

# THE CHRONICLE

of Higher Education®



## Providing fairness and neutrality for campus sexual-assault cases

**E**IGHTEEN months ago, Education Secretary Betsy DeVos announced her department's intent to revise Obama-era sexual assault guidelines, citing "failed" guidance on campus sexual assault cases that diminished due process and did a disservice to the accuser and accused alike. While the new regulations may not be made official for months, higher education administrators are busy determining how the proposed revisions will affect policies and procedures related to Title IX, the law designed to protect students from sexual harassment, sexual violence, or any form of gender-based discrimination.

### *The urgent need for a "neutral" solution, now*

Some state courts are not waiting for the latest Education Department regulations to take effect, however, and are very clearly establishing the need to change the single-investigator model used by most colleges and universities in Title IX matters, as well as the adjudicative strategy incorporating internal panels to decide whether a student violated code.

JAMS officials point to a recent California appellate case, *Doe v. Allee*, as a prime example. Decided in January 2019, the case states that when "a student accused of

sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses ... 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 ... before a neutral adjudicator with the power independently to find facts and make credibility assessments." [Emphasis added.]

Now that *Allee* is law in California, administrators at colleges and universities in that state and beyond are swiftly reassessing their policies and procedures to protect both their students and institutions.

### *An experienced neutral organization*

After the 2011 "Dear Colleague" letter, some colleges and universities turned to outside parties to adjudicate their Title IX cases, preferring seasoned professionals over in-house panels of faculty members and investigators. At that time JAMS began adjudicating Title IX cases alongside the usual commercial cases that compose most of the organization's workload.

JAMS is the largest private provider of alternative dispute resolution (ADR) in the world. Though known over its 40 years as

a premier mediation and arbitration services provider, the organization also provides colleges and universities with retired federal and state court judges and experienced attorneys trained in Title IX issues to serve as adjudicators, hearing officers, external reviewers, facilitators, mediators, and any other unbiased role a campus may find they need for dispute resolution.

With reports of assault and harassment in higher education making headlines in the last few years, neutrality in these complex, highly emotional cases is crucial, says Kimberly Taylor, JAMS senior vice president and chief legal officer. "Colleges and universities have come under scrutiny for how they've handled these matters internally, but we have been doing this day in and day out," Taylor says. "We offer solutions to help them focus on education, as opposed to being decision makers in these cases." JAMS assists schools with formal and informal resolution of Title IX matters. Formal resolution typically consists of a disciplinary hearing where, upon following school policies and procedures, a JAMS neutral conducts a session, determines whether prohibited conduct occurred, and advances applicable sanctions. Neutral JAMS professionals are also engaged in formal appellate review of Title IX adjudications.

Under current guidance from the U.S. Department of Education, colleges and universities also are able to propose informal mediation and facilitation to the parties in certain circumstances. This process can feature a managed session by a professional, neutral mediator. JAMS resolves thousands of cases annually through mediation—many of them traumatic and often intense—and is uniquely qualified to assist in such circumstances. “There could be an apology issued, or acknowledgement of a school-policy violation, or an opportunity to air grievances without a formal resolution,” says Taylor. “Some complainants may not want a hearing, or have to go through the stress of formally testifying.” Mediation also provides an opportunity for both parties to help determine how a particular matter could be best addressed.

### *Avoiding pitfalls while building trust*

Colleges and universities need professionals well-versed in due process, and there’s nobody better than a retired judge or a neutral attorney in understanding those protections, say JAMS officials. Though an institution’s Title IX proceedings are typically different from a courtroom, they are no doubt bolstered by a neutral’s decades of experience.

“It’s less formal, for sure—there’s no judge with a gavel sitting on a bench,” says Taylor. “But the process is made better because you have a completely objective former judge or attorney following the school’s policies and the law. This builds trust in an institution’s Title IX program—not only for the complainant and respondent, but also third parties.” Poor publicity, diversion of resources and even lost donations are just a few consequences stemming from mishandled Title IX matters, says Taylor. Institutions may have good intentions in adjudicating or mediating complicated cases themselves, but the dangers of doing so are too prominent to ignore.

“We have experts who can discuss a school’s challenges, and help identify resources that work best for them,” Taylor says. “It’s a question of ensuring that colleges and universities are aware there’s another alternative, rather than trying to manage on their own.”

*JAMS Solutions for Higher Education resulted from a crucial need for neutral third parties to help address sensitive issues that are a reality on campuses throughout the nation.*

*The program is focused on providing neutral services unique to higher education, including Title IX adjudications and appeals, faculty and administration dispute prevention and resolution, and investigation services, as well as other solutions to problems affecting colleges and universities.*

*JAMS Solutions can be adopted in whole or in part, independent from or in conjunction with pre-established institutional policies and procedures. Schools are assigned a dedicated administrative contact to ensure that requests are accommodated efficiently.*

*To engage JAMS Solutions, please contact us at [Solutions@jamsadr.com](mailto:Solutions@jamsadr.com)*



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