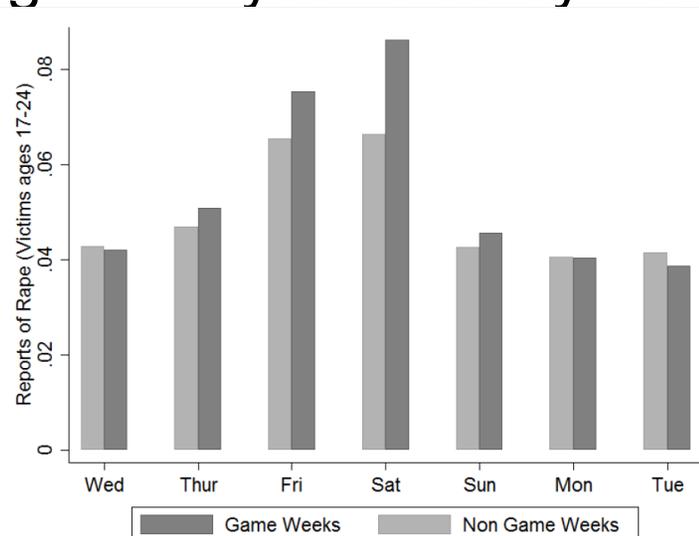
“We educate our students once a year prior to spring break. Is this the best time?”

# Pitfall 8

**Provide Training in the beginning of FALL!**

## College Athletics and Sexual Violence

- ◆ Division I football games increase reports of sexual assault among 17-24 year olds by 28%



# Pitfall 8

- ◆ Home football games increase reports of rape by 41%
  - Per year, that means there are between 253 and 770 additional rapes per year across the 128 schools participating in FBS football because of the spikes in partying that accompany football games.
  - Largest spikes after “upset” wins

## PITFALL 9

“Responsible employees are often asked to keep portions of information that they receive confidential. Is this ok if they do so?”

## Pitfall 9

- ◆ Responsible employees should avoid attempting to preserve confidentiality
- ◆ Students should be informed of confidential reporting options
- ◆ Students should be advised that confidentiality may need to be compromised in order to fulfill the adjudication process.

## PITFALL 10

“We have a confidential reporting option that is also routed through the Title IX office, is this best practice?”

# Pitfall 10

- ◆ Consider routing confidential reporting options through one or more of the following departments:
  - Medical
  - Counseling
  - Clergy
- ◆ OCR does not require campus mental-health counselors, pastoral counselors, social workers, psychologists, health center employees, or any other person with a professional license requiring confidentiality, or who is supervised by such a person, to report, without the student's consent, incidents of sexual violence to the school in a way that identifies the student
- ◆ Professional counselors and pastoral counselors whose official responsibilities include providing mental-health counseling to members of the school community are not required by Title IX to report *any* information regarding an incident of alleged sexual violence to the Title IX coordinator or other appropriate  
Exceptions to confidentiality include:
  - Mandatory child abuse reporting
  - Risk of imminent risk of harm to self or others
  - State felony or sexual assault reporting

# PITFALL 11

“We have evidence that is very probative, but the evidence is from a source who wishes to remain confidential. Can we use this evidence without revealing the identity of the source?”

# Pitfall 11

- ◆ Source must understand the need to compromise confidentiality in the instance where evidence is solely from that source.

## PITFALL 12

“We have received a complaint from an employee. The employee has now sued us because of “retaliation” because the institution has not taken any action while the investigation goes on. How can we avoid this?”

# Pitfall 12

SPORTS

## Former UMD women's hockey coach wins discrimination case, \$3.7 million award

Shannon Miller will receive monetary awards for lost wages and emotional distress.

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By Karen Zamora Star Tribune | MARCH 16, 2018 — 10:47AM

## Pitfall 12

**Deliberate indifference: “clearly unreasonably in light of known circumstances”**

- ◆ Implement remedial measures
- ◆ Inform parties involved with complaint
- ◆ Prevent any potential for continued discrimination

# Thank You

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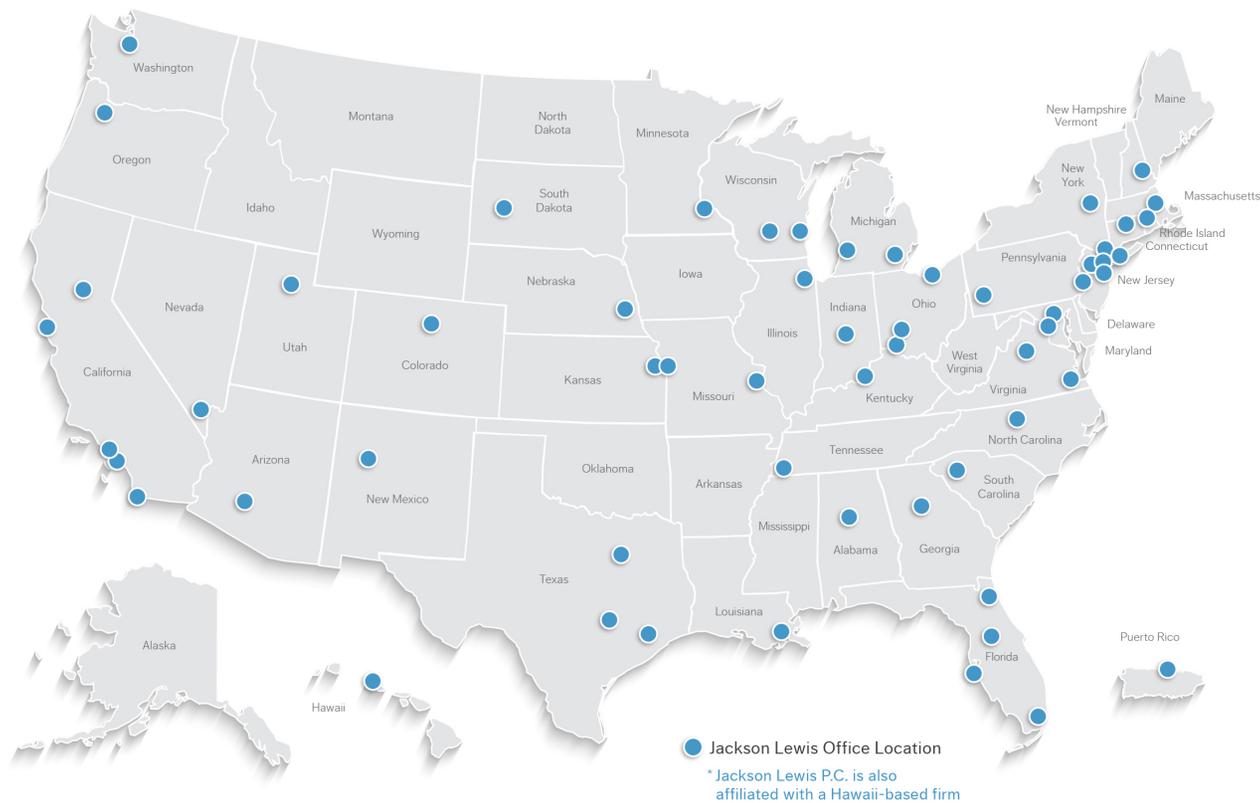
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