

## 2019 Best Practices for Sexual Assault, Sexual Harassment Complaints and Investigations

### DPMC Association of Chief Human Resource Officers Presentation October 2019

New California laws related to training and litigation standards, including a discussion of the new cases calling for due process of the accused; federal government's proposed changes to Title IX Rules and recession of the Obama Era Regulations; and a discussion of what this means for your campus in terms of policy and procedure revisions, complaint handling, and resolving these issues on your campus.

### Sexual Harassment Complaint and Investigation Case Law Updates

#### Current Litigation - July and August Class Actions

In July a California State University Fullerton student filed a class action lawsuit against all 23 California State University campuses alleging the Title IX procedures employed by the CSU system are unfair. Meanwhile, in August, a University of California graduate student filed a class action lawsuit against all ten UC campuses alleging similar unfair Title IX procedures.<sup>1</sup>

#### *Doe v. Allee* January 2019<sup>2</sup>

In January 2019, the California Second District Court of Appeal heard, *Doe v. Allee*, a case brought by a former University of Southern California student. In 2014, Doe was accused of sexual assault and a Title IX investigation was opened. USC's Title IX Coordinator completed an investigation; determined Doe had violated the school's code of conduct; and expelled him. Doe appealed and his case was eventually brought before the Second District Court of Appeal who found that USC's investigation and determination process was "fundamentally flawed," and resulted in a lack of "fundamental fairness."

The Second District stated:

when a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (such as means provided by technology like videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments.<sup>3</sup>

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<sup>1</sup> <https://www.latimes.com/california/story/2019-08-02/california-universities-face-class-action-suits-by-students-accused-of-sexual-harassment>

<sup>2</sup> <https://www.latimes.com/local/education/la-me-california-universities-title-ix-20190215-story.html>

<sup>3</sup> *Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1039.

The Court also took issue with USC's practice that Title IX claim investigators were responsible for both the investigative process and making final disciplinary determinations. The Court ruled this practice lacks "fundamental fairness." The Court opined that students are entitled to a hearing before a "neutral adjudicator with the power to independently judge credibility and find facts. The factfinder may not be a single individual with [. . .] divided and inconsistent roles" as USC's Title IX investigator was.<sup>4</sup>

*Doe v. Westmont College* April 2019

In April 2019, the Second District heard another challenge to school Title IX sexual misconduct complaint procedures.<sup>5</sup> In *Doe v. Westmont College*, the Court found a Westmont College student had been deprived of a fair opportunity to defend himself against sexual misconduct claims.

In this case, the sexual misconduct claim was investigated by an associate dean and a live hearing was conducted by a separate decision making panel. However, the Second District explained, the hearing did not provide Doe a "meaningful opportunity" to defend himself. A "meaningful opportunity" requires both parties be provided with all evidence and information regarding the investigation and be given the opportunity to cross-examine all witnesses against them at a live hearing. Here, the Court noted three significant issues with how Westmont College handled the claim.

First, the College's Panel withheld information uncovered during the investigation from Doe. The Court stated that "fair hearing requirements 'do not allow [a college's adjudicator] to rely on evidence that has never been revealed to the accused' student when it assesses witness credibility."<sup>6</sup> Without access to that information Doe did not have a meaningful opportunity to refute witness credibility.

Next, the Panel credited portions of nontestifying witnesses' statements based solely on the investigative reports. For the live hearing, Westmont College's Panel chose to only recall one witness for testimony, but the Panel based their decision on statements made by additional witnesses during the investigation stage. This tactic is unacceptable because, as the Court reiterated, the principals of fair hearings allow adjudicators to assess witness credibility only from live testimony.<sup>7</sup>

Finally, the Panel did not allow Doe to question witnesses, either directly or indirectly. During the Title IX process, Doe was neither allowed to submit a list of questions for the

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<sup>4</sup> *Ibid.* at pp. 1061.

<sup>5</sup> *Doe v. Westmont College* (2019) 34 Cal.App.5th 622.

<sup>6</sup> *Ibid.* at pp. 638.

<sup>7</sup> *Id.* at pp. 637.

investigator to ask witnesses during the investigation stage nor permitted to ask the Claimant questions at the hearing. As *Doe v. Allee* explained, accused persons are entitled to a mechanism to cross-examine witnesses against them.<sup>8</sup> Building on their *Allee* decision, the Court stated that an accused is not entitled to directly question a witness, but “fairness [. . .] requires [the accused’s] material participation in submitting proposals for the questioning of critical witnesses.”<sup>9</sup>

The Second District’s decision that Westmont College deprived Doe of a fair decision-making process is consistent with several similar rulings from 2018 and their January 2019 decision. Currently, these cases stand as a mandate to California schools, both public and private, to utilize processes that upholds the principles of fundamental fairness and give complainants and respondents equal opportunities to be heard.

### Proposed Title IX Changes<sup>10</sup>

Since their implementation in 1972, the Department of Education has periodically updated Title IX regulations. In November 2018, Secretary of Education Betsy DeVos proposed new Title IX updates that attempt to balance the rights of claimants and respondents in sexual misconduct complaint procedures. The proposed changes will rollback Obama Era Regulations that had the practical effect of creating an imbalance in the complaint process and weighted too heavily in favor of complainants. If implemented, the changes will require schools nationwide follow procedural safeguards during the sexual misconduct complaint process.

The changes begin by altering schools’ legal obligations in sexual misconduct claims. Under these proposed regulations schools are only required to respond to allegations of sexual misconduct that occurs within their educational programs or activities. Additionally, the updated regulations redefine the “hostile environment” standard from unwelcome sexual conduct that is “severe **or** pervasive” to unwanted sexual conduct that is “severe, pervasive, **and** objectively offensive,” a more difficult threshold to meet.

Many of DeVos’ proposed regulations are in line with current case law that has been steadily carving out procedural regulations for students since 2011. These safeguards require schools:

- Employ a presumption of innocence when handling sexual misconduct complaints.
- Separate the roles of investigator and decision maker.
- Provide the complainant and respondent with an explanation of the specific allegations.

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<sup>8</sup> *Doe v. Allee*, supra, at pp. 1039.

<sup>9</sup> *Doe v. Westmont College*, supra, at pp.639.

<sup>10</sup> Section 106.45(b)(3).

- Provide the complainant and respondent with access to all evidence directly related to the allegations.
- Conduct hearings that give parties the opportunity to hear each other and be heard in front of the neutral decision-maker before a decision can be made.
- Choose to use either the “preponderance of the evidence” standard or the “clear and convincing evidence.”

The proposed changes were published in the Federal Reporter in November 2018 for a two-month public comment period. The Department of Education is now required to respond to each credible comment received, a process that is ongoing.

### **Best Practices for Your Campus**

To ensure your school is following the best practices for sexual misconduct complaints an eleven step administrative process should be employed.

#### **Step 1 – Support Resources**

- Provide involved parties with information on available School and community resource.

#### **Step 2 - Notice**

- Upon receipt of a sexual misconduct complaint the designated Title IX Administrator should provide complainant and respondent notice in writing along with the applicable policy(ies) and procedures and a description of the alleged violation(s), including date, time, and location of incident(s).
- The Title IX Administrator should continue to keep the parties informed of any additional allegations, and dates, times, and locations of interviews, evidence review opportunities, hearings, and related procedures throughout the process.

#### **Step 3 – Interim Accommodations/Actions**

- Upon initial receipt of the complaint the Title IX Administrator should make an interim assessment and determine if immediate remedies are warranted, pending investigation.
- Immediate remedies can include changing academic or work schedules, referrals to school wellness personnel, no contact orders and other remedies to promote well-being, safety, and restoration of the parties.

#### **Step 4 – Fact Gathering Investigation**

- Through a trained investigator, the school should investigate all reports of alleged violations of sexual misconduct.

- The investigator should interview the complainant, respondent, and any witnesses deemed relevant by the investigator or Title IX Administrator.
- The investigator should ask all persons interviewed for all information related to the alleged prohibited conduct; including but not limited to, names of witnesses, documents, emails, texts, social media posts, photographs, the existence of video footage, and call logs.

#### **Step 5 – Evidence Review**

- At the conclusion of the fact finding investigation, the Title IX Administrator should coordinate to allow complainant and respondent each an opportunity to review the information collected by the investigator and provide a written response within 10 days.
- All evidence collected, including but not limited to, witness statements, physical and documentary evidence, and audio/visual material should be provided for review.
- Parties need not be provided copies or allowed to take photographs, but may take notes.
- Parties should be permitted to review the material for as much time as desired within the Evidence Review Period.
- The investigator or Title IX Administrator may redact or exclude evidence from review that violates the privacy rights. However, information that is redacted, or otherwise excluded from review, should not be considered in making findings of fact or determining responsibility.

#### **Step 6 – Prepare Investigation Report**

- The investigator should prepare a written report that fairly summarizes the relevant evidence within 10 days of the close of the Evidence Review Period.

#### **Step 7 - Hearing**

- After each party has reviewed the evidence and received the written report or summary of the report, a hearing should be held to provide parties an opportunity to respond to the evidence gathered.
- For cases in which a student faces severe disciplinary sanctions (expulsion or long-term suspension) and the credibility of witnesses is central to the adjudication of the allegations, a live hearing should be held before a neutral adjudicator. Written responses are not accepted in lieu of attendance at the live hearing; however video-conferencing, privacy screens or other methods may be used to limit the adverse effect on parties or witnesses.
- The information reviewed during the Evidence Review should be available for reference and consultation at the live hearing.

- During the live hearing, parties may indirectly cross-examine parties and witnesses whose credibility is central to the adjudication of the allegation.
- Cross examination includes relevant questions and follow-up questions, including those challenging credibility, but excludes those that are inflammatory, argumentative, or relate to character evidence or non-relevant sexual history. Responses provided are considered evidence and may be used in the findings of fact and policy violation.

### **Step 8 – Findings**

- Following the live hearing the adjudicator should make a determination of Responsible or Not Responsible based on the preponderance of the evidence that there has been a violation of the school’s policy on sexual misconduct.
- A Notice of Determination should be prepared. It should present and analyze the evidence collected during the investigation and presented at the live hearing and makes findings of fact and policy violation(s), using a preponderance standard.
- The Notice of Determination should be issued within 5 days of the live hearing.

### **Step 9 – Penalties**

- If there is a finding that a respondent violated the School’s policy on sexual misconduct, the School’s Standards of Student Conduct, or other applicable policy, should be consulted to impose penalties and to notify the respondent of the penalties and their right to appeal.
- Once the penalties have been imposed, the Title IX Administrator should notify the complainant of the imposed penalties and their right to appeal.

### **Step 10 – Appeals of the Investigation Process or Imposed Sanctions**

- Both respondents and complainants have the right to submit an appeal for review of the investigation process and/or the imposed Sanctions (refer to Section VII & VIII Appeal Hearing Process).
- Appeals should be submitted in writing to Human Resources or the Dean of Student Services within 5 Days of the notice of findings.

### **Step 11 – Ongoing Accommodations for Complainants**

- Parties may request ongoing or additional accommodations. In consultation with other campus departments, a determination should be made on whether such measures are appropriate.
- Schools should also determine whether additional measures are appropriate to respond to the effects of the incident (e.g. school policy revisions, additional security at locations where misconduct occurred, additional training or education for students or faculty).

## **Conclusion**

Jeffery Morris of Devaney Pate Morris & Cameron has serviced educational institutions for more than 30 years. We regularly provide workplace and sexual harassment training as well as independent investigation services. If you would like further information regarding compliance current laws and coming Title IX regulations, or information regarding our investigation services, please contact Jeffery A. Morris at [jmorris@dpmclaw.com](mailto:jmorris@dpmclaw.com).