JAMS VIRTUAL ROUNDTABLE

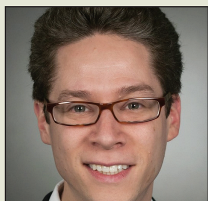
# Trends in Managing and Resolving Title IX Cases

### *About the Moderator and Panelists*

**HON. JANE GREENSPAN (RET.)** is a JAMS neutral and former justice of the Supreme Court of Pennsylvania. Based in Philadelphia, she routinely serves as an arbitrator and mediator in complex commercial, labor, financial and business disputes, as well as an adjudicator in college and university Title IX cases. She can be reached at **jgreenspan@jamsadr.com**.

**MICHAEL BAUGHMAN** is a partner at Pepper Hamilton. As chair of the firm's Higher Education Practice Group, Michael Baughman represents colleges, universities and other educational institutions in providing counseling, litigation and investigative services for the unique challenges that face institutions of higher learning. He has counseled many schools on their Title IX policies and procedures and represents colleges and universities in Title IX litigation around the country, as well as in investigations by the Department of Education's Office for Civil Rights.

**PATRICIA HAMILL** is a partner at Conrad O'Brien who has extensive experience successfully representing clients nationwide spanning a breadth of matters, including complex commercial litigation, Title IX litigation and student disciplinary matters. She was recently recognized as the "2018 Pennsylvania Power Player" by The Legal Intelligencer for her work related to Title IX. In addition to her nationwide Title IX practice, she is a frequent speaker on Title IX litigation and related issues to audiences of higher education Title IX coordinators, advocacy groups and attorneys.



**WILL MILLER** is an associate general counsel in the Office of General Counsel at New York University and specializes in litigation and student affairs. He routinely advises on general policy and individual investigations and hearings involving Title IX and sexual misconduct.

**HON. JANE CUTLER GREENSPAN (RET.)** recently convened a roundtable discussion with luminaries in the Title IX field to discuss their observations and nascent trends. As part of this discussion, the panel identified issues and provided solutions for higher education leadership to better serve their institutions and parties in these proceedings.

## External Versus Internal Adjudicators

***GREENSPAN:** After retiring from the Supreme Court of Pennsylvania in 2010, I began serving as a neutral adjudicator shortly after the "Dear Colleague" letter of 2011 changed the way schools look at Title IX. Since then, I have seen schools incorporate rules and procedures utilizing either external adjudicators or internal adjudicators, with some changing course along the way.*

*What are the benefits and drawbacks of each model?*

**MIKE BAUGHMAN:** Some schools have, I think appropriately, given themselves the option to use either internal or external adjudicators, depending on the nature of the allegations in a particular case. The size and resources of the school may also influence whether or not to utilize an external resource to resolve cases. Some larger institutions may have more individuals available with the appropriate background to hear cases. Conversely, where members of the community are well known to each other, it may be more difficult to have an internal person deciding these difficult cases.

**WILL MILLER:** The benefits of using an external adjudicator include lessening the risk that one or the other party will raise bias or conflict of interest-related concerns about the process as well as an increased ability to manage complex evidentiary issues. The benefits of using

an internal adjudicator include a greater familiarity with institutional values and process and an ability on the part of the institution to select and focus training on the internal individual(s) serving as the adjudicator(s). I find it helpful for school policies to allow for this determination to be made on a case by case basis.

**PATRICIA HAMILL:** Building on Will's point, one way to have possibly the best of both worlds — perceived independence of an outside adjudicator and knowledge of the institution/focused training for internal decision makers — is to have a panel approach that includes one outside adjudicator and two internal adjudicators. I have seen that work quite well. Regardless of the model chosen, schools need to have a method of ensuring that there is transparency for decision makers regarding sanctions that have been meted out in similar cases in order to eliminate arbitrariness that could arise if there is no such transparency.

***GREENSPAN:* *If cost is a factor, do you think enough consideration has been given to the less obvious, indirect costs associated with keeping processes that might appear to be unfair; for example, the effect negative news coverage might have on alumni donations, endowments and student enrollment?***

**MILLER:** I do think consideration is given to the general risks and benefits of using or not using an external adjudicator for particular cases, but typically, the types of costs listed are difficult to quantify as stemming from a given matter.

**HAMILL:** I think this is best summed up as penny wise and pound foolish. Better to pay for skilled participants up front because you will likely have a fairer process and one that is less easily attacked in hindsight by either party involved.

***GREENSPAN:* *It has been said by some school officials that Title IX matters are "internal governance issues" and therefore they should be handled by internal resources like other matters of student discipline. Should schools treat allegations of sexual assault and harassment under Title IX differently than other student discipline issues? If so, why?***

**HAMILL:** Sexual assault issues in particular are unique, require a level of skill to adjudicate and to evaluate evidence, including witness testimony, are not within the normal wheelhouse of a college administrator or faculty member and cannot be learned with a limited training program. These are definitely not internal governance issues, and I don't think courts see them that way either, as courts have tended to be more willing to wade in to analyze a school's Title IX's processes and procedures than they typically would with a case involving, for instance, academic dishonesty.

**MILLER:** The simple answer from a legal perspective is that disciplinary matters involving sexual harassment – and in particular, sexual assault – warrant a different disciplinary process than other matters of student discipline because they are more heavily regulated. Above and beyond the higher degree of regulation, however, I think a more robust attention to appropriate process is warranted in such matters given the increased sensitivity of the subject matter of such cases, the often complex evidentiary issues involved and the often heightened stakes for the parties.

***"Schools must strike the balance of ensuring a fair process that also encourages reporting and accountability."***

***—Michael Baughman***

**BAUGHMAN:** Title IX cases are often more complex and difficult than typical student discipline issues, and require special attention and care. Therefore, schools often appropriately seek assistance from outside experts in these matters. It is critical that a school's Title IX policy – and the procedures it puts in place to resolve complaints – reflects each individual school's values and culture. The decision in any case – whether decided by internal or external resources – is ultimately the school's decision, so the school's process must have in place ways to ensure that the institution's values are reflected in each outcome.

## Adjudicative Versus Investigative Resolution Models

***GREENSPAN:* *In your experience, what are the most notable benefits and shortcomings of each?***

**MILLER:** I think the benefits of the adjudicative model are having a fresh set of eyes on the totality of the evidence after it has been gathered and the opportunity for parties to hear and respond in real time to the statements of the other party and of witnesses. Also, the hearing

model can enhance the ability of the fact finder to gauge the nonverbal and verbal reactions of the parties as evidence is presented and thus to assess credibility. On the other hand, with respect to the investigative model, there is a value in having the investigators as fact finders making credibility determinations because they typically spend more time considering and gathering the evidence and get the parties' initial responses and reactions to questions and evidence before they have heard or reviewed much of the evidence in the case (e.g., complete account of the other party, witness testimony, documentary evidence).

**HAMILL:** So much depends on the quality of the players regardless of the model, so I have been equally dissatisfied and satisfied with both systems depending on how professionally I feel a process has been executed.

I personally prefer a hearing model if the accused student has an advisor. That way, the accused student gets to hear in real time the witnesses against him (or her), and I think an adjudicative model has the best chance of getting at the truth/reaching a just result, assuming that the decision makers are skilled and discerning. At the same time, I acknowledge that the adjudicative model can put greater pressure on both parties and is likely more anxiety-provoking than a one-on-one interview. Adjudicative models can also put a student who has slower processing at a disadvantage – it's much harder when one is anxious to think clearly or process information in real time. Students should never be on panels regardless.

My concern with the investigative model, where there is no hearing at the end of the process, is that it lacks the most transparency. The accused student is "at the mercy" of the investigator in terms of what questions are asked of the other party and witnesses, how those questions and answers are recorded, etc. There is also no real ability to cross-examine the accuser, even if only indirectly through a hearing panel. That being said, a truly skilled investigator can sometimes be very effective at both investigating and recording the results of that investigation.

**BAUGHMAN:** There is no one-size-fits-all approach, and schools have used different forms of "adjudicative" models and "investigative" models, including hybrids of the two. I agree with Will's reactions on the advantages of the adjudicative model, which encompasses a formal hearing. I also agree with Patricia that the adjudicative model has the advantage of allowing parties to observe all aspects of the hearing. Some form of formal hearing may be a safer approach for public schools, to ensure they are in compliance with constitutional due process requirements. (Some recent decisions have suggested the importance of some form of cross-examination and the opportunity to judge credibility through the fact finder's personal observation of the parties and witnesses.) A significant disadvantage of the adjudicative model is that it often takes longer and involves duplication of effort – where an investigator first develops the record and interviews the parties, to only then have the adjudicative body interview the same people for a second time. An adjudicative hearing also can be very stressful to students involved in the process. In many situations, the best approach is a hybrid, where the investigator collects the evidence, makes credibility assessments and makes a recommended finding, with a more limited and less formal hearing to confirm or reject the findings.

***"Schools should absolutely be more focused on 'objectively fair' due process and should bring rigor to their efforts in that regard. More process, without overly encumbering the system, is a recipe for more integrity in outcomes, which benefits the school and the participants."***

***—Patricia Hamill***

## Due Process

***GREENSPAN:* Nearly every week, colleges and universities are named in news reports for alleged Title IX missteps, such as civil lawsuits, OCR investigations and student-led demonstrations. Certainly this is a big concern for school leadership, and one that, it seems, could be helped by placing more focus on due process.**

***How mindful are schools about providing "objectively fair" due process? Should they be more focused on this, and why?***

**MILLER:** It's my experience and impression that schools are very focused on affording participants in sexual misconduct cases a thorough and fair process. Doing so is important to achieving more thoughtful and well-reasoned outcomes as well as ensuring that the parties come away feeling that they have had a full opportunity to be heard.

**HAMILL:** Whether they like it or not, schools are now in the business of essentially "trying" sexual misconduct allegations. These can

***Although not always the case, I do find there is often a correlation between the extent to which complainants and respondents feel that they have had a full and fair opportunity to be heard and their level of respect for the outcome, even if they do not agree with the outcome.***

***—Will Miller***

be very murky and often complicated situations, involving differing perceptions, oftentimes alcohol, young people and communication or lack thereof, and sexual experimentation, etc. Given the relatively low standard of proof currently used at almost every college or university, and the significant impact a finding of responsibility (or not) can have on the involved students' lives, colleges need to get it right. Schools should absolutely be more focused on "objectively fair" due process and should bring rigor to their efforts in that regard. More process, without overly encumbering the system, is a recipe for more integrity in outcomes, which benefits the school and the participants. More process includes clear notice of what the student is accused of and a robust effort to gather all relevant evidence, both inculpatory and exculpatory; truly unbiased and skilled/experienced decision makers; and a real opportunity for the accused student to challenge the evidence, whether that be through a live hearing process or one that allows students to comment on the evidence as it is gathered and on any conclusions drawn from the evidence.

**BAUGHMAN:** Colleges and universities, in my experience, make every effort to provide a fair process, with procedural safeguards for both parties. While it is true that there are many news reports about one party or the other complaining about processes in which they participated, it is important to keep in mind that, just like in a court process, generally one party will always be dissatisfied with the outcome of the case. Schools are also limited in how they can respond publicly about cases involving their students, so the accounts that are presented in the press frequently are not complete and do not reflect the school's point of view. And while it is very important for colleges and universities to have processes in place that are fundamentally fair to all involved, it is also important to remember that these institutions are not courts of law. The student disciplinary process is an internal administrative proceeding to determine whether the school's standards of conduct were violated, not to decide issues of criminality. That said, I fully agree with Patricia that schools should provide clear notice of what the student is alleged to have done, and should have procedures in place that provide a thorough vetting of the evidence by an unbiased and well-trained decision maker, including giving both parties a full opportunity to rebut the claims presented by the other.

***GREENSPAN:** Do you see a relationship between the objective fairness of schools' due process protections and the level of trust that students have in their schools' programs?*

**MILLER:** Although not always the case, I do find there is often a correlation between the extent to which complainants and respondents feel that they have had a full and fair opportunity to be heard and their level of respect for the outcome, even if they do not agree with the outcome.

**HAMILL:** Honestly, no. First, there is no transparency about these processes and their outcomes, so every accused student assumes the worst – they have only heard or read about the horror stories because that's what gets publicized – the lawsuits that lay bare the worst of the worst. Also, regardless of how much process an accused student may get, it will never feel like enough because it isn't a court of law, even the most robust systems at colleges and universities do not really allow an accused student to confront his or her accuser, there is no ability to compel the production of evidence and a student is not allowed a true advocate in the system and must advocate for him (or her) self, students will likely always mistrust their school's systems. That being said, the more process that is allowed to fairly challenge an accusation – and if a school provides support for responding (accused) students even if they can't afford an attorney/advisor – those students will likely feel less anxiety as they go through the process. It's always going to be traumatic, however. It's very scary given the major consequences that can accompany a finding of responsibility.

**BAUGHMAN:** There are a multitude of factors that go into the trust that students have in their school's processes for resolving sexual misconduct cases, ranging from the policies themselves to those

charged with implementing the policies to the communication from the school regarding sexual misconduct and how the school will address it. It is certainly important for respondents to know that the school will provide them with a fair process, which will give them a fulsome opportunity to rebut the charges, and schools should explain to respondents how that process will work from the outset of the proceeding and provide resources to help them navigate the process. But it is equally true that victims of sexual misconduct will be more reluctant to come forward when the school's process is unnecessarily complex or could subject them to additional, unnecessary trauma. Schools must strike the balance of ensuring a fair process that also encourages reporting and accountability.

***GREENSPAN:*** ***How might a school tailor its rules and procedures to be fairer to the parties, build trust and help reduce legal exposure to due process-related claims?***

**HAMILL:** Simply put, build in as much transparency in the process as possible, provide real notice of the facts underpinning the accusation, pursue evidence, make adverse inferences when a party does not turn over relevant evidence that is known to exist, provide case managers or advocates for responding students at the same levels as for complaining students (who are often supported through the process both emotionally and from an advisory standpoint by the local or on-campus women's center), leave stereotypes at the door and do not chalk up every inconsistency in a complainant's narrative to trauma, which prejudges that an assault has occurred.

**BAUGHMAN:** Schools have come up with a variety of ways to investigate and adjudicate sexual misconduct cases, and there is no one "right" approach. Generally speaking, policies should allow both parties a fair opportunity to explain their positions and respond to and test the position of the other party, and should allow for a thorough evaluation of all the relevant evidence. Schools should follow their published procedures. And schools should be communicative throughout the process and responsive to questions or concerns from either party. Recent cases also counsel in favor of having some articulated method for allowing the decision maker to fully assess the credibility of the parties through an in-person meeting whenever possible.

**MILLER:** Generally speaking, I think the path to building trust in the process is offering both parties an equivalent and meaningful opportunity to present evidence and suggest witnesses and to respond to the accounts and evidence provided by the other party and by witnesses.

## Current Political and Social Climate

***GREENSPAN:*** ***The Department of Education has set forth recent changes in Title IX policy. How would you describe the litigation landscape today for Title IX cases that become court cases? Do you expect Title IX-related litigation to increase, decrease or stay the same as a result of the changes?***

**HAMILL:** First, I have seen little change in how colleges and universities are handling these matters since the 2017 guidance was issued. I do think some aspects of that guidance that outlined specifically what a "fair and equitable" process or investigation would look like are helpful in terms of giving accused students something to point to as they advocate for their rights during an investigative process. I also have seen some schools be slightly more willing to do informal resolutions, but I still think most schools are proceeding lockstep and seem to be afraid to be flexible, for fear, perhaps, that one or the other party will sue. I do not see any abatement in Title IX-related litigation as things currently stand, although perhaps the Department of Education will issue some regulations this fall for notice and comment that may clarify the landscape a bit. I think the current landscape for respondent student Title IX litigation is that courts are more willing than ever to entertain claims from accused students, the appellate courts in the Sixth Circuit have laid out some strong foundations for the importance of cross-examination in Title IX proceedings and, generally, responding students are winning more than they are losing. That being said, these are still tough cases in which to prevail.

**BAUGHMAN:** As to the current regulatory landscape, I think the message from the Department of Education today is that it will provide schools with more flexibility in determining these cases, so long as the process is fair and equitable to both parties. I do not think the Department of Education's guidance will have a significant impact on the litigation landscape, as the Department's guidance on Title IX is not the same as the standard for civil liability in lawsuits. As Patricia and I are often on the other side of each other in these cases, not surprisingly,

I have a slightly different take on the current litigation landscape. As to so-called "reverse" Title IX cases – cases brought by respondents – ultimately the plaintiffs in those cases must prove that the school made the decision to discipline because of the respondent's gender. In my experience, schools don't discipline respondents because they are men, and even if the process is not perfect in every respect, that is not a violation of Title IX. While some decisions have allowed these cases to proceed to discovery, there is not yet much guidance on whether courts will allow them to proceed to trial (in the face of motions for summary judgment). As to litigation brought by complainants, they too must ultimately show that the school's actions were motivated by intentional gender discrimination, by proving the school was "deliberately indifferent" to known, ongoing harassment. Cases are currently working their way through the federal courts as to what actions or inactions by schools constitute "deliberate indifference" and whether a school can be liable for the way it responds to a reported single, past incident of sexual violence. While in either type of case the bar is a high one, I do not see schools' risk of litigation declining unless courts more stringently evaluate these claims at the outset of litigation on motions to dismiss. Student sexual assault cases are highly emotional ones, with high stakes. As someone will always be unhappy with the outcome of the school's process, the school will always be at risk of lawsuits from one side or the other, particularly if courts do not carefully evaluate the merits of those suits at the outset.

***GREENSPAN:*** ***Given the prevalence of sexual assault and harassment highlighted by the #MeToo and #TimesUp movements on a national level, many have identified a systematic failure and complacency among organizational and academic leaders to prevent such instances from occurring. Additionally, reactive policies are apparently falling short of eliminating this previously tolerated or ignored behavior. How can schools be proactive in changing this culture? Please provide any success stories.***

**HAMILL:** Generally, I do think the current generation of college students is much more sensitized to issues of consent, bystander intervention, etc., which is a product of explicit training programs plus peer pressure. I think all of that is a step in the right direction. I am concerned, however, that there is too much of a willingness to have a knee-jerk response at a mere accusation, to shun students who are accused of sexual misconduct without appreciating any nuance to the issues, and that all allegations are treated as equal. I don't mean to minimize anyone's personal experience of assault or harassment – and anyone who feels he or she has been a victim of such conduct absolutely deserves support within the counseling and victim advocacy services available on college campuses – but I do think that care needs to be taken as well in the response to the accused student. ■

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