

“They’re Doing What?” - Defamation Lawsuits Filed by the Accused in Title IX Cases

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6th Annual Heartland Campus Safety Summit
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Johnson County Community College, Overland Park, KS

Session Outcomes

Participants will leave the session with an understanding of:

- ▶ defamation cases attracting media attention;
- ▶ higher education defamation cases specifically linked to sexual harassment and sexual misconduct;
- ▶ common reasons responding parties are filing lawsuits;
- ▶ best practices for academic transcript annotations related to responsible findings in sexual misconduct cases;
- ▶ common administrative implications of increased number of lawsuits, and;
- ▶ defamation claims and defenses to those claims.

Quick Exercise...

Grab a pen and a piece of paper. For the next 60 seconds, list names associated with defamation lawsuits you have heard about in recent news stories.

- ▶ Roy Moore v. Leigh Corfman, Debbie Gibson, Tina Johnson, and Beverly Nelson
- ▶ Stormy Daniels v. Donald Trump
- ▶ Vern Unsworth v. Elon Musk
- ▶ Lukas Gottwald “Dr. Luke” v. Kesha

Higher Education Defamation Cases

- ▶ McGill University professor
- ▶ University of California at Berkeley professor
- ▶ Liberty University
- ▶ University of North Alabama professor

Litigious Climate

32% of Title IX related lawsuits are brought by the respondent.

- ▶ Brandeis University
 - Breach of contract
 - ▶ Columbia University
 - Violation of Title IX
 - ▶ University of Virginia
 - Administrative Procedures Act
-
- Breach of contract (institutions not following own policies)
 - Violation of Title IX (reverse discrimination)
 - Negligence (employees not properly trained)
 - Defamation (false accusations)*

*72 percent of responding parties who file a Title IX-related lawsuit against university also sue complaining party and/or victim for defamation

Key take-away...consistent enforcement of clear campus policies is essential.

Controversial Practice?

- ▶ University practice of noting on transcripts whether students have been found responsible for sexual misconduct.

United Educators has reported a rise in defamation claims brought forward by responding parties against colleges associated with the increasingly common practice of noting on transcripts whether students have been found responsible for sexual misconduct.

AACRAO Transcript Disciplinary Notations Work Group

Key recommendations from the Work Group:

1. Recognizing that the most egregious acts of misconduct may result in the involuntary separation of the student from an institution, and may indicate a pattern of behavior that might be repeated at a subsequent institution, **some form of notice** should be provided to a receiving institution when a student has committed serious behavioral misconduct (e.g. including, but not limited to, that defined by the Clery Act.)
 - Clery Act crime categories include: Criminal offenses (homicide, sexual assault, burglary, arson, theft, aggravated assault, destruction/damage of property), Hate Crimes, VAWA offenses (domestic or dating violence, stalking), and Criminal Arrests (weapons law violations, drug abuse violations).
2. **The academic transcript is an appropriate means to support communication about serious student misconduct, but may not be the only means of notification.** A student's standing that impacts his or her eligibility to continuously enroll at an institution affects academic progress and, for this reason, is deemed transcript-appropriate.
3. **If a college or university decides not to record disciplinary notations on official transcripts,** the following alternatives might be considered by an institution:
 - Student Conduct Transcript
 - Dean's Certification Letter
 - Transcript Insert

Work Group Recommendations (cont.)

4. As with academic probations and warnings, disciplinary probations and warnings for minor violations that do not result in a mandatory separation from an institution should not be noted on official transcripts or otherwise disclosed to another institution.
5. Institutions should align as closely as possible in their use of standardized terms and definitions for various student sanctions or penalties for misconduct. Such separations are generally denoted by commonly used and understood language, including:
 - Expulsion or Dismissal - a permanent separation from the institution.
 - Suspension - a temporary separation, often for a specific period of time, from the institution with the option of a possible future return.

Work Group

Recommendations (cont.)

6. In cases of suspension, dismissal and expulsion (or the equivalent), transcript notations should include the following:
 - The general type of infraction -- academic or behavioral (e.g. disciplinary).
 - The department responsible for issuing the student separation from the institution (e.g. Office of Student Conduct).
 - Effective dates or date/term ranges of student separation from institution, if applicable.
7. Institutions may record a “Pending Conduct” statement on transcripts while an investigation or hearing is planned or underway. The use of a hold to block the release of an official transcript until the investigation concludes may be preferable, but may also impact service to students.
8. A special notation may be placed on the transcript when a student is permitted to withdraw while an investigation is underway. The standard suspension/expulsion notation should replace this special notation if the student is found in violation of the code and that special notation should be removed if the student is found to not be in violation. The use of a hold to block the release of a transcript until the investigation concludes may be preferable, but may also impact service to students.

Work Group Recommendations (cont.)

9. Transcript notations should be placed at the end of the semester/term in which the sanction occurs. Transcript legends (keys) should offer further explanation, as needed, and provide the reader with instructions on how/where to obtain additional information.
10. All institutions should have comprehensive policies and business processes that clearly document expected codes of student conduct, infractions, institutional review panels, sanctions, due process (appeal hearings), recordation and disclosure practices, and specific verbiage related to the retention and removal of transcript notations.
11. Educational institutions that receive transcripts with disciplinary notations should have comprehensive and consistent admissions procedures in place to handle applicants with active sanctions at other institutions. No institution should apply negative consequences to a student whose record includes a disciplinary notation on his/her transcript without seeking or considering additional information.

Administrative Implications of Increase in Lawsuits

- ▶ **POLICY EVALUATION:** Universities are re-evaluating policies based upon legal challenges by both responding and complaining parties
 - ▶ Lawsuits may stem from both oral and written statements
- ▶ **FINANCIAL IMPACT:** Responding parties have not been very successful in court but the impact is felt
 - ▶ Estimated that universities pay \$187,000 per case
 - ▶ In 40 percent of cases, > \$200,000
 - ▶ No matter who's bringing the legal action, the costs associated with defending against allegations of mishandled sexual-misconduct cases is significant

Lawsuits

Tort - French word
for “civil wrong.”

Three kinds of “tort”.

1. Negligence
2. Intentional torts
3. Strict liability

Intentional Torts

1. Assault
2. Battery
3. Defamation
4. Outrage
5. Conversion
6. Fraud

Defamation - A
false statement
made by one
person to another
and heard by a
third party.

Two types of defamation:

1. Libel- the written word.
2. Slander- the spoken word.

Defenses to a defamation claim:

1. Truth
2. Opinion
3. Absolute Privilege
4. Statute of Limitations

Statute of
limitations - time
within which a claim
must be brought or
it is barred forever.

Arkansas: One year for slander, three years for libel.

Nebraska: One year.

Iowa: Two years.

Kansas: One year.

Missouri: Two years.

Oklahoma: One year.

Defenses to a defamation claim:

1. Truth
2. Opinion
3. Absolute privilege
4. Statute of limitations
5. Qualified privilege

Qualified privilege: anti-SLAPP laws

SLAPP

- ▶ Abbreviation for Strategic Lawsuits Against Public Participation

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and *to petition the Government for a redress of grievances.*

Arkansas: A.C.A. 16-63-502

Nebraska: Neb. Rev. Stat. 25-21, 243 (2010)

Iowa: Not one

Kansas: Not one

Missouri: Mo. Rev. Stat. 537.528 (2011)

Oklahoma: Okla. Stat. Title 12, 1443.1 (2011)

Defenses to a defamation claim:

1. Truth
2. Opinion
3. Absolute privilege
4. Statute of limitations
5. Qualified privilege
6. Immunity

Potential defendants in a Title IX claim from campus:

- ▶ The institution
- ▶ The employees of the institution
- ▶ The accuser
- ▶ Unknown third party

“I follow three rules:

1. Do the right thing

2. Do the best you can

3. Always show people
you care”

-Lou Holtz

“Do the right thing. It will gratify some people and astonish the rest.”

-Mark Twain

Questions?

Engaging Administration - Why They Really Need to Pay Attention to Title IX

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Participants will leave the session with an understanding of:

- ▶ key findings from a 2017 ACE survey related to college presidents;
- ▶ overview of recent cases in which Title IX issues have impacted college/university administrations;
- ▶ suggested best practices for engaging administration in the importance of Title IX;
- ▶ the relationship between Title IX and HLC requirements;
- ▶ emerging trends in administrator contracts specifically related to Title IX, and;
- ▶ developing movement related to external party reporting requirements for sexual harassment.

American Council on Education (ACE)

- ▶ 2017 American College
President Survey

Top Five Areas that Occupy College President's Time

1. Budget/Financial Management (65%)
2. Fundraising (58%)
3. Managing a Senior-Level Team (42%)
4. Governing Board Relations (33%)
5. Enrollment Management (32%)

Top Five Frustrations Facing College Presidents

1. Never enough money (61%)
2. Faculty resistant to change (45%)
3. Lack of time to think (44%)
4. Problems inherited from previous leadership (35%)
5. Belief by others you are infinitely accessible (31%)

A school has notice if a responsible employee “knew, or in the exercise of reasonable care should have known,” about the harassment.

- Office for Civil Rights, *Revised Sexual Harassment Guidance* (66 Fed. Reg. 5512, Jan. 19, 2001)



"In a moment of decision,
the best thing you can do is
the right thing to do, the
next best thing is the wrong
thing, and the worst thing
you can do is nothing."

Theodore Roosevelt

Journl.

Recent Cases

- ▶ Baylor University
- ▶ Michigan State University
- ▶ University of Southern California

Ten ways to help administrators pay attention to Title IX

Employees won't believe what leaders are communicating to them until they've heard it seven times.

- Lencioni, P. (2012), *The Advantage* (1st ed.). San Francisco, CA: Jossey-Bass.

1. Annually get on the Executive Council agenda
2. Be an annual Board of Trustees agenda item
3. Provide annual training to senior-leadership, including Board of Trustees
4. Secure presentation time for on-boarding of new employees
5. Provide quarterly report to the college/university president, highlight key Title IX statistics

6. Spend INDIVIDUAL time with:
 - ▶ Athletic Director
 - ▶ Student Affairs VP
 - ▶ Academic Affairs VP
 - ▶ Finance and Administration VP
7. Attend VP direct report meetings
8. Hearing panel nominations by the college/university president
9. Create a perpetuity notebook
 - ▶ Be a constant
10. Talk to your General Counsel

Higher Learning Commission (HLC)

Heartland Campus Safety Summit

Higher Learning Commission

Arkansas
Oklahoma
Missouri
Kansas
Nebraska
Iowa

Arkansas
Oklahoma
Missouri
Kansas
Nebraska
Iowa

+13 more

Federal Compliance filing by Institutions

▶ 47 Questions

Question # 20

34 CFR 668.41

(b), (c), (d), (e)

34 CFR 668.46

(b)(11)

Contract Clauses

1. Coaches

2. Academic Staff

In their
employment
contract, doing
three things.

Naming them as a “responsible employee” under Title IX, which includes:

1. Reporting requirements
2. Cooperation with Title IX investigations
3. Participation in Title IX trainings

ARTICLE III - DUTIES AND AUTHORITY

- (u) Performing the duties of a campus security authority under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act and the duties of a mandatory reporter under the University's Title IX-related policies;

ARTICLE VIII - TERMINATION BY UNIVERSITY FOR CAUSE

- (g) Failure by Fulmer to cooperate reasonably with the University's efforts to prevent sexual assault, dating violence, domestic violence, and/or stalking;
- (p) Failure by Fulmer to report misconduct as required by University Rules (e.g., failure to comply with Tennessee laws regarding the mandatory reporting of child abuse and/or child sexual abuse; failure to comply with the University's Title IX-related policies including without limitation failure to satisfy the duties of a mandatory reporter/responsible employee; failure to satisfy the duties of a "campus security authority" relating to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act);
- (v) Violation by Fulmer of UTK's Policy on Sexual Misconduct, Relationship Violence, Stalking, and Retaliation, which may be amended by the University from time to time.

New paragraph 4.1 (e) of Meyer's extension reads:

Coach shall promptly report to Ohio State's Title IX Athletics any known violations of Ohio State's Sexual Misconduct Policy (including, but not limited to, sexual harassment, sexual assault, sexual exploitation, intimate violence and stalking) that involve any student, faculty or staff or that is in connection with a university sponsored activity or event. ... For purposes of this Section 4.1 (e), a "known violation" shall mean a violation or allegation of a violation of Title IX that Coach is aware of or has reasonable cause is taking place or may have taken place.

8. **RESPONSIBLE EMPLOYEE.** Coach is considered a “Responsible Employee” pursuant to Title IX of the Education Amendments Act of 1972 (“Title IX”). As a Responsible Employee, Coach is required to inform the Title IX Officer if Coach becomes aware that a student (undergraduate, graduate, or professional) has experienced sexual violence, sexual harassment, or other behavior prohibited by University policy. Coach must contact University’s Title IX Office as soon as possible when Coach learns of an incident of sexual violence or sexual harassment and share whatever information Coach has, including the names of any individuals involved, their contact information, and any details of the incident. As a Responsible Employee, Coach must report directly to the Title IX Office, even if Coach is unsure that the incident actually occurred or unsure whether it constitutes sexual harassment or sexual violence. Coach should not investigate the report, and should not try to intervene or resolve the issue. While information must be provided to the Title IX Office, Responsible Employees should not discuss the case with other people who do not have a legitimate need to know.

National Science Foundation grants

News Release 18-082

NSF announces new measures to protect research community from harassment

New policy requires awardee institutions to report sexual harassment findings



Questions?