



# NACUA NOTES

National Association of College and University Attorneys May 18, 2016 | Vol. 14 No. 4

---

## TOPIC:

**BETWEEN A ROCK AND A HARD PLACE: A DISCUSSION OF ISSUES THAT FREQUENTLY ARISE IN SEXUAL MISCONDUCT-RELATED LITIGATION AGAINST COLLEGES AND UNIVERSITIES**

## AUTHORS:

Craig Wood<sup>[1]</sup>, Josh Whitlock<sup>[2]</sup>, Melissa Nelson<sup>[3]</sup>, Tyler Laughinghouse<sup>[4]</sup>, Jillian Nyhof<sup>[5]</sup>

## INTRODUCTION:

Against the backdrop of several high-profile lawsuits and heightened government scrutiny, colleges and universities find themselves in a legal and political minefield as they try to prevent and address sexual misconduct on college campuses. The prevalence of claims of sexual assault and other types of sexual misconduct at colleges and universities in the United States is well-documented. <sup>[6]</sup> Although institutions have been making a concerted effort to create, revise, and improve sexual misconduct-related policies and procedures since the 2011 “Dear Colleague” Letter (DCL) <sup>[7]</sup>, they continue to grapple with an increasing number of lawsuits—from both accusing students and accused students—related to the handling of sexual misconduct allegations.<sup>[8]</sup>

These lawsuits often begin after a student disciplinary hearing or other internal investigation or proceeding has ended. With increasing frequency, the “losing” party takes his or her case to court, alleging a host of claims under both state and federal law. These lawsuits are not limited to the losing party, however. Even a “winning” complainant might file a lawsuit if he or she feels disappointed by the institution’s process or dissatisfied with the sanction or other remedies imposed. Furthermore, because these complex cases often are accompanied by intense media scrutiny and/or parallel complaints with and investigations by the U.S. Department of Education Office for Civil Rights (OCR)<sup>[9]</sup>, colleges and universities often find themselves waging a multi-front battle both inside and outside of the courtroom.

Given this rise in *post hoc* litigation, colleges and universities should approach each allegation of sexual misconduct with an eye toward eventual litigation. Institutions should first strive to articulate

and apply policies and procedures that are: (1) fully compliant with applicable laws, regulations, and regulatory guidance; (2) practical and well-suited for the institution's unique culture and characteristics; and (3) scrupulously followed by all involved in the investigation and disciplinary process.<sup>[10]</sup> But even with well-drafted and well-executed policies, institutions still run the risk of lawsuits.

This Note addresses some of the most common litigation-related issues that arise during sexual misconduct cases and outlines some practical advice and strategy considerations. Although the issues discussed below may help guide institutions as they traverse this complex legal landscape, every case and every institution is different, and there is no one-size-fits-all approach. Colleges and universities must remain flexible in their approach and vigilant in identifying legal issues lurking underneath the surface.

## **DISCUSSION:**

### **I. Brief Discussion of Sexual Misconduct-Related Lawsuits Filed Since January 2014<sup>[11]</sup>**

The unprecedented pace of sexual misconduct-related cases filed against colleges and universities shows no signs of abating. Since January 2014, 42 lawsuits involving student-on-student sexual misconduct have been filed against colleges and universities.<sup>[12]</sup> Moreover, institutions are increasingly facing so-called “reverse Title IX” cases with respondents, or accused students, seeking to overturn an adverse disciplinary decision.<sup>[13]</sup> More than half of the reverse Title IX cases since the 2011 DCL (42 out of 70) were filed in 2014 and 2015<sup>[14]</sup>, whereas only 12 Title IX cases from alleged victims of sexual assault have been filed since January 2014.<sup>[15]</sup> Beyond introducing a new type of case on college and university campuses, these reverse Title IX cases increase the likelihood that institutions will face some form of litigation when a sexual misconduct-related student investigation or disciplinary hearing results in an adverse outcome for the respondent. The prospect of these reverse Title IX cases further weighs in favor of institutions preparing themselves for possible litigation from the moment they receive a report of student-on-student sexual assault.

### **II. Lessons From An Evolving Case Law**

Institutions continue to face a wide range of claims from both complainants and respondents. Complainants, for example, have claimed that institutions have delayed bringing disciplinary hearings or commencing investigations, engaged in conspiracies and cover-ups, or simply done nothing.<sup>[16]</sup> In the reverse Title IX cases, respondents have alleged that institutions have rushed to judgment, that policies were systematically biased against men, that the institutions acted out of fear of OCR sanctions, or that the institutions failed to follow their own policies.<sup>[17]</sup> Although each case presents its own unique challenges and raises distinct legal issues, this Note highlights the most common legal and strategic issues that institutions should consider from the moment they receive a complaint of student-on-student sexual assault. Although no institution can prevent a lawsuit, colleges and universities can take steps to place themselves in the best defensible position if, and when, a lawsuit is filed.

#### **A. Complainant-Initiated Lawsuits**

Although complainants have pursued a range of legal theories, Title IX claims have dominated.<sup>[18]</sup> From 2011-2013, nearly 75% of complainant-initiated lawsuits alleged violations of Title IX.<sup>[19]</sup> To prevail in a Title IX lawsuit, a plaintiff-complainant must ultimately prove four elements: (1) that the

defendant was a Title IX funding recipient; (2) that an “appropriate person” had actual knowledge of the discrimination or harassment the plaintiff alleges occurred; (3) that the defendant acted with deliberate indifference to known acts of harassment in its programs or activities; and (4) that the discrimination was so severe, pervasive, and objectively offensive that it effectively barred the plaintiff from accessing an educational opportunity or benefit.[\[20\]](#)

Litigation most often turns on the last two prongs, i.e., whether the institution’s response to the allegation was clearly inadequate and whether the response resulted in misconduct that was so severe as to deprive the plaintiff of access to educational benefits and opportunities. Focusing on these two prongs, complainants most commonly allege that the institution:

- discouraged the student from pursuing a disciplinary complaint;
- delayed initiating the disciplinary process;
- engaged in conduct intended to cover-up the respondent’s actions;
- failed to conduct a prompt and thorough investigation; or
- imposed inadequate sanctions.

An institution’s liability often hinges on whether the institution acted reasonably to a complaint of sexual assault. A reasonable response does not always require a formal disciplinary proceeding or sanction, however. As the Eighth Circuit’s holding in *Roe v. Saint Louis University*[\[21\]](#) shows, providing the complainant with certain services—such as referring her to a counselor, encouraging her to inform her parents about the situation and contact the police, and emailing her academic advisor—can be a sufficient response in some circumstances.[\[22\]](#)

Although determining the reasonableness of an institution’s response remains a fact-intensive inquiry, the recent increase in Title IX cases has allowed courts to begin to define the contours of Title IX liability. Although several questions remain, certain important takeaways have emerged from recent cases:

- The Department of Education’s administrative guidance—namely, the 2011 DCL—does not necessarily provide a roadmap for assessing Title IX liability in private lawsuits. The Court in *Karasek v. Regents of the University of California*[\[23\]](#) addressed this issue directly, ruling that the DCL sets forth “the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief,” not the standard in private lawsuits for monetary damages.[\[24\]](#) The Court therefore concluded that “the DCL does not define what amounts to deliberate indifference for the purposes of [the] case,” though noting that “there are undoubtedly situations in which a school’s conduct in violation of the DCL also amounts to a clearly unreasonable response.”[\[25\]](#)
- A growing number of courts have rejected the “no further harassment” defense. Relying on *Davis v. Monroe County Board of Education*[\[26\]](#), which held that a college or university is only liable if its response causes students to undergo harassment or makes them liable or vulnerable to it, several courts have held that a school is not liable under Title IX when the alleged victim is not “subjected” to further harassment.[\[27\]](#) Increasingly, however, courts have rejected this defense, holding that requiring a complainant to prove additional harassment runs counter to the inherent purpose of Title IX and may penalize a plaintiff who actively takes steps to avoid further harassment.[\[28\]](#)
- Efforts by plaintiffs to link an institution’s overall response to sexual violence on campus to the facts of their specific cases have fallen flat. The students in *Karasek*, for example, alleged that the university’s general response to sexual assault on campus created an environment that “substantially increased the risk” of sexual assault, highlighting both the

number of OCR complaints against the university and an unfavorable state audit.<sup>[29]</sup> The *Karasek* court rejected this theory, reasoning that allegations that a university was aware of the “general problem of sexual violence” on its campus are insufficient to meet the “actual knowledge” standard under Title IX.<sup>[30]</sup> The court’s ruling may well prevent complainants from successfully pleading similar theories in the future.<sup>[31]</sup>

- Courts will ultimately have to decide whether a particular sanction itself can support a claim of deliberate indifference under Title IX. In *Butters v. James Madison University*<sup>[32]</sup>, the complainant alleged that the sanction imposed against her alleged assailants showed that the university was deliberately indifferent to known acts of sexual assault.<sup>[33]</sup> After finding three students responsible for sexual assault, the university imposed a punishment of “expulsion after graduation,” barred the men from having any contact with the plaintiff, and required them to create a thirty-minute presentation on sexual assault. <sup>[34]</sup> The complainant alleged that this sanction was materially deficient and demonstrated the university’s deliberate indifference to the assault.<sup>[35]</sup> Although the Court declined to decide whether the discipline itself constituted deliberate indifference—as it found that her Title IX claim could continue based on another theory<sup>[36]</sup>—this remains an open question in the case law.

## **B. Respondent-Initiated Lawsuits**

With increasing frequency, respondents are turning to Title IX to challenge unfavorable investigations and disciplinary proceedings.<sup>[37]</sup> Often called “reverse Title IX claims,” these cases present a different set of challenges for institutions. These cases hinge less on the reasonableness of the institution’s response and focus more on whether the institution operated with a gender bias during the investigation or disciplinary proceeding.

Although courts have recognized four possible theories,<sup>[38]</sup> most respondent-plaintiffs bring “erroneous outcome” and/or “selective enforcement” claims. In “erroneous outcome” cases, the student claims that the institution erred in finding him responsible and that gender bias was the motivating factor behind that erroneous decision. In “selective enforcement” cases, the student claims that the institution treated, or would treat, a similarly-situated female student differently, either in deciding to initiate a proceeding or in imposing a sanction.<sup>[39]</sup> Under both theories, however, the student must ultimately prove that the school was motivated, at least in part, by an impermissible gender bias.

Recent cases make clear that a student’s subjective beliefs are generally insufficient on their own to state a plausible claim under Title IX.<sup>[40]</sup> Most courts require the student to allege that the decision-makers made biased statements or to allege that a female student accused of sexual assault has—or demonstrably would—receive better treatment under the institution’s policies.<sup>[41]</sup> When the student fails to plead such allegations, most courts have declined to reach the question of whether the proceedings were deficient or whether the outcome was erroneous.

## **III. Issues That Frequently Arise in Sexual Misconduct-Related Litigation**

Although institutions cannot wholly prevent litigation, strategic thinking and planning early in the process can put institutions in a better position to defend against a lawsuit from either the alleged victim or assailant. At a minimum, lawsuits from both complainants and respondents require the institution to be able to produce extensive documentation to show its response and investigatory efforts. Detailed below are common issues that institutions should consider in advance of litigation and additional issues that should be considered once a lawsuit has been filed.

## A. Before the Complaint is Filed

### 1. Paper Trail: The Importance of Documenting the Institution's Response

It is well-settled that parties to a potential lawsuit have an obligation to preserve relevant evidence once they reasonably anticipate litigation, and the institution should send out litigation hold notices as soon as the institution reasonably anticipates litigation.<sup>[42]</sup> The point in time when an institution reasonably should know that litigation is likely remains a case-specific inquiry and sometimes arises before a complaint is actually filed.<sup>[43]</sup> Institutions, however, should be consistent in their interpretation of when they reasonably anticipate litigation. The work product doctrine, for example, only protects documents made in anticipation of litigation. Thus, institutions should avoid being placed in the untenable position of claiming two different times at which they anticipated litigation. An institution may wish to assert the work product doctrine as to certain documents but not be able to do so if it had not simultaneously initiated litigation-hold document preservation measures. (In fact, arguing that certain documents are protected work product could inadvertently result in sanctions if other documents were not contemporaneously preserved.) Institutions should also be aware that OCR is increasingly focusing on institutions' documentation and document retention policies. As such, institutions can (and should) take steps to ensure preparation and preservation of important documents before they have a legal obligation to do so.<sup>[44]</sup>

Beyond an institution's legal requirement to preserve documents, preparing and keeping thorough and accurate records is essential when defending a sexual misconduct-related claim. In traditional Title IX cases, for example, liability often turns on the institution's efforts to investigate an alleged sexual assault and ameliorate the effects of any sexual assault found to have occurred, as opposed to the question of what disciplinary sanction was imposed, if any. As a result, evidence that the institution made immediate and continued contact with the complainant will be central to an institution's defense.<sup>[45]</sup>

Courts have made clear that the victim of an alleged sexual assault is not entitled to demand a particular outcome, and courts will not generally second-guess the university's disciplinary decisions.<sup>[46]</sup> In certain instances, for example, courts have found that an institution's failure to launch a formal investigation,<sup>[47]</sup> or the failure to follow its disciplinary policy, did not—by itself—constitute deliberate indifference.<sup>[48]</sup> Rather, the ultimate inquiry is whether the university responded in a reasonable manner under the circumstances, which usually turns on the institution's specific efforts to alleviate any negative effects of a complaint of sexual assault.

In *Roe v. Saint Louis University*<sup>[49]</sup>, for example, the court dismissed a Title IX claim, holding that providing the plaintiff with certain services—such as referring the plaintiff to a counselor, encouraging the plaintiff to inform her parents about the situation and contact the police, and emailing her academic advisor—was a sufficient response.<sup>[50]</sup> As a result, colleges and universities must—at a minimum—be prepared to produce e-mails, letters, referrals, and any other documents that chronicle their efforts to respond to sexual assault allegations.

Colleges and universities face a similar evidentiary burden in reverse Title IX cases filed by students who have been accused of, or found responsible for, sexual assault. In these cases, an institution will need to show that it pursued an objective, unbiased process and that it followed its policies and procedures throughout the resolution process. As several courts have held, these cases turn less on “what happened between the Plaintiff [] and the Complainant” or “whether a sexual assault occurred, whether any such acts were consensual, or who . . . is credible”<sup>[51]</sup>; rather, these claims focus on whether the institution acted with gender bias, whether it followed its own policies and procedures, and whether it treated the respondent in an overall fair manner. As a

result, an institution needs to be able to explain in detail its rationale for all decisions rendered and produce documentation of all actions taken related to the allegations against a student accused of sexual assault.

## 2. Document Preservation and Internal E-mail Policies

E-mail folders will often constitute the largest repository for the institution's documentation. As a result, colleges and universities should understand (and if necessary, refine) their document retention policies and e-mail use policies. General counsel and other high level administrators, for example, should understand how long e-mails and other electronic documents will remain on institutional servers before being overwritten automatically. Moreover, they should ensure that their document retention periods are sufficient, as lawsuits can be delayed for years after the initial sexual misconduct allegation. Additionally, institutions should consider requesting that their IT departments preserve key documents and e-mails beyond the usual retention period for cases in which litigation appears more likely. Once the institution reasonably anticipates litigation, the institution should issue litigation holds and send out preservation notices to ensure that documents are preserved.

Similarly, institutions should identify potential custodians—such as Title IX coordinators—and begin preserving e-mails early in the complaint investigation process. Institutions should also consider designating longer retention periods for the e-mails of certain custodians. Similarly, institutions should train employees on the applicable e-mail policies to ensure that employees do not destroy critical documents. Institutions should also warn employees that communications on personal e-mail accounts and/or text messages are often discoverable and should train employees to use these accounts carefully.

Against this backdrop is an oppositional question. General counsel and senior administrators should consider what the institution does *not* want to retain—unless and until the institution is required to retain everything because litigation is now reasonably anticipated. Many e-mails—as well as staff notes that precede an investigation report, notes of hearing participants during a disciplinary hearing, drafts of hearing outcome reports, and other such working papers—might actually prove very useful to a plaintiff's lawyer who may wish to argue that the institution acted in an inconsistent manner or that assertions of institutional witnesses are inconsistent with contemporaneous working drafts. For that reason, it would be prudent to retain a “master set” of all final reports, proceedings, and outcome documents, and promptly destroy the various preliminary and personal documents. That way, the institution will have a single, consistent record that is not contradicted or undermined by the institution's own files.

To achieve this consistency and to become familiar with the full record, colleges and universities will often want (or need) to review internal student or staff e-mail accounts before litigation starts. General counsel and other high level administrators, however, will need to have a firm understanding of their e-mail use policies to determine whether and to what extent they can access student e-mail accounts without prior consent. Some student handbooks, for example, inform students that the institution retains the right to search e-mails at any time. If the handbook does not have these disclosures, however, then the institution needs to determine whether accessing the e-mails would violate some express or implied promise or expectation of privacy. Similar concerns arise with respect to professor and other employees' e-mail accounts, and counsel should consult state law and the institution's own policies before reviewing faculty or staff e-mails.

Student records will also likely contain important and relevant information. Institutions, however, must be thoughtful when accessing confidential and/or privileged student information. Whether an institution can obtain and review those records or share the records without a subpoena will

depend on many factors, including the laws of the relevant jurisdiction and the purpose for obtaining the records. The institution should understand the services provided by the institution's counseling centers and the professional licenses held (or not) by the counselors providing support, and be familiar with applicable state and federal laws that may provide protection to such communications. Records of a treating health care professional, for instance, would be subject to much greater legal protections than records of campus counselors not serving in a health care capacity.

Whether an institution should use information contained in student "treatment records" during litigation has generated some attention recently. On August 18, 2015, for example, the Department of Education released a proposed "Dear Colleague" Letter<sup>[52]</sup> addressing an institution's right under the Family Educational Rights and Privacy Act (FERPA) to access and share "treatment records" during litigation. Among other things, the proposed letter contemplated whether to import HIPAA's more restrictive privacy rules into FERPA. The Department opined that institutions should not share treatment records (even with their own attorneys) unless the litigation in question relates directly to the medical treatment or the payment for that treatment.<sup>[53]</sup> It remains to be seen whether the Department will formally adopt this position and, if it does, how that interpretation would affect Title IX litigation.<sup>[54]</sup>

### 3. The Internet Can Be Your Friend: Benefits of Social Media

Social media can also provide important information about sexual misconduct allegations. From Facebook posts to Tweets, institutions can obtain important evidence from a simple Google search. Institutions should not wait until a lawsuit is filed to search social media websites, however, since social media accounts may be stripped or shut down by that point and valuable evidence may be lost.

Although institutions may request social media evidence during discovery, it is still a best practice to preserve any publicly available evidence early on—especially because social media giants (like Facebook, Instagram, and Twitter) often refuse to respond to subpoenas or document requests in private civil litigation.<sup>[55]</sup> Although courts have upheld the defendant's right to compel the plaintiff to provide access to social media accounts, including compelling the plaintiff to provide passwords to his or her accounts or provide screenshots<sup>[56]</sup>, an institution can find itself fighting an uphill battle to determine whether information has been lost or deleted. Even when institutions are proactive in obtaining social media evidence, institutions may wish to consider hiring an outside vendor to forensically retrieve social media evidence to ensure the documents can be authenticated for use in a deposition or at trial.

#### **B. After the Lawsuit is Filed**

In addition to preserving necessary documentation, institutions will have to make several critical, strategic decisions to address the allegations and media attention after the lawsuit is filed. Although all lawsuits require careful thought, cases arising from sexual misconduct allegations often bring their own set of unique strategic considerations.

##### 1. Plaintiffs' Use of Temporary Restraining Orders/Preliminary Injunctions

In many reverse Title IX cases, plaintiffs seek a preliminary injunction to prevent an institution from carrying out the sanction imposed as a result of the investigation or disciplinary hearing.<sup>[57]</sup> By their nature, preliminary injunctions can create a firestorm of activity early in the case. In most jurisdictions, preliminary injunction standards require the plaintiff to show "a likelihood of success on the merits," which can jump-start the litigation and force institutions to put together a defense

very quickly. In practice, this might induce some institutions to want to settle the matter quickly and quietly. Although preliminary injunctions can be intimidating at first glance, institutions should not immediately shy away from contesting them. In fact, effectively opposing a preliminary injunction can provide institutions with the opportunity to tell their side of the story without some of the usual privacy restrictions. Unlike public statements in the media, arguments presented in court documents are not subject to FERPA's restrictions. An institution can therefore use this opportunity to articulate its position and discuss facts that are part of the publicly filed documents.<sup>[58]</sup> (In most instances, these documents will not be filed under seal.) As such, a well-crafted response can both frame the case going forward and provide more balanced information about the underlying facts to the media and, consequently, the public.

Moreover, institutions can rely on strong case law holding that a delay in a student's education does not constitute irreparable harm that would warrant a preliminary injunction.<sup>[59]</sup> In fact, a study by United Educators found that when challenged, plaintiffs were only successful in obtaining temporary restraining orders 20% of the time.<sup>[60]</sup> At a minimum, however, the possibility of a preliminary injunction hearing highlights the need for institutions to position themselves to respond quickly and efficiently when a sexual misconduct-related lawsuit arises.

## 2. Who Is Jane Doe? The Benefits and Drawbacks of Challenging Pseudonyms

Not surprisingly, increasing numbers of plaintiffs are choosing to sue under pseudonyms in both traditional and reverse Title IX sexual misconduct cases.<sup>[61]</sup> Colleges and universities are not without any recourse, however. In *Doe v. Temple University*, for example, the court denied the male plaintiff's request to proceed under a pseudonym, stating that "the potential harm to Doe and those similarly situated is not enough to outweigh the public's interest in an open proceeding."<sup>[62]</sup> The court's decision reflects the well-settled maxim that "[f]ederal courts strongly prefer open, public proceedings" and that "[l]imited exceptions exist when a plaintiff can show he reasonably fears that severe harm will result from having his or her name attached to a lawsuit."<sup>[63]</sup>

When a plaintiff attempts to proceed under a pseudonym, the institution must make the strategic decision whether to challenge the pseudonym. Forcing the plaintiff to publicly reveal his or her name may cause the institution to appear to the public as insensitive at best and vindictive at worst. It may also make the case more difficult to settle—in the event that the institution decides a settlement would be advantageous—because the publicly-named plaintiff may feel that the only way to vindicate his or her reputation is to proceed with and ultimately prevail in the litigation. On the other hand, challenging the pseudonym may discourage the plaintiff from using the complaint as a retaliatory weapon against the institution and its students. This consideration is amplified when the plaintiff or the plaintiff's attorneys have openly discussed the case or vilified the institution in the media without revealing the plaintiff's identity.

From a practical standpoint, requiring the plaintiff to publicly reveal his or her name in the case caption might encourage other students—who might not otherwise know about the case or know that they have relevant information—to come forward. It might also discourage sexual misconduct victims from coming forward as complainants if they perceive their institution will not consistently protect their identities. Moreover, acquiescing to a plaintiff's desire to proceed anonymously runs the risk of conferring a formal imprimatur supporting the plaintiff's claims of harm.<sup>[64]</sup> Institutions and their counsel should carefully weigh all of these considerations and not automatically accept the plaintiff's decision to proceed anonymously.

## 3. Who Is The Proper Party? Individual Liability in Sexual Misconduct-Related Lawsuits

While colleges and universities are by far the most common defendants in sexual misconduct-related lawsuits, college and university employees, and occasionally complainants and accused students, also are often named as defendants. Although there is no individual liability under Title IX<sup>[65]</sup>, the Supreme Court has made clear that “Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights.”<sup>[66]</sup> As a result, a plaintiff can bring a Title IX claim against the institution and concurrent claims against individual college and university administrators for constitutional and/or state law violations.<sup>[67]</sup> It is also increasingly common for reverse Title IX plaintiffs to add defamation or other tort claims against students who bring the disciplinary complaint or additional state law torts or breach of contract actions against individual university employees.<sup>[68]</sup>

When an individual employee is named as a party, the employer institution must determine whether to defend or otherwise indemnify the employee. In most cases, no conflict exists between the employee’s and the institution’s interests, and the employee can be represented by the institution’s attorney. Moreover, most claims against employees fail to make it past pre-trial motions, mitigating the indemnity exposure for the institution.<sup>[69]</sup> Whether an institution must provide attorneys for its employees named as co-defendants, however, can be a fact-specific inquiry and the answer depends on the damages sought against the employee (i.e., money damages or merely injunctive relief), the internal indemnification policies of each institution, and any applicable state laws for both private and public institutions.<sup>[70]</sup> As such, institutions should proactively review their indemnification policies and insurance agreements to ensure that they comply with all applicable laws and are drafted to benefit the institution during litigation. Even if an institution’s indemnification agreement does not require the college or university to represent an employee, the employee’s actions and prior statements will likely be central in the lawsuit and have a direct impact on the course of the litigation. As such, an institution should determine the best course of action depending on its policies, any applicable laws, and the overall posture of the case.

#### 4. “No Comment?” Issues to Consider When Responding to Media Requests

In addition to the complex legal issues present in these cases, sexual misconduct allegations attract considerable media attention, and institutions often experience a public backlash or rush to judgment.<sup>[71]</sup> Although college and university administrators often face pressure from both the media and alumni to set the record straight, federal law limits what institutions can legally disclose to the public.

Generally, the Family Educational Rights and Privacy Act (FERPA)<sup>[72]</sup> prohibits schools from disclosing personally identifiable information from a student’s education records to a third party unless the eligible student has provided written consent.<sup>[73]</sup> FERPA defines education records broadly to include any records that are: “(1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution.”<sup>[74]</sup>

Although FERPA allows schools to release education records pursuant to a validly issued subpoena or court order,<sup>[75]</sup> institutions often struggle with how to respond to media inquiries before the lawsuit is filed. Moreover, even after the litigation has started, most education records are produced pursuant to a protective order, which also limits the institution’s ability to make public statements.<sup>[76]</sup>

The desire to make public statements is often amplified when the plaintiff shares his or her story with the media while using FERPA as both a shield and a sword to omit or distort critical facts. If an institution decides to release a statement, the institution should speak as broadly as possible to prevent an inadvertent disclosure of identifying information. Institutions can always speak publicly

about their sexual misconduct policies and procedures generally, and can craft answers to predictable questions that can be “on the shelf” or dropped into a standby statement. Obviously, institutions face some risk by delving into the specifics of certain cases. Although there is no private cause of action under FERPA,<sup>[77]</sup> the Department of Education has the power—although it has never exercised it—to strip an institution’s federal funding if the institution releases protected records. Moreover, institutions should be aware of state law protections or common-law torts that might provide a claim for divulging confidential information. That said, institutions are free to state publicly that federal and state law prevents the school from making detailed statements unless and until the student consents, signaling to the public that the plaintiff is, in effect, forcing the school to remain silent.

When institutions do decide to release a statement, they should ensure that any response is carefully fashioned, accurate, and coordinated. Institutions should implement a media response policy prohibiting its employees from responding to media inquiries and requiring all employees to send any media requests to the institution’s general counsel’s office (or designated communications official) for comment.

## 5. Public Relations or Media Consultants

Due to the intense media scrutiny surrounding these cases, institutions may feel the pressure to retain public relations or media consultants to manage their response to media inquiries. When retaining a media consultant, thought should be given as to how best to ensure robust protection for work product generated as a result of the efforts of such independent consultants.

Some courts have shielded documents shared with media consultants from later disclosure. During the Martha Stewart litigation, for example, one court reasoned that “dealing with the media in a high profile case is not a matter for amateurs” and that “[q]uestions such as whether the client should speak to the media at all, whether to do so directly or through representatives, whether and to what extent to comment on specific allegations, and a host of others can be decided without careful legal input only at the client’s extreme peril.”<sup>[78]</sup>

Courts are not uniform, however. Some recent case law has held that communications to and from two public relations consultants were not privileged and did not fall within the work product doctrine.<sup>[79]</sup> Specifically, a New York district court held that non-lawyer communications are only entitled to the attorney-client privilege if “the non-lawyer’s services are necessary to the legal representation.”<sup>[80]</sup> To that effect, the court held in an earlier case that the privilege would not apply if the consultant did not do “anything other than standard public relations services for [the plaintiff].”<sup>[81]</sup> Simply put, “a media campaign is not a legal strategy.”<sup>[82]</sup>

As this case law demonstrates, institutions must take active steps to protect the work product of any hired consultants. On the front end, institutions can reduce some risk by structuring the retainer agreement to highlight that the public relations firm is being retained to assist with legal strategy, as opposed to merely offering public relations advice. Legal counsel should be involved so that such an agreement is legitimate. However, institutions should be careful what information they share with consultants, as institutions could be forced to disclose that information during litigation or might inadvertently waive privilege.

## 6. Importance of Responsive Pleadings

In many cases, responsive pleadings provide the institution with its first opportunity to speak publicly about the specifics of the allegations. As a result, institutions should think strategically about what responsive pleadings to file and how to structure those pleadings. Generally speaking, institutions have three options: they can either file an answer to the allegations, file a motion to dismiss, or file a combination of the two. Each responsive pleading has its advantages and disadvantages, and institutions should evaluate the particular facts of the case to determine which option will best serve the institution in the long run.

College and university counsel should think strategically about the wisdom of filing a motion to dismiss. Although institutions have had mixed results in traditional Title IX cases,<sup>[83]</sup> institutions have had some recent success in reverse Title IX cases.<sup>[84]</sup> In some of these reverse Title IX cases, the courts have held that plaintiffs who merely alleged that the institution was biased—without alleging specific facts to suggest a gender bias—failed to state a plausible claim.<sup>[85]</sup> Even if the plaintiff survives a motion to dismiss on the Title IX claim, however, a motion to dismiss can streamline the litigation and eliminate distracting claims, such as a breach of contract or constitutional claims, or eliminate improperly pled parties, such as individual employees.<sup>[86]</sup> However, the institution's administration should be prepared to address media or constituent misunderstanding when a court takes all the allegations as true and then prints those allegations as "facts" in support of a decision denying the motion to dismiss. The media and public invariably take those "facts" as proven rather than mere allegations, to the institution's reputational detriment.

College and university counsel should also carefully plan the content and form of their answers. Institutions, for example, should decide whether to simply "admit" or "deny" certain allegations, or provide more expansive responses to the allegations. An answer also presents an attractive option for the institution to frame its case and dispute the plaintiff's version of events. Although the institution should refrain from going too far in its answer,<sup>[87]</sup> a succinct and well-crafted statement could educate both the court and the public regarding the nuances of the case and create a more balanced explanation of what actually happened. As discussed above, FERPA—which prevents the institution from disclosing student records or information contained within those records—provides an exception during litigation. Under this exception, institutions have a right to defend allegations by pleading defenses and introducing relevant facts, even if those facts are otherwise contained in a student's educational records.<sup>[88]</sup>

## 7. Issues During Discovery

Like most civil lawsuits, the discovery process in a Title IX case remains an integral part of the institution's defense strategy. In addition to making strategic decisions regarding when and the manner in which to depose the plaintiff, institutions should also be prepared to propound discovery to third parties and government agencies. The need to obtain third party discovery, especially for social media evidence, is heightened in Title IX cases, and institutions should familiarize themselves with the benefits and limits of Rule 45. Similarly, institutions should also look to other discovery devices—such as Freedom of Information Act or open public records act requests and subpoenas—for third party discovery of governmental entities, especially if the plaintiff has filed an OCR complaint.

## 8. Potential Issues When Settling a Case

Title IX lawsuits are not immune from the general trend of most civil cases ending in settlement instead of trial.<sup>[89]</sup> Because of the nature of the relief sought (especially in reverse Title IX

lawsuits), however, Title IX and reverse Title IX cases raise unique settlement issues. Settlements with plaintiffs found “responsible” for sexual misconduct, for example, may require altering the sanction or records memorializing it.<sup>[90]</sup> And, if a negotiated settlement of a reverse Title IX claim alters a sanction previously rendered by the institution, the complainant might need to be notified.<sup>[91]</sup> Such notification may give the complainant an incentive to file an OCR complaint and/or his or her own Title IX lawsuit. For that reason, institutions might find it advantageous to involve (non-party) complainants in the settlement process so that the institution does not simply trade one legal challenge for another.

Institutions must also be aware of various state laws that could affect the terms of the settlement. Some new state laws, for example, require institutions to place a notation on a student’s transcript when the student is found responsible for sexual assault or otherwise limit an institution’s ability to expunge student records.<sup>[92]</sup> As a result, institutions must be careful when structuring a settlement and be mindful of the potential legal risks associated with a particular agreement.

Institutions facing lawsuits in federal court should also consider the possibility of a Rule 68 offer of judgment. Specifically, offers of judgment can limit post-offer costs and attorney’s fees and place pressure on the plaintiff to settle.<sup>[93]</sup> Offers of judgment are particularly desirable where the plaintiff will likely receive minimal or nominal damages, as an offer of judgment can stop the meter on attorney’s fees. Even if the plaintiff is poised to collect a large verdict, a well-pled offer of judgment can shift the risk of litigation onto the plaintiff. As such, institutions should consider making an offer of judgment as soon as practicable after the complaint is filed. There are certain drawbacks, however, including that a public admission of liability will be docketed with the court. Moreover, the offer cannot contain confidentiality or other conditions. As a result, most institutions that are reasonably confident in their legal positions will forego an offer of judgment.

## **CONCLUSION:**

Colleges and universities across the country face an increasingly complex legal and political landscape with respect to sexual assault on college campuses. The number of private lawsuits continues to rise, and governments—at both the state and federal level—have increased enforcement efforts and expanded regulatory requirements. Despite this contentious environment, institutions have continued to maintain a good track record in defending these cases, especially where an institution has developed and followed clear and fair policies and procedures that protect both the complainant and the respondent. As colleges and universities continue to litigate these cases, however, institutions should be mindful of potential legal issues that arise before and during the litigation. As detailed above, being proactive and preparing for possible litigation from the beginning will place colleges and universities in a better position to successfully defend these claims.

## **RESOURCES:**

James A. Keller & Amy C. Foerster, “Defending (and Winning) a Title IX Lawsuit: Student Claims Arising out of Alleged Sexual Violence,” NACUA (Feb. 28 – Mar. 1, 2014).

United Educators, “Confronting Campus Sexual Assault: An Examination of Higher Education Claims,” EduRisk.org (Jan. 2015).

[Higher Education Compliance Alliance Sexual Misconduct Resource Page](#)

[NACUA Sexual Misconduct Resource Page](#)

## ENDNOTES:

[1] R. Craig Wood is a partner at McGuireWoods, and regularly represents colleges and universities as well as K-12 institutions in a variety of litigation and compliance matters, including employment, student misconduct, Title IX and commercial disputes. He teaches Higher Education Law at Washington and Lee University School of Law, and Trial Advocacy at the University of Virginia School of Law. He has served as Chair of the Litigation Section of the Virginia State Bar, and as President of the Education Law Association, where he is a frequent presenter.

[2] Josh Whitlock is a partner at McGuireWoods and defends and counsels colleges and universities in connection with a variety of issues, including Title IX, ADA, Section 504, FERPA, Title VII, and program integrity rules compliance; administration of international programs; and sexual misconduct, student lending, student discipline, tenure, and general employment matters. He also is the former chair of the North Carolina Bar Association Education Law Section and part of a McGuireWoods team that teaches the Higher Education Practicum at the Washington and Lee University School of Law.

[3] Melissa Nelson is a senior counsel at McGuireWoods. Melissa is an experienced trial attorney and brings a unique, innovative perspective to every case. Her litigation practice focuses on commercial litigation, defense of Title VII and Title IX claims and white collar criminal defense. Melissa represents management clients and college and university clients in matters related to sexual harassment, sexual assault, and sexual discrimination. She represents employers and educational institutions before state and federal courts, federal and state administrative agencies, arbitrators and mediators.

[4] Tyler Laughinghouse is an associate at McGuireWoods. In the higher education context, he has defended and advised major colleges and universities in connection with sexual assault and student misconduct investigations and lawsuits under Title IX of the Education Amendments Act of 1972. He is also part of a team of attorneys who teach the Higher Education Law Practicum at Washington and Lee University School of Law, where he teaches a lecture on sexual assault and Title IX. Prior to entering private practice, he clerked for Judge Jackson L. Kiser of the U.S. District Court for the Western District of Virginia.

[5] Jillian Nyhof is an associate at McGuireWoods. Jillian counsels middle market private equity funds, mezzanine finance funds, financial institutions, public and private businesses, and other institutional investors on general corporate matters and commercial financial and corporate transactions, including mergers and acquisitions.

[6] United Educators, *Confronting Campus Sexual Assault: An Examination of Higher Education Claims 3* (Jan. 2015) [hereinafter UE Report], available at <https://www.edurisksolutions.org/Templates/template-article.aspx?id=2147484744&pageid=47>.

[7] Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dept. of Educ., Dear Colleague Letter (Apr. 4, 2011) [hereinafter 2011 DCL], available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

[8] UE Report, *supra* note 6, at 3 (showing rising claims since the 2011 DCL).

[9] Although OCR investigations are not the primary focus of this Note, plaintiffs are increasingly using the OCR process (which encompasses a three year review period when a complaint is filed) as a litigation tool to put pressure on schools and use government resources for fact finding.

[10] The case law shows that a school is far more vulnerable to losing a claim if it fails to follow its own procedures, even if those procedures are more stringent than the law requires. *See, e.g., Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 246 (D. Vt. 1994) ("Moreover, this deviation from the procedures established by the College did render the hearing given Fellheimer fundamentally unfair."); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 382 (Mass. 2000) ("In short, if the university puts forth rules of procedure to be followed in disciplinary hearings, the university should be legally obligated to follow those rules.").

[11] Although this Note summarizes recent case law, a comprehensive case law summary is also available in an article from March 2014: James A. Keller & Amy C. Foerster, NACUA, *Defending (and Winning) a Title IX Lawsuit: Student Claims Arising out of Alleged Sexual Violence* (Feb. 28 - Mar. 1, 2014) [hereinafter the Keller/Foerster Article], available at [http://www.nacua.org/securedocuments/programs/february2014/05b\\_14-02-7.pdf](http://www.nacua.org/securedocuments/programs/february2014/05b_14-02-7.pdf).

[12] *See infra* notes 14 and 15 for list of all cases filed since January 2014; *see also* UE Report, *supra* note 6, at 3 (discussing claims reported by year).

[13] *See* UE Report, *supra* note 6, at 17-19. According to United Educators, from January 1, 2011, to December 31, 2013, approximately 32% of "the litigation against institutions was initiated by students accused of sexual assault." *Id.* There are indications that the current trend will increase this percentage. *See infra* note 14.

[14] See Complaint, *Doe v. Rector and Visitors of George Mason Univ.*, No. 1:15-cv-209 (E.D. Va. July 10, 2015); Complaint, *Doe v. Amherst Coll.*, No. 3:15-CV-30097 (D. Mass. May 29, 2015); Complaint, *Turner v. Texas A&M Univ.*, No. 4:15-CV-01413 (S.D. Tex. May 27, 2015); Complaint, *Doe v. Alger*, No. 5:15-CV-00035 (W.D. Va. May 11, 2015); Complaint, *Marshall v. Indiana Univ.*, No. 1:15-CV-00726 (S.D. Ind. May 6, 2015); Complaint, *Nungesser v. Columbia Univ.*, No. 1:15-CV-03216 (S.D.N.Y. Apr. 23, 2015); Complaint, *Doe v. Reed Inst.*, No. 3:15-CV-00617 (D. Or. Apr. 14, 2015); Complaint, *Doe v. Brown Univ.*, No. 1:15-CV-00144 (D.R.I. Apr. 13, 2015); Complaint, *Doe v. Brandeis Univ.*, No. 1:15-CV-11557 (D. Mass. Apr. 9, 2015); Complaint, *Doe v. Regents of Univ. of California at Santa Barbara*, No. 2:15-CV-02478 (C.D. Cal. Apr. 3, 2015); Complaint, *Doe v. Univ. of South Florida Bd. of Trs.*, No. 8:15-CV-00682 (M.D. Fla. Mar. 25, 2015); Complaint, *Prasad v. Cornell Univ.*, No. 5:15-CV-00322 (N.D.N.Y. Mar. 19, 2015); Complaint, *Doe v. Trs. of Boston Coll.*, No. 1:15-CV-10790 (D. Mass. Mar. 11, 2015); Complaint, *Marshall v. Ohio Univ.*, No. 2:15-CV-00775 (S.D. Ohio Mar. 4, 2015); Complaint, *Doe v. Washington & Lee Univ.*, No. 6:14-CV-00052 (W.D. Va. Dec. 13, 2014); Complaint, *Elias v. Wesleyan Univ.*, No. 3:14-CV-01735 (D. Conn. Nov. 20, 2014); Complaint, *Doe v. Univ. of Colorado Boulder*, No. 1:14-CV-03027 (D. Colo. Nov. 17, 2014); Complaint, *Plummer v. Univ. of Houston*, No. 4:14-CV-02959 (S.D. Tex. Oct. 17, 2014); *Tanyi v. Appalachian State Univ.*, No. 5:14-CV-00170 (W.D.N.C. Oct. 17, 2014); Complaint, *Blank v. Knox Coll.*, No. 1:14-CV-01386 (C.D. Ill. Sept. 23, 2014); Complaint, *Doe v. Case Western Reserve Univ.*, No. 1:14-CV-02044 (N.D. Ohio Sept. 15, 2014); Complaint, *Doe v. Temple Univ.*, No. 2:14-CV-04729 (E.D. Pa. Aug. 12, 2014); Complaint, *Doe v. Univ. of Massachusetts-Amherst*, No. 3:14-CV-30143 (D. Mass. Aug. 7, 2014); Complaint, *Doe v. Amherst Coll.*, No. 3:14-CV-30114 (D. Mass. June 24, 2014); Complaint, *Doe v. Columbia Univ. and Trs. of Columbia Univ.*, No. 1:14-CV-03573 (S.D.N.Y. May 19, 2014); Complaint, *Peloe v. Univ. of Cincinnati*, No. 1:14-CV-00404 (S.D. Ohio May 15, 2014); Complaint, *Villar v. Philadelphia Univ.*, No. 2:14-CV-02558 (E.D. Pa. May 2, 2014); Complaint, *Sterrett v. Cowan*, No. 2:14-CV-11619 (E.D. Mich. Apr. 23, 2014); Complaint, *Benning v. Corp. of Marlboro Coll.*, No. 2:14-CV-00071 (D. Vt. Apr. 15, 2014); Complaint, *Parisi v. Drew Univ.*, No. 2:14-CV-02263 (D.N.J. Apr. 8, 2014); Complaint, *Faiaz v. Colgate Univ.*, No. 5:14-CV-00322 (N.D.N.Y. Mar. 24, 2014); Complaint, *Haidak v. Univ. of Massachusetts-Amherst*, No. 3:14-CV-30049 (D. Mass. Mar. 18, 2014); Complaint, *King v. DePauw Univ.*, No. 2:14-CV-00070 (S.D. Ind. Mar. 17, 2014); Complaint, *Doe v. Swarthmore Coll.*, No. 2:14-CV-00532 (E.D. Pa. Jan. 23, 2014); Complaint, *Doe v. Univ. of California-Los Angeles*, No. BS155236 (Cal. Sup. Ct. May 6, 2015); Complaint, *Doe v. Yale Univ.*, No. BC579833 (Cal. Sup. Ct. Apr. 24, 2015); Complaint, *Sousa v. San Diego State Univ.*, No. 37-2015-00011119-CU-WM-CTL (Cal. Sup. Ct. Apr. 2, 2015); Complaint, *Doe v. Univ. of California, San Diego*, No. 37-2015-00010549-CU-WM-CTL (Cal. Sup. Ct. Apr. 2, 2015); Complaint, *Doe v. Roe* (Minn. Dist. Ct. Jan. 26, 2015); Complaint, *McLeod v. Duke Univ.*, No. 14-cvs-003075 (N.C. Sup. Ct. May 2, 2014); Complaint, *Doe v. Occidental Coll.*, No. BS147275 (Cal. Sup. Ct. Feb. 13, 2014); Complaint, *Doe v. Univ. of Cincinnati*, No. 1:15-cv-600 (S.D. Ohio Sept. 16, 2015); Complaint, *Doe v. Denison Univ.* (Ohio Ct. Com. Pl. Nov. 5, 2014); see also *Lawsuits Database*, Boys & Men in Education (Apr. 13, 2016), <http://titleixforall.knackhq.com/due-process-lawsuits>.

[15] See Complaint, *Karasek v. Regents of Univ. of California*, No. 3:15-cv-03717 (N.D. Cal. Aug. 14, 2015); Complaint, *Ford v. Queens Univ. of Charlotte*, No. 3:15-cv-00298 (W.D.N.C. July 10, 2015); Complaint, *Doe v. Doe Univ.*, 1:15-cv-00085 (D. Haw. Mar. 18, 2015); Complaint, *Higgins v. Kmiecik*, No. 2:15-cv-01219 (E.D. Penn. Mar. 9, 2015); Complaint, *Butters v. James Madison Univ.*, No. 5:15-CV-00015 (W.D. Va. Mar. 3, 2015); Complaint, *Doe v. Univ. of Oregon*, No. 6:15-CV-00042 (D. Ore. Jan. 8, 2015); Complaint, *Doe v. Florida State Univ. Bd. of Trs.*, No. 6:15-CV-00016 (M.D. Fla. Jan. 7, 2015); Complaint, *Doe v. Emerson Coll.*, No. 1:14-CV-14752 (D. Mass. Dec. 31, 2014); Complaint, *Doe v. Univ. of Alabama in Huntsville*, No. 5:14-CV-02029 (N.D. Ala. Oct. 23, 2014); Complaint, *Ross v. Univ. of Tulsa*, No. 4:14-CV-00484 (N.D. Okla. Aug. 18, 2014); Complaint, *Prado v. Univ. of Denver*, No. 1:14-CV-01847 (D. Colo. July 3, 2014); Complaint, *Doe v. Virginia Wesleyan Coll.*, No. CL14006942-00 (Va. Cir. Ct. Oct. 3, 2014).

[16] See, e.g., Complaint, *Butters v. James Madison Univ.*, No. 5:15-cv-00015-EKD (W.D. Va. Mar. 3, 2015); Complaint, *Kinsman v. Florida State Univ. Bd. of Trs.*, No. 4:15-cv-00235-MW (N.D. Fla. Apr. 28, 2015); Complaint, *Roe v. St. Louis Univ.*, No. 4:08-cv-01474-HEA (E.D. Mo. Sept. 25, 2008).

[17] See generally *supra*, note 14.

[18] Although less frequent, complainants have also brought claims under state law, such as breach of contract claims alleging that the institution failed to follow its written process for investigating and adjudicating reports of sexual assault, and intentional infliction of emotional distress claims alleging that the institution failed to ameliorate known risks. See UE Report, *supra* note 6, at 17.

[19] See *id.*

[20] See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

[21] 746 F.3d 874 (8th Cir. 2014).

[22] *Id.* at 879-81.

[23] No. 15-cv-03717, 2015 WL 8527338, at \*13-14 (N.D. Cal. Dec. 11, 2015).

[24] *Id.* at \*13.

[25] *Id.* at \*13-14.

[26] 526 U.S. 629, 644-45 (1999).

[27] See, e.g., *Ha v. Northwestern Univ.*, No. 14-cv-00895, 2014 WL 5893292, at \*2 (N.D. Ill. Nov. 13, 2014), *appeal dismissed*, No. 15-1786 (7th Cir. Apr. 20, 2016); *Moore v. Murray State Univ.*, 2013 WL 960320, at \*4-5 (W.D. Ky. Mar. 12, 2013); *Dececco v. Univ. of South Carolina*, 918 F. Supp. 2d 471, 494-95 (D.S.C. 2013); *Lopez v. Regents of the Univ. of California*, 5 F. Supp. 3d 1106, 1126 (N.D. Cal. 2013).

[28] See, e.g., *Karasek*, 2015 WL 8527338, at \*21 (collecting cases); see also *Takla v. Regents of the Univ. of California*, No. 15-cv-04418, 2015 WL 6755190, at \*4-5 (C.D. Cal. Nov. 2, 2015); *Kelly v. Yale Univ.*, No. 01-cv-01591, 2003 WL 1563424, at \*4-5 (D. Conn. Mar. 26, 2003).

[29] See *Karasek*, 2015 WL 8527338, at \*9-12.

[30] *Id.*

[31] See *id.* at \*21; see also *Doherty v. Emerson Coll.*, No. 1:14-cv-13281 (D. Mass. May 14, 2015) (ruling that the plaintiff “failed to allege, plausibly, that Emerson College’s (in)actions regarding prior sexual assaults were causally related to [her] rape”).

[32] No. 15-cv-00015, 2015 WL 6825420 (W.D. Va. Nov. 6, 2015).

[33] *Id.* at \*1.

[34] *Id.* at \*4.

[35] *Id.*

[36] *Id.* at \*7-8.

[37] Respondents often bring state law claims based on torts or breach of contracts in conjunction with their Title IX claims. Public colleges and universities have also faced due process and other constitutional claims.

[38] See *Doe v. Univ. of the South*, 687 F. Supp. 2d 744, 755-56 (E.D. Tenn. 2009).

[39] Although less frequent, some courts have recognized theories based on “archaic assumptions” and “deliberate indifference.” See *id.*

[40] See, e.g., *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 371 (S.D.N.Y. 2015).

[41] *Id.* at 371-72.

[42] See Fed. R. Civ. Pro. § 37(e); see also *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 U.S. Dist. LEXIS 51312, at \*8 (N.D. Ill. May 25, 2010); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

[43] See, e.g., *Jones*, 2010 U.S. Dist. LEXIS 51312, at \*9 (holding that the duty to preserve arose when defendant received notice of plaintiff’s EEOC charge). *But see Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 621 (D. Colo. 2007) (finding that a duty to preserve arose upon filing of complaint despite earlier communications between counsel regarding a negotiated settlement).

[44] Schools should also be consistent in their approach to determining when they reasonably anticipate litigation. The work product doctrine—which schools can use to shield documents made for litigation—also turns on when the parties reasonably anticipate litigation. As a result, schools should start preserving documents at the same time that they start designating certain documents and notes as protected work product.

[45] In addition to helping a school defend against such allegations, preserving important documents and other evidence is necessary to avoid a spoliation issue.

[46] Courts have recognized that “courts should be slow to intrude into the sensitive area of the student-college relationship, especially in areas of curriculum and discipline,” and should not “second guess the professional judgment of the academic decision makers.” *Lucey v. Nevada ex rel. Bd. of Regents of Nevada Sys. of Higher Educ.*, No. 2:07-cv-00658, 2009 WL 971667, at \*6 (D. Nev. Apr. 8, 2009) (quoting *Gukenberg v. Boston Univ.*, 974 F. Supp. 106, 150 (D. Mass. 1997)). The principle derives, in part, from the Supreme Court’s holding in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), where the Court held that the “four essential freedoms” of the university are “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” *Id.* at 263; see also *Tigrett v. Rector & Visitors of the Univ. of Virginia*, 290 F.3d 620, 629 (4th Cir. 2002) (“In the absence of a constitutional or statutory deprivation, the federal courts should be loathe to interfere with the organization and operation of an institution of higher education.”); *Hill v. Madison County Sch. Bd.*, 957 F. Supp. 2d 1320, 1332 (N.D. Ala. 2013) (“Courts are hesitant to second-guess the decisions of school administrators in the area of student discipline and control . . . .”); *Gutzwiller v. Fenik*, 860 F.2d 1317, 1331 (6th Cir. 1988)

("[C]ourts and juries must be extremely reluctant to second guess the professional judgment of the academic decisionmakers.").

[47] Compare *Vaughan v. Vermont Law Sch., Inc.*, No. 2:10-cv-276, 2011 WL 3421521, at \*16 (D. Vt. Aug. 4, 2011) (holding that school had an independent obligation to investigate allegations) with *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121-23 (10th Cir. 2008) (holding that limited investigation was sufficient where the victim failed to make a formal complaint, there were proof problems, the local police department was concurrently investigating the case, and the alleged assailants refused—on advice of counsel—to answer the school's questions).

[48] See, e.g., *K.F. ex rel. C.F. v. Monroe Woodbury Cent. Sch. Dist.*, No. 12 Civ. 2200, 2013 WL 177911, at \*8 (S.D.N.Y. Jan. 16, 2013); *Doe v. Bd. of Educ. of Prince George's County*, 982 F. Supp. 2d 641, 658 (D. Md. 2013).

[49] No. 4:08CV1474, 2012 WL 6757558 (E.D. Mo. Dec. 31, 2012), *aff'd*, 746 F.3d 874 (8th Cir. 2014).

[50] *Id.* at \*7-8; see also *Doe v. Blackburn Coll.*, No. 06-3205, 2012 WL 640046 (C.D. Ill. Feb. 27, 2012).

[51] *Doe v. Univ. of the South*, 687 F. Supp.2d 744, 755 (E.D. Tenn. 2009).

[52] U.S. Dep't of Educ., Dear Colleague Letter to School Officials at Institutions of Higher Education (Aug. 2015), available at <http://ptac.ed.gov/sites/default/files/DCL%20Final%20Signed-508.pdf> (For an explanation of the interplay between FERPA and HIPAA, see U.S. Dept. of Health & Human Servs. & U.S. Dep't of Educ., Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to Student Health Records (Nov. 2008), available at <http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf>).

[53] See U.S. Dept. of Educ., Dear Colleague Letter to School Officials at Institutions of Higher Education, *supra* note 52, at 1.

[54] The Title IX action filed against the University of Oregon brought such an issue to the forefront, sparking news commentators to criticize the University's decision to affirmatively use the plaintiff's treatment records in its defense. See, e.g., Jake New, *Staying Confidential*, INSIDE HIGHER ED (Aug. 3, 2015), <https://www.insidehighered.com/news/2015/08/03/privacy-loop-hole-remains-open-after-outrage-over-u-oregons-handling-therapy-records>.

[55] See, e.g., *Doe v. City of San Diego*, No. 12-cv-0689, 2013 WL 2338713 (S.D. Cal. 2013).

[56] See, e.g., *Caputi v. Topper Realty Corp.*, No. 14-cv-2634, 2015 WL 893663 (E.D.N.Y. Feb. 25, 2015); *Ogden v. All-State Career Sch.*, 299 F.R.D. 446 (W.D. Pa. 2014); *In re White Tale Oilfield Servs., LLC*, No. 11-0009, 2012 WL 4857777 (E.D. La. Oct. 11, 2012).

[57] See, e.g., Complaint, *Blank v. Knox Coll.*, No. 1:14-CV-1386 (C.D. Ill. Sept. 23, 2014); Complaint, *Doe v. Case Western Reserve Univ.*, No. 1:14-CV-02044 (N.D. Ohio Sept. 15, 2014); Complaint, *Doe v. Denison Univ.*, No. 2014CV00986 (Ohio Ct. Com. Pl. Nov. 5, 2014).

[58] See 34 C.F.R. § 99.33(a)(9)(iii)(B) ("If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.").

[59] Compare *Doe v. Middlebury Coll.*, No. 1:15-cv-192 (D. Vt. Sept. 16, 2015) (granting preliminary injunction), *King v. DePauw Univ.*, No. 2:14-cv-70, 2014 WL 4197507 (S.D. Ind. 2014) (enjoining DePauw from enforcing its suspension of the plaintiff for the fall 2014 semester and allowing the plaintiff to enroll without restriction); *McLeod v. Duke Univ.*, No. 14CVS3075 (N.C. Sup. Ct. May 29, 2014) (granting preliminary injunction to prevent university from expelling plaintiff) with *Rothberg v. Law Sch. Admission Council*, 102 Fed. App'x. 122, 126 (10th Cir. 2004) (noting that "the mere delay of educational opportunities does not constitute irreparable harm" (citing *Martin v. Helstad*, 699 F.2d 387, 391-92 (7th Cir. 1983))); *Jones v. Bd. of Governors of Univ. of North Carolina*, 704 F.2d 713, 715-16 (4th Cir. 1983) ("In applying these factors to review a preliminary injunction issued in the unique context of academic disciplinary procedures, we emphasize at the outset our understanding that federal courts must accord great deference to the administration of those procedures by state educational institutions.").

[60] UE Report, *supra* note 6, at 19.

[61] See, e.g., Order Denying Motion to Proceed in Fictitious Name, *Doe v. Wesleyan Univ.*, No. 3:14-CV-01735 (D. Conn. Aug. 20, 2014).

[62] *Doe v. Temple Univ.*, No. 14-cv-04729, 2014 WL 437613, at \*1 (E.D. Penn. Sept. 3, 2014).

[63] *Id.*

[64] See *Doe v. North Carolina Central Univ.*, No. 1:98CV01095, 1999 WL 1939248, at \*5 (M.D.N.C. Apr. 15, 1999) ("Defendants could be prejudiced before the jury if Plaintiff asserts claims for pain and suffering based

on her embarrassment and shame, and the Court then reinforces those claims by allowing Plaintiff to proceed under a pseudonym.”).

[65] See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 256-57 (2009) (holding that Title IX has been interpreted as not authorizing suit against school officials, teachers, and other individuals).

[66] *Id.* at 246.

[67] In *Sterrett v. Cowan*, for example, ten employees at the University of Michigan—Ann Arbor were named as defendants but the school itself was not named. See Complaint, *Sterrett v. Cowan*, No. 14-cv-11619 (E.D. Mich. Apr. 23, 2014). The employees were sued in both their individual capacities for money damages and in their official capacities for injunctive relief, Fourteenth Amendment due process violations, and violations of First Amendment free speech. *Id.* at 1-2. Although nine of the defendants were dismissed from the case by reason of sovereign immunity, the court held that the plaintiff had pled sufficient facts to continue with his due process claim against one of the defendants. *Sterrett*, No. 14-cv-11619, at 31-35.

[68] See, e.g., Complaint, *Doe v. Swarthmore Coll.*, No. 2:14-cv-00532-SD (E.D. Pa. Jan. 23, 2014); Complaint, *Harris v. St. Joseph’s Univ.*, No. 13-3937 (E.D. Pa. May 13, 2014).

[69] See, e.g., *Dempsey v. Bucknell Univ.*, No. 4:11-CV-01679 (M.D. Penn. Sept. 6, 2011) (all employee defendants represented by same attorneys retained by Bucknell University).

[70] Some states require employers to indemnify employees in certain circumstances. See, e.g., N.J. Stat. Ann. § 14A:3-5(4) (2015). Institutions should consult state law in addition to their own policies or agreements.

[71] See, e.g., Sabrina Rubin Erdely, *A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE (Nov. 19, 2014), <http://web.archive.org/web/20141119200349/http://www.rollingstone.com/culture/features/a-rape-on-campus-20141119>, later retracted by *A Note to Our Readers*, ROLLING STONE (Dec. 5, 2014),

<http://www.rollingstone.com/culture/news/a-note-to-our-readers-20141205>. The accuracy of this article was widely called into question, but not before UVA suspended Greek activities for the semester and endured scathing feedback from concerned parents and alumni. See Jennifer Steinhauer, *UVA Fraternity Reinstated After Rolling Stone Article on Rape*, N.Y. TIMES (Jan. 12, 2015), [http://www.nytimes.com/2015/01/13/us/uva-fraternity-reinstated-after-rolling-stone-article-on-rape.html?\\_r=0](http://www.nytimes.com/2015/01/13/us/uva-fraternity-reinstated-after-rolling-stone-article-on-rape.html?_r=0). The fraternity at issue in the article has filed a \$25 million lawsuit for defamation.

See T. Rees Shapiro, *U-Va. Fraternity Files \$25 Million Lawsuit Against Rolling Stone*, WASH. POST (Nov. 9, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/11/09/phi-psi-chapter-at-u-va-files-25-million-lawsuit-against-rolling-stone/>.

[72] 20 U.S.C. § 1232g.

[73] 20 U.S.C. § 1232g(b)(4)(B).

[74] 34 C.F.R. § 99.3.

[75] 20 U.S.C. § 1232g(b)(1)(J)(i)-(ii).

[76] See 34 C.F.R. § 99.31(a)(9)(ii).

FERPA allows schools to disclose those records, without consent, to the following parties or under the following conditions (34 CFR § 99.31):

- School officials with legitimate educational interest;
- Other schools to which a student is transferring;
- Specified officials for audit or evaluation purposes;
- Appropriate parties in connection with financial aid to a student;
- Organizations conducting certain studies for or on behalf of the school;
- Accrediting organizations;
- To comply with a judicial order or lawfully issued subpoena;
- Appropriate officials in cases of health and safety emergencies; and
- State and local authorities, within a juvenile justice system, pursuant to specific State law.

Family Policy Compliance Office, U.S. Dep’t of Educ., *Law and Guidance: Family Educational Rights and Privacy Act (FERPA)* (Feb. 5, 2015), available at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html/>.

[77] See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280-83 (2002).

[78] See *In re Grand Jury Subpoenas Dated Mar. 24, 2003 Directed to (A) Grand Jury Witness Firm & (B) Grand Jury Witness*, 265 F. Supp. 2d 321, 330 (S.D.N.Y. 2003); see also *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213 (S.D.N.Y. 2001); *Haugh v. Schroder Inv. Mgmt. North America, Inc.*, No. 02CIV7955DLC,

2003 WL 21998674 (S.D.N.Y. Aug. 25, 2003) (holding that consultant-prepared press release held the dual purpose of developing both media and litigation strategies and therefore fell within the work product doctrine); *Everbank v. Fifth Third Bank*, 3:10-cv-1175-J-12, 2012 WL 1580778 (M.D. Fla. May 4, 2012) (citing approvingly cases extending protection to consultant documents and communications); *FTC v. GlaxoSmithKline*, 294 F.3d 141 (D.C. Cir. 2002) (shielding public relations consultant's work product and communication where the consultant "act[ed] for the corporation and possess[ed] the information needed by attorneys in rendering legal advice").

[79] *In re Bausch & Lomb Inc. Contact Lens Solution Prods. Liab. Litig.*, No. CA 2:06-MN-77777-DCN, 2008 WL 2338552 (D.S.C. May 8, 2008); see also *Doe v. Soc'y of the Missionaries of the Sacred Heart*, No. 11-cv-02518, 2014 WL 1715376 (N.D. Ill. May 1, 2014) (holding that the work product doctrine did not protect a memorandum from the public relations firm that detailed the firm's strategy to "generate media coverage"); *McNamee v. Clemens*, No. 09 CV 1647, 2013 WL 6572899 (E.D.N.Y. Sept. 18, 2013); *Calvin Klein Trademark Trust v. Wachner*, 124 F. Supp. 2d 207, 209-10 (S.D.N.Y. 2000).

[80] *SEC v. Wyly*, No. 10 civ 5760, 2011 WL 3366491, at \*2 n. 3 (S.D.N.Y. July 27, 2011) (citing *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961)).

[81] *Haugh*, 2003 WL 21998674, at \*3.

[82] *Id.* at \*3.

[83] *Compare Kinsman v. Florida State Univ.*, No. 15-cv-00235-MW (N.D. Fla. Aug. 12, 2015), ECF No. 69 (order denying motion to dismiss) with *DeCecco v. Univ. of South Carolina*, 918 F. Supp. 2d 471 (D.S.C. 2013).

[84] See, e.g., *Doe v. Columbia Univ.*, No. 14-cv-3573, 2015 WL 1840402, at \*8-15 (S.D.N.Y. Apr. 21, 2015); *Doe v. Case Western Reserve Univ.*, No. 1:14-cv-02044, 2015 WL 5522001 (N.D. Ohio Sept. 16, 2015).

[85] See generally *Doe v. Columbia Univ.*, 2015 WL 1840402.

[86] See e.g., *Doe v. Washington & Lee Univ.*, No. 6:14-cv-00052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015) (dismissing breach of contract claim and constitutional claim); *Faiaz v. Colgate Univ.*, No. 5:14-CV-322 (N.D.N.Y. Nov. 24, 2014) (dismissing some claims and some individual defendants); *Doe v. George Mason Univ.*, No. 1:15-cv-00209 (E.D. Va. Sept. 16, 2015) (same).

[87] See, e.g., *Kinsman v. Winston*, 6:15-cv-00696 (M.D. Fla. Sept. 15, 2015), ECF 50 (order striking portion of Answer).

[88] See 34 C.F.R. § 99.31(a)(9)(iii)(B).

[89] See *Benning v. Corp. of Marlboro Coll.*, No. 2:14-CV-00071 (D. Vt. Apr. 5, 2014) (settlement in October 2014); *Doe v. Williams Coll.*, No. 1:13-CV-11740 (D. Mass. July 19, 2013) (settlement in September 2014); *Luby v. Univ. of Connecticut*, No. 3:13-CV-01605 (D. Conn. Nov. 1, 2013) (settlement in August 2014); *Wells v. Xavier Univ.*, No. 1:13-CV-00575 (S.D. Ohio Aug. 20, 2013) (settlement in April 2014); *Doe v. George Washington Univ.*, No. 1:11-CV-00696 (D.D.C. Apr. 8, 2011) (confidential settlement in July 2011); *Hunt v. Denison Univ.*, No. 2013CV01231 (Ohio Ct. Com. Pl. Dec. 11, 2013) (confidential settlement in 2013); *Gorton v. Denison Univ.*, No. 11CV1599 (Ohio Ct. Com. Pl. Nov. 28, 2011) (confidential settlement in 2011).

[90] See *Doe v. Swarthmore Coll.*, No. 2:14-CV-00532 (E.D. Penn. Jan. 23, 2014). The lawsuit was dismissed on a joint motion by both parties after Swarthmore vacated its findings in November 2014.

[91] See, e.g., Office for Civil Rights, U.S. Dep't of Educ., Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School 2 (Apr. 2, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.pdf/>.

[92] See, e.g., VA Code § 23-9.2:18 (2015).

[93] See *Marek v. Chesny*, 473 U.S. 1, 6 (1985).

## **Permitted Uses of NACUANOTES Copyright and Disclaimer Notice**

**[NACUANOTES Issues](#) | [Contact Us](#) | [NACUA Home Page](#)**