Title IX, Equality & the Greeks
How Court Cases & Regulatory Mandates Will Shape the Future of Fraternity/Sorority Life

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OVERVIEW

• Title IX applies to host institutions of higher education—with increasingly significant implications for fraternity/sorority life.
  • Longstanding practice of accepting same sex organizations as permitted by Title IX now under stress despite prior legislative compromises.
• Title IX regulatory enforcement efforts and related litigation trends have the potential to alter the roles of campus professionals interacting with fraternity/sorority life.
• Look for potential impacts in funding and institutional arrangements, such as relationship agreements and redesigned internal dispute resolution and RSO self-governance models.
• Major new developments we will discuss:
  • potential new Title IX regulations
  • a recent case at LSU alleging selective enforcement of hazing laws as a form of sex discrimination
  • the controversy at Harvard over Finals Clubs
  • Title IX litigation trends involving IHE’s

Proposed New Title IX Regulations

• Off-campus incidents?
• Due process?
• Direct cross-examination?
• Change in the definition of harassment?
• Single Investigator?
• Mediators and Neutrals (JAMS)?
• Advocacy?
• Fee shifting?

*How could these proposed regulations impact Greek life?*
Title IX Updates: Proposed New Regs

• NOTABLE COMMENT: Jerry Falwell letter to Dept. of Education/Betsy DeVos

• RECORD SETTING COMMENTS: Notice and Comment Period—Over 100,000 comments

• GAME OF THRONES: Fate of regulations, whenever and however they drop, uncertain—likely to be tested in court, may face Congressional response.

• REGULATIONS IMPLY FUTURE NEW GUIDANCE: No new guidance, although we might expect to receive some related to new regulations when finalized. Technically, 2017 guidance still operative.
  • President Trump signs executive orders on legal impact of “guidance” from administrative agencies.

• RETREAT OR FORWARD ASSAULT: Enforcement efforts have not been as numerous or comprehensive; but watch for the potential for enforcement of existing regulations against IHE’s. Notably Clery Act and Safe and Drug Free Schools and Communities Act enforcement.
  • In Sept. 2019, the U.S. Dept. of Education levied an unprecedented $4.5 million Clery Act fine against Michigan State Univ. after an investigation of the Nasser sexual abuse crimes.

Title IX Updates Continued

• Congress—Reauthorization of Higher Ed Act/expanding LBGTQ rights?

• 2020 Campaign— President Trump and several Democratic Contenders.
  • Example: Joe Biden (VAWA) (prominent in 2011 Title IX regulatory drop, inter alia)
  • Gun violence in schools etc./Cost and affordability/K-12 vs. Title IX issues (Which issues will dominate national debate? How prominent will safety issues become in light of other political issues?)

• “Close the Frats” and other “characterizations” of IHE’s—the blame game

• Courts and the litigation explosion (More to come...Sixth Circuit/California Appellate Court, etc.)

• STATE LEGISLATION—Tennessee Free Speech Bill Section 7 (Definitions of sexual harassment and hostile environment); Texas Senate Bill 212 (takes effect on 1/1/20 and has specific Title IX reporting requirements for employees— employees can be terminated for failing to report a Title IX-related incident)

• #MeToo and similar/related movements:: Watch for broader connections with social justice issues.

• Single sex organizations and the 21st Century...
New Research on Sexual Predation and Prevalence

• Serial sexual predation: “More than 87% of alcohol-involved sexual assault was committed by serial perpetrators. Fraternity men and student athletes were significantly more likely to commit alcohol-involved sexual assault than other men on campus.”
  

• Prevalence: “One in four” statistic was affirmed by the most recent Association of American Universities survey (October 15, 2019)
  
  • Rate of nonconsensual sexual contact by physical force or inability to consent was 26.4% for undergraduate women, 10.8% for graduate and professional women, and 6.9% for undergraduate men (all stats are slightly higher than 2015 survey results)

Litigation Explosion Against Host Institutions

Why so many court cases against colleges? Lessons learned...

• “Ambush”
• Inconsistency of Internal Results
• Bias and Fairness
• State law mandates
• Following Policies?
• Overly Legalistic Policies and Procedures
• Relationship to Criminal Justice
• Loss of Trust—Authenticity and Transparency (Mission Rectification)
• War Chests
Litigation Explosion—Causes for Litigation Continued

• Public perceptions regarding major scandals
• Red, Blue and Purple congruences
• Weak emphasis on prevention and ERM
• Challenges in governance models and corporate leadership
• Changes in consumer expectations; Gen Z, “Alma Mater” In Loco Parentis, and the persistence of family imagery and reluctance to embrace business imagery
• Choices to adopt legalistic models for managing education environments; poverty of imagination in dispute resolution
• Lawyers as leaders: need for new legal services and new approaches to managing conflict

Some Notable Recent Title IX Cases

Doe v. Univ. of Cincinnati

• 6th Circuit, September 2017 (decided after and relied upon 2017 interim guidance)
• Cross-examination
• “The Due Process Clause guarantees fundamental fairness to state university students facing long-term exclusion from the educational process. Here, the University’s disciplinary committee necessarily made a credibility determination in finding John Doe responsible for sexually assaulting Jane Roe given the exclusively “he said/she said” nature of the case. Defendants’ failure to provide any form of confrontation of the accuser made the proceeding against John Doe fundamentally unfair.”
Some Notable Recent Title IX Cases

Doe v. Baum, No. 17-2213 (6th Cir. 2018)
- Cross-Examination
- Univ. of Michigan
- “If a public university has to choose between competing narratives to resolve a case, it must give the accused student an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.”

Some Notable Recent Title IX Cases

Haidak v. Univ. of Massachusetts Amherst et al. (1st Cir. 2019)
- Male student accused of sexual misconduct on a study abroad trip. Haidak was ultimately expelled.
- Plaintiff argued that his due process rights were violated because he was not afforded the opportunity to directly challenge the complainant’s allegations via cross-examination. He also argued that his Title IX rights were violated because the process was biased against him.
- “[W]e have no reason to believe that questioning of a complaining witness by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation. We also take seriously the admonition that student disciplinary proceedings need not mirror common law trials. . . . If we were to insist on a right to party-conducted cross-examination, it would be a short slide to insist on the participation of counsel able to conduct such examination, and at that point the mandated mimicry of a jury-waived trial would be near complete.”
- Conflicts with 6th Circuit court decisions and proposed Title IX guidance from the Dept. of Education.
Some Notable Recent Title IX Cases


• Cross-Examination
• Student at the University of Southern California was expelled after an allegation of sexual misconduct.
• “We hold that when a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of that 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.”
  Presiding Judge Thomas Willhite

Some Notable Recent Title IX Cases

John Doe v. Purdue University, et al. (June 2019)

• U.S. Court of Appeals, 7th Circuit
• Purdue student was suspended for a year and expelled from the Navy ROTC program after an allegation of sexual misconduct. This prevented Doe from receiving his scholarship and prevented him from pursuing a career in the Navy.
• He brought claims against Purdue under both the Fourteenth Amendment (due process) and Title IX (gender discrimination).
• Doe alleged, among other things, he was not able to view the evidence against him, not able to cross examine the complainant, not able to present exculpatory evidence, and that two out of the three hearing panel members had not read the investigative report.
• The Court of Appeals determined that Doe did have a protected property interest and, viewing the allegations favorably to Doe, that Doe raised issues as to whether campus used a fundamentally unfair process (allegedly Doe was denied seeing the evidence against him, panel members relied on accusations rather than the evidence, and the complainant was found to be more credible than Doe without ever being interviewed). Doe pointed to a Washington Post article “Alcohol Isn’t the Cause of Sexual Assault. Men Are” that was posted on a university website as evidence that he was discriminated against based on his gender as well.
Some Notable Recent Title IX Cases

Fogel v. Univ. of the Arts, et al, E.D. Pa., 2019

- Erroneous Outcome
- Professor claims he was “terminated without a hearing after a biased investigation based on allegations that he greeted one colleague at a meeting with a kiss and mistakenly gave another a hotel room key instead of a business card.” Colleen Flaherty, A Male Professor, Wronged by Title IX?, Inside Higher Ed (April 4, 2019).
- “Professor Fogel sues the University for violating Title IX under an ‘erroneous outcome’ theory.”
- “[P]laintiffs claiming a Title IX violation under an ‘erroneous outcome’ theory ‘must allege particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding.’ But the plaintiff must allege more than an erroneous outcome. To survive a motion to dismiss, the plaintiff must also allege ‘particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding.’”
- Judge denied the university’s motion to dismiss.

SCOTUS Cases Pertaining to LGBTQ Rights: Title VII

Three employment cases currently before the U.S. Supreme Court

- Zarda and Bostock cases alleges employment termination due to sexual orientation
- Stephens involves a transgender woman who experienced an adverse employment outcome after coming out as transitioning
- In all three cases, plaintiffs argue that their firing was a violation of their civil rights.
- Court will potentially decide the meaning of “sex” for purposes of sex discrimination, resolving disputes in the lower federal courts
- Cases raise Title VII issues and may have future implications for Title IX
- Will SCOTUS follow the 2nd Circuit in Zarda?
  - “Because one cannot fully define a person’s sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person’s sex and the sex of those to whom he or she is attracted. Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.”
Harvard Finals Clubs

- Harvard sought to penalize same-sex sororities, fraternities and finals clubs in 2016
  - Harvard severed ties with Finals Club groups in the 1980s because of their refusal to admit women. Since that time, few all-women groups were formed.
  - Surveys suggested clubs were linked to higher prevalence of sexual misconduct.
- Harvard was sued twice in different venues in 2018
- Plaintiffs claim banning these clubs is a violation of Title IX and associational rights. Some say women’s groups will be disproportionately affected.
- Now, the College will penalize extracurricular groups who have leaders associated with any Unrecognized Single-Gender Social Organization (USGSO). Newly enacted campus policy bans undergraduate members of any single-gender social clubs from holding RSO leadership position or capturing an athletic team.
  - “Student Organizations who are found to have elected a member of a USGSO to a leadership position will be put through the Student Organization Discipline process and that student will be removed from the leadership position.”

Hazing Death of Max Gruver at LSU

- 2017 death of an 18-year pledge after hazing involving alcohol
- Phi Delta Theta fraternity (now banned from LSU until 2033)
- Ten fraternity members were charged criminally
- Parents of decedent brought a Title IX claim against LSU
- Parents allege that LSU did not treat hazing as aggressively with the fraternities as it did with the sororities
- Title IX suit survived the motion to dismiss in July 2019
- Watch the Title IX case carefully....
Hazing Death of Max Gruver at LSU Continued

• “Gruver’s parents filed a lawsuit in federal court Thursday alleging that the university’s failure to stop the hazing was ‘driven by a broken model of self-governance and outdated gender stereotypes about young men engaging in masculine rites of passage,’ which violates Title IX of the Education Amendments of 1972...” Jeremy Bauer-Wolf, Family of Dead Pledge Sues LSU, Inside Higher Ed (Aug. 17, 2018).

• “The family alleges that the university treats hazing rituals among fraternities less seriously than it does those among sororities.”

• Family is suing for $25 million in damages.

• See connections with strengthening anti-hazing laws generally...

Hazing

• Not just a fraternity issue (Robert Champion incident) but narratives persist that depict hazing as a Greek male phenomena.

• Anti-hazing laws (no specific federal law...yet?) → Role of consent and assumption of risk

• Increasing criminal penalties for hazing in some states

• Hazing defined:

  MASS. GEN. LAWS ch. 269, § 17 (2002) defines hazing as “any conduct or method of initiation into any student organization . . . which willfully or recklessly endangers the physical or mental health of any student or other person” and removes consent as a defense to prosecution.

  Florida Hazing Law...
Title IX Litigation Takeaways

- **Due process/Contract rights for respondents**
  - After the Dear Colleague Letter: Developing Enhanced Due Process Protections for Title IX Sexual Assault Cases at Public Institutions by Jim Newberry & William E. Thro
  - Title IX developments may push IHEs to create a singular college court for Title IX and develop mediation strategies. This may compete with independent self governance models for RSOs and even unrecognized groups. IHE’s may move to reduce risk and may be influenced by narratives about sexual violence. Will the next cases be Greek v. IHEs claiming Title IX violations??
- Still no definitive SCOTUS rulings, although critical Title VII rulings may come soon...
- Title IX gender inequity claims by respondents generally fail—so far, but...
- New SCOTUS dynamics: *Chevron and the regulatory state*
- Hyper-legalization of dispute resolution processes and college court
- Insurance issues!!!!!
- Men’s rights issues, especially equity and fairness claims: “Close the Frats” and “forced” membership
- Fights over RSO’s, contractors, externships etc.—the “penumbra” of Title IX
Preparing for What Lies Ahead...

- Expect dynamism as Title IX develops. Tensions between Congress, courts, chief executive and federal regulators, and the states.
- False or misleading narratives must be addressed head on.
- Loss of academic freedom may translate into attacks on freedoms of Greeks: Beware of defamation.
- Must prepare and be prepared for multiple contingencies: Consider various legal and political scenarios.
- Business realities: Higher education as neither family, government nor charity but business/Role of Greeks in a symbiotic business relationship often out-competing host institutions in delivering hospitality services.
- Evaluate consumer preferences for single sex education experiences.
- Political and legal battles continue to focus on grievance procedures and sanctioning issues while actual Title IX activity increasingly focuses on interim measures and remedies—and especially no-contact arrangements—and mediation.

Preparing for What Lies Ahead... Continued

- Training is more imperative than ever, as is continuing education.
- Budget for disruption and dynamism: May need new staff, new training in new, additional services, including counseling and counsel.
- Authenticity and transparency vs. FERPA.
- The future lies with prevention, pro-vention, and science-based intervention strategies.
- Intersectionality/Multidimensionality will rise/Social justice advocacy in many forms including men’s rights issues.
- Know your host: “Edu-pocalypse”? Declining enrollments, business and legal pressures of all sorts; loss of trust in the industry; business models under stress; “referees” and loss of internal control, etc.
Questions & Answers