

Meritas Capability Webinar

Title IX: On Campus & Beyond

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WHAT IS TITLE IX?

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

– Title IX, Education
Amendments of 1972

(20 U.S.C. § 1681(a))

Impact on campus culture!



- Until recently, Title IX was most known for promoting gender equality in athletics.
- No legislative history supports the notion that Title IX was intended to be applied to campus disciplinary proceedings involving claims of sexual harassment and/or sexual violence.

Sex, Sports, and Discrimination



- The cultural environment is different.
- The investigation is not supposed to be biased.
- A student cannot rest on enjoying the presumption of innocence.
- A student must take a more active role in the investigation.
- A student should talk to the school in the vast majority of cases.



Dear Colleague Letter – April 4, 2011 & 2014 Q & A

Addressed sexual harassment and violence in educational programs/activities.

Premised on the belief that student sexual violence is significantly underreported.

Reinterpreted Title IX as giving the federal government authority to dictate the specific procedures that colleges must use to adjudicate student-on-student sexual assault allegations.

- Lowest possible standard of proof, a preponderance of evidence.
- Required to allow accusers to appeal not-responsible findings, a form of double jeopardy.
- Accelerated adjudications, with a recommended 60-day limit.
- Discouraged direct cross-examination of accusers.
- No “mediation” for sexual misconduct cases.
- Off-campus conduct.

**2011 Dear
Colleague
Letter/ 2014
Q & A**

vs.

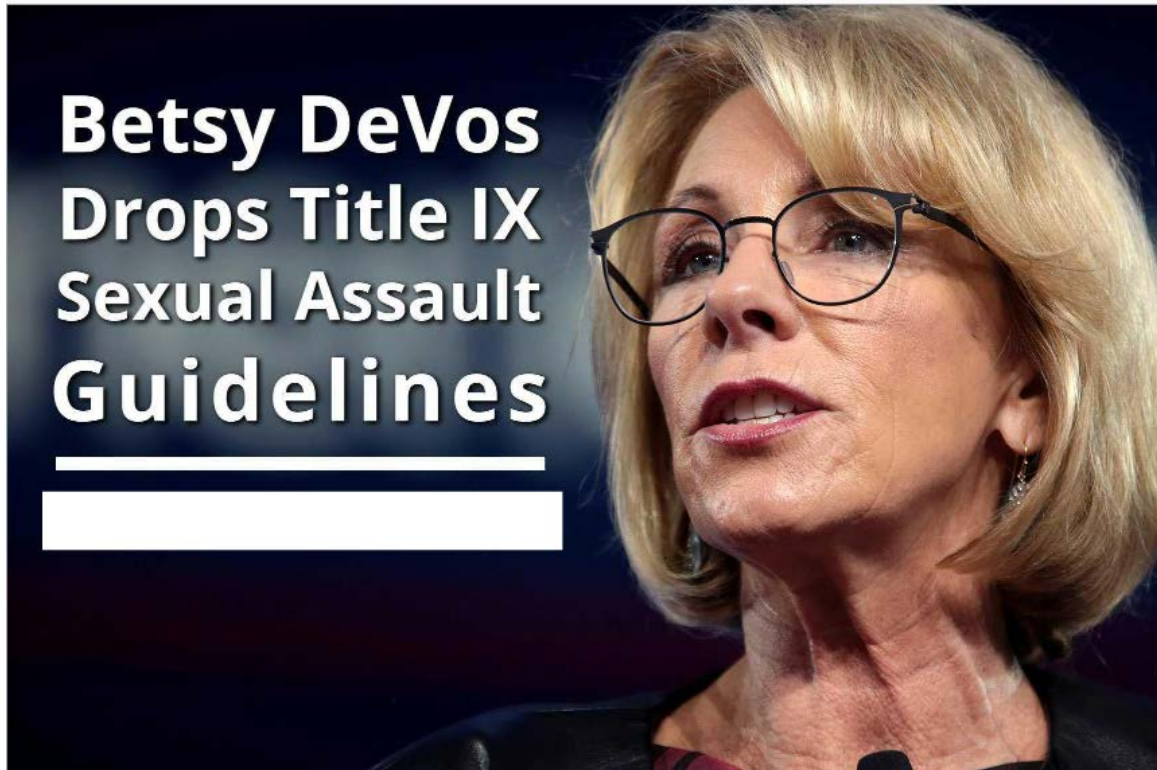
**2017 Dear
Colleague Letter**

vs.

**Rumors of New
2018 Guidance?**

Dear Colleague Letter – September 22, 2017

- Withdraws the statements of policy and guidance in the April 4, 2011 Dear Colleague Letter and 2014 Q & A.
- A step towards greater due process protections for accused?
- Education Secretary Betsy DeVos called the 2011 guidance heavy handed and stated that it pushes colleges “to overreach.”



The New York Times

New 2018 Title IX Guidance?

According to the *New York Times*, the new guidance:

- Instructs schools to cloak accused students with a presumption of innocence until proven in violation of a school's sexual misconduct policy.
- Changes the standard of proof.
- Changes the definition of sexual harassment.
- No longer includes a duty to investigate off campus allegations.



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- (1) Erroneous Outcome;
 - (2) Selective Enforcement/Sexual Harassment;
 - (3) Deliberate Indifference; and
 - (4) Retaliation
 - (5) Archaic Assumptions*



No. 15-1536 (2nd Cir. July 29, 2016)



The famous “mattress girl” case that really brought attention to campus “rape culture”

Victim blaming

Scrutiny of accuser’s appearance/dress/past sexual history

Tolerance of sexual harassment



177 F. Supp. 3d 561 (D. Mass. 2016)

- Judge Saylor goes rogue! One of the first cases to recognize quasi-due process rights in the private school setting.
- Brandeis failed to provide John with basic procedural fairness:
 - Importance of notice of charges beyond recitation of handbook language
 - Recognized right to counsel as a student advisor
 - Recognized importance of cross-examination
 - Recognized right of respondent to examine evidence & witness statements
 - Court took issue with school using a lower standard of proof for sexual misconduct cases than for other misconduct cases.

Doe v. Miami University

No. 17-3396, 2018 WL 797451 (6th Cir. 2018)

- Quintessential “drunken hookup” case
- Found that school discriminated when male & female were intoxicated and hooked up, but school only disciplined one student!



Roe v. University of Cincinnati
Case No. 18-CV-312, S.D. Ohio

- Can two people simultaneously sexually assault each other?



Doe v. Baum

No. 17-2213 (6th Cir. Sept. 7, 2018)

Strongest circuit court opinion in support of the right to cross-examination in campus proceedings.

“If a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses.”

Further support for cross-examination:

[Doe v. University of Cincinnati](#) No. 16-4693 (6th Cir. Sept. 25, 2017)

No. 18-11776 (E.D. Mich. 2018)



- A school must notify the complainant that she/he may file a criminal complaint.
- OCR instructs schools to conduct their own investigation even if a criminal investigation is pending or concludes with no arrest.
- Respondent's decision not to submit to an interview undoubtedly impacts the outcome!



John Doe v. Kenyon College, U.S.D.C., Southern District of Ohio

- Jane Roe filed a sexual misconduct complaint against John. The alleged incident took place about 18 months prior to Jane's complaint.
- 2 weeks before John's graduation, Jane Roe 2 filed a report against John. Even though Jane Roe 2 did not want her report investigated, Kenyon decided to investigate anyway.
- Kenyon extended the investigation timeline and it was not anticipated to be completed until the day before commencement, which would effectively preclude John from availing himself of an appeal (if necessary) prior to his graduation date. Kenyon advised John he would not receive his degree or be permitted to participate in commencement if he were found responsible.
- Suit filed to facilitate John's participation in graduation ceremonies.

John Doe v. College of Charleston, et al., U.S.D.C., District of South Carolina

- Jane Doe alleged John sexually assaulted her.
- She first approached John's fraternity leadership about the alleged assault and demanded John resign his membership.
- One month later, Jane filed a police report with the local police department. Following their investigation, law enforcement notified Jane that there was insufficient evidence to proceed with prosecution.
- Thereafter, Jane filed a Title IX complaint against John. John demanded on at least 2 occasions that the investigation cease due to the P.D. finding of insufficient evidence and a lack of probable cause.
- John subsequently filed suit against CofC and Jane. CofC settled.

Jane Roe filed a Title IX complaint against John Doe alleging John laced a marijuana cigarette and that she was too intoxicated to consent to sexual activity with John.

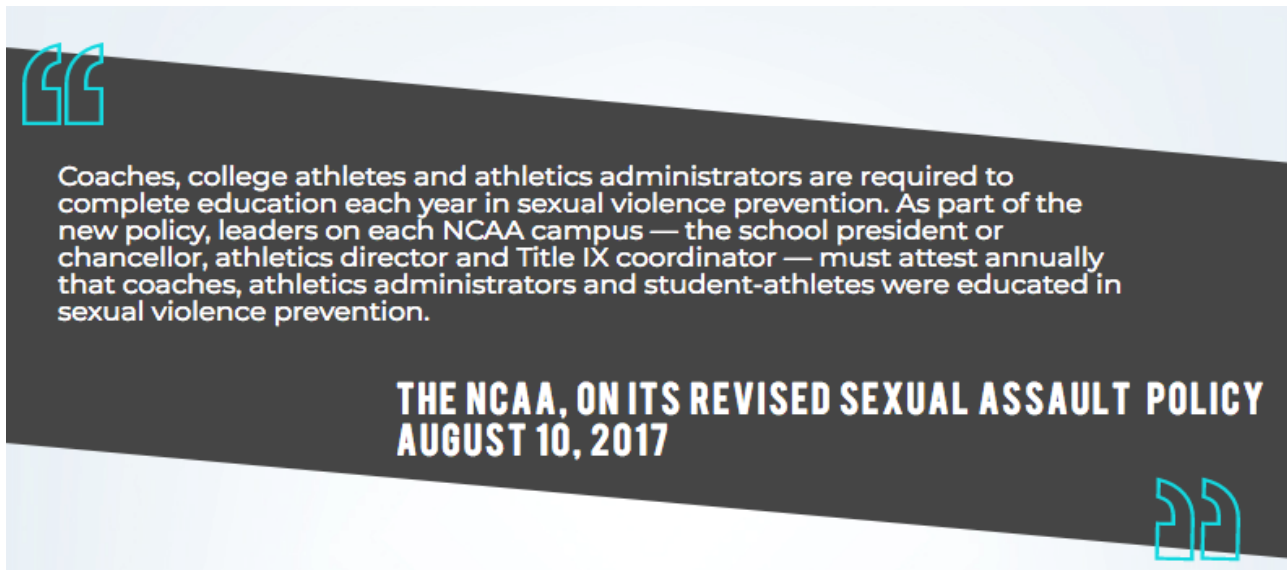
An investigation commenced and a hearing panel convened. The panel concluded that John did not lace the marijuana cigarette and that she was not too intoxicated to consent to sexual activity. However, the panel also found John had not obtained or maintained effective consent for the entire sexual encounter. John was suspended for 2 years.

Almost 2 years later, Jane retained an attorney in an attempt to obtain money from John. The attorney threatened to report the matter to law enforcement if John did not pay Jane a financial settlement and that a potential civil lawsuit could ruin his reputation.



- 2017 Sexual Violence Policy

- Coaches, athletes & administrators are required to complete education on sexual violence prevention





- Cannot compete in the SEC if convicted of or pled guilty or no contest to a crime included in the SEC’s definition of “serious misconduct”.
- Pertains to transfer students and high school players.
- Serious misconduct includes sexual assault, domestic violence, other forms of sexual violence, dating violence or stalking, or conduct of a nature that creates a serious concern about the safety of others.
- NCAA considering adopting the transfer rule used by the SEC conference

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- Clause in Meyer's employment contract that requires him to promptly report "any known violations of Ohio State's Sexual Misconduct Policy," which "would include 'sexual harassment, sexual assault, sexual exploitation, intimate violence and stalking' involving any student, faculty or staff or that is in connection with a university sponsored activity or event. According to the contract, a 'known violation' means one that the coach is aware of or has 'reasonable cause to believe is taking place or may have taken place.'"
 - There was an independent investigation that led to a 3 game suspension.



- As part of due diligence in mergers and acquisitions, some investment firms are asking sellers to supply an additional guarantee that top executives haven't been accused of or entered into settlements for past sexual harassment or misconduct.
- Some clauses require an indemnification should a later scandal emerge that requires a legal defense or large output of money to manage a scandal.



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