

Title IX and the Lessons Learned in Higher Education

By JOHN PARDUN

One of the biggest challenges for colleges and universities is handling sexual misconduct investigations and disciplinary proceedings in ways that are demonstrably fair. These cases are complex because they may involve drugs and alcohol, a combination of consensual and forced acts, often a lack of witnesses and sometimes multiple claimants with multiple claims. Adding to that complexity, the legal landscape in this area has shifted dramatically in recent years. Specifically, the Obama administration in 2011 issued its Dear Colleague letter and subsequent directives three years later, which required institutions of higher learning to strongly and swiftly address campus sexual violence and respond to the needs of individuals claiming to be survivors. But in 2017, United States Secretary of Education Betsy

DeVos and the U.S. Department of Education's Office for Civil Rights rescinded the Obama administration's directive and issued its own interim guidance, insisting instead that schools strengthen procedures to protect students accused of misconduct. Mix in the #MeToo movement and it's no wonder that colleges and universities are confused as to which investigative, evidentiary and decision-making models are best employed in campus sexual misconduct cases.

Many schools have adopted a single investigator model for Title IX complaints. With this model, a single person may: interview the complainant, the respondent and witnesses; review evidence; prepare a report determining the credibility of each side's account; and issue a final determination that might include a recommendation of suspension or expulsion. Because an individual serving in multiple capacities can raise



questions of neutrality and fairness, this model is often criticized. In fact, the American Bar Association's Criminal Justice Section's Task Force on College Due Process Rights and Victim Protections in 2017 concluded that the single investigator model of adjudication is structurally unfair. Indeed, respondent litigation is on the rise against institutions for alleged bias and violation of due process rights.

In contrast, some schools employ a hearing model, in which an investigator's report is reviewed by a different, internal panel typically comprised of faculty and students who were not involved in conducting the investigation. Critics of this model suggest that student panels create issues of confidentiality and peer pressure. Similarly, some argue that professors might treat students differently knowing they were involved in a sexual misconduct proceeding. Faculty and student panels may also deter students from reporting sexual misconduct incidents due to the social cost of discussing a sensitive topic with individuals they may continue to encounter on campus. Critics also question the qualifications of internal personnel to neutrally evaluate complex evidentiary issues and ensure due process, and to reach an unbiased decision that is fairest for the participants.

Sexual misconduct matters of all kinds are being met with increased scrutiny, and as a result, schools are under a growing threat of litigation. Allegations of mishandled matters can affect alumni relations and donations, damage a school's brand and reduce applications and enrollment. To counteract this, the fairest process is one

that combines the benefits of the investigator and the hearing models with experienced, external and unaffiliated third parties. Indeed, courts have pointed to the decision maker's independence when ruling on Title IX adjudications or sanctions. For example, in *Doe v. Allee*, a California Court of Appeal held that when a student accused of sexual misconduct faces severe disciplinary sanctions and the credibility of witnesses is central to the adjudication, fundamental fairness requires that the university provide a mechanism in which the accused can cross-examine those witnesses before a neutral adjudicator with the power to independently find facts and assess credibility. [See 30 Cal.App.5th 1036 (2019).]

While using third-party investigators and adjudicators enhances fairness for the participants it also fosters the school's credibility and alleviates the financial, resource and public relations impact on colleges and universities dealing with campus sexual misconduct claims. JAMS is uniquely qualified to provide neutral Title IX adjudicative services to colleges and universities, in addition to informal resolution services such as facilitation and mediation allowed under the federal guidelines. Comprised of retired

state and federal judges and distinguished attorneys with established track records, JAMS hearing officers enhance due process and instill trust and integrity in the process for all participants. Their capabilities are bolstered by decades of legal experience and up-to-date training in Title IX, trauma and evidentiary evaluation, making them ideally suited for complicated and highly sensitive sexual misconduct matters.

John Pardun is the national business development director for JAMS.

JAMS Solutions addresses the unique needs of higher education by providing services such as Title IX adjudications, appeals and informal resolution, faculty and administration dispute prevention and resolution, systemic investigation, and dispute resolution training. To engage JAMS Solutions, please contact us at Solutions@jamsadr.com.

