

TITLE

IX TODAY

Helping colleges, universities
& schools ensure gender equity

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ABOUT US

The NCHERM Group, LLC., a law and consulting firm offering systems-levels solutions to create safer campuses, and the Association of Title IX Administrators, which provides networking and professional development for Title IX coordinators, publish *Title IX Today*, its companion website, www.TitleIX.Today, and subscriber e-newsletter.

THE LEAD | TITLE IX ADMINISTRATION

Gain allies, collaborators across campus using a grassroots strategy

By Courtney H. Bullard, J.D.

Difficult, stressful, confusing, overwhelming, and never-ending: I have heard all of these words used by campus practitioners in describing the task of achieving Title IX compliance, and they are right. However, I have learned that while compliance efforts can often be all of these things, they do not have to be. Grassroots initiatives can be simple but effective for moving towards the goal of campus compliance and, ultimately, campus safety.

Campaign season inspired me to conduct a bit of research into the various definitions of grassroots movements or campaigns. In essence, grassroots efforts are a bottom-up, rather than a top-down approach. They are considered to be more organic, incorporating a variety of strategies that include simply starting a conversation with constituents on issues about which they care. While it's my belief that colleges and universities must prioritize Title IX compliance from the top downward to reach a compliance mindset, a grassroots strategy can be

very useful in terms of getting key individuals across an institution to take ownership of creating a more equitable campus environment.

So just how do you launch a grassroots strategy? First, identify your potential allies. Find those

'...a grassroots strategy can be very useful in terms of getting key individuals across an institution to take ownership of creating a more equitable campus environment.'

— Bullard

individuals on your campus whose compliance-based work or roles may intersect with your own in ways they may not realize or that may not be so easily apparent to you. Set up a lunch, coffee, or office meeting with no pre-set agenda, just

to talk. The purpose of this meeting should be two-fold. First, get to know those colleagues and their departmental needs and struggles. Remember, people do not care what you know until they know that you care. Second, share your message: educate them about your role, the functions of your office, your Title IX processes, current and planned compliance efforts, and where their departments, roles, and/or interests may intersect with those your own efforts.

When seeking out whom you

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FROM THE FIELD | HOSTILE ENVIRONMENTS

A group of female victims sues UT over culture of permissiveness

By Cynthia Gomez, Editor

When institutions fail to adequately address known sexual misconduct, deliberate indifference lawsuits can ensue. But when institutions fail to do so repeatedly with different reporting parties, their risk of legal liability rises exponentially. In *Jane Doe v. University of Tennessee*, a group of women, identified as Jane Does in court documents, claim that while they were students at the University of Tennessee, they were sexually assaulted by male members of the basketball or football teams, or others affiliated with the teams, and that the school treated them unfairly during the ensuing proceedings.

Their complaint further alleges that the university had actual knowledge of a pattern of sexual misconduct by male student-athletes, was indifferent to it, and fostered a hostile environment that left females vulnerable to assault. According to the complaint, university officials, and particularly those within the athletics department, knew of assaults going back as far as 1995; tried to cover up the incidents or failed to report them to and work with police and relevant administrators; and failed to

implement an appropriate response.

The plaintiffs also allege that the university's response subjected them to further discrimination. For one, its procedures favored giving responding parties but not reporting parties the right of confrontation, cross-examination, and to an evidentiary hearing, they claimed. UT also interfered with and stopped the disciplinary process, concealed charges and investigations, and arranged for specialized counsel for those facing charges, creating a culture of tolerance and protection for male athletes. Not only did the university tolerate misconduct, but also fostered it, according to the plaintiffs, by encouraging parties where recruits could engage in underage drinking and allowing the football team to adopt an anthem by a rapper whose music contains lyrics and images condoning coercion and rape culture.

Doe I's "before" claim, for compensatory damages arising from her sexual assault, was dismissed without prejudice. The "before" claims of Does II-IV and VI-VIII were allowed to proceed, as was Doe V's retaliation claim and the plaintiffs' claim for injunctive relief. ♦

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want to meet with, do not just hit the easy targets — those who regularly cooperate and collaborate and who you know “get it.” Instead, start with those who might express ambivalence about Title IX compliance, or who care about gender equity but don’t really understand Title IX or the work of your office, and even those folks who tend to think that compliance is just not their problem. Who are the folks you would need to win over if your office’s initiatives were facing a vote? Maybe these are faculty or staff members who have expressed irritation over policy changes related to Title IX, have demonstrated reluctance about participating in mandated training, or have pushed back on interim remedies in the past.

As you identify colleagues, also consider those who work in high-risk areas, such as athletics, housing, international programs, Greek life, and other areas of campus from which you may get a lot of traffic. These individuals do not have to be a department Dean or Vice President. Often, the important work gets done through mid- or even lower-level administrators and staff. These folks can also influence decision-makers above them, so it’s important to get them on your team.

I am not suggesting that you attempt to meet with everyone on campus. I know that your plate is already full between managing ongoing cases and leading compliance efforts. Start with perhaps five people over the course of two months. Meeting with small groups can work well, but I have found one-on-one meetings to be most valuable in gaining trust, working out differences, and moving towards cooperation.

A face-to-face scheduled but casual conversation with identified

individuals outside of situations to which they may bring a negative attitude (such as when being asked to help implement an interim remedy for a reporting party in a Title IX-related case), could go a long way towards advancing compliance efforts for your campus. While it’s important that these colleagues see you as genuine in your attempts to understand where they are coming from and to identify and collaborate on mutual goals, think like a politician: know what you hope to get from them and strategize how you’ll approach the subject in a way that will be most likely to resonate.

Finally, as you make your rounds on the Title IX “campaign trail,” adopt a Nancy Drew mentality. Take note of things going on around campus that could be helpful to your own efforts, such as trainings, awareness programs, or collaborations on issues related to Title IX. As you learn about these efforts, record information about them in an easily accessible location, because if your campus finds itself in a federal investigation, the Office for Civil Rights may want to know about everything your institution is doing in the area of Title IX compliance. Having this handy will save you a lot of time and energy.

Title IX administrators tend to have a whole lot on their plates, making compliance a daunting undertaking. The key is to avoid trying to eat the apple whole. Do a little bit at a time, and amplify your office’s work by slowly accumulating allies throughout the entire institution. Remember, a grassroots campaign starts small, but momentum will build and the impact on campus compliance and safety will be much bigger than a single person or office could ever achieve alone. ♦



COURTNEY H. BULLARD, J.D.

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KEY TAKEAWAYS

- » A grassroots campaign can help you find helpful allies throughout campus and ultimately create a more equitable campus culture.
- » Identify key individuals throughout campus whose work or interests may intersect with your own in the area of gender equity, as well as those who could be helpful allies but may not yet understand the importance of what you do.
- » Meet with these individuals to talk about shared interests and goals, and how you may be able to be of assistance to them. ♦



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KEY TAKEAWAYS

- » Title IX creates a jurisdictional floor for what kinds of incidents institutions must investigate and address. But schools do not have to stop there.
- » Vet all allegations initially to determine whether both the harasser and context of the harassment are under the institution's control. Clearly document whether an incident is covered under Title IX or not.
- » Off-campus, non-programmatic misconduct on its own does not create a hostile environment under Title IX. However, off-campus conduct could contribute to a hostile environment if there are downstream effects or actions on-campus or in a program or activity controlled by the institution. ♦

Lack of obligatory jurisdiction doesn't mean you can't take discretionary jurisdiction

By Daniel C. Swinton, J.D., Ed.D.

One of the most frequent questions I receive from clients and trainees is whether Title IX applies to off-campus behavior. This is a widely misunderstood issue, though for good reason: the answer is nuanced, technical, and many training programs get it wrong. Throughout this article, I will use the example of an institution that has received a report of a student-on-student sexual assault at an off-campus apartment following a non-university-sponsored gathering. In such a situation, Title IX does not apply to the alleged incident. However, I do not want anyone to think that the allegations should not be subject to the institution's resolution process or that the institution should not address the allegation as it would a report that is covered by Title IX. I mean only that the incident does not meet the legal or regulatory standard that *requires* application of Title IX because it is an off-campus, non-university-sponsored activity.

Key to this discussion is the distinction between obligatory and discretionary jurisdiction. Federal laws, including Title IX and VAWA Section 304, may obligate an institution to take jurisdiction over various forms of sexual misconduct. Where those laws do not create obligation, the institution has discretion to determine whether to exercise jurisdiction over the incident voluntarily. Most institutions do so (with the exception of some community colleges, when an on-campus/off-campus bright-line distinction can still often be found). Voluntarily taking jurisdiction when it is not obligated does not subject the institution to the

mandates of Title IX or VAWA, though we may treat the incident identically to one where those laws did apply.

In *Davis v. Monroe County Board of Education*, the U.S. Supreme Court applied a two-part rubric as a litmus test to determine whether Title IX applies and thereby requires an institutional response: when the institution has control over *both* the harasser *and* control over the context of the harassment. If both elements are not present, Title IX does not apply, though an institution may use its discretion to investigate and address the behavior.

In its 2011 Guidance, the Office for Civil Rights stated that, "Title IX protects students in connection with all the academic, educational, extracurricular, athletic, and other programs of the school, whether those programs take place in a school's facilities, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere. For example, Title IX protects a student who is sexually assaulted by a fellow student during a school-sponsored field trip." The reason for this is that on a school-sponsored field trip, the school controls both the harasser and the context of the harassment, which is occurring within a federally funded educational program.

In the example provided earlier, the institution may exert a degree of control over the alleged harasser because that person is a student who may be subject to institutional policies; however, it does not control the context within which the alleged incident occurred. Accordingly, it cannot be liable in court under Title IX for the alleged incident. Title IX is also not directly applicable

to this situation, though a failure to address it appropriately could result in an on-campus hostile environment that would be a Title IX issue.

To declare that Title IX applies to the incident implies that the institution had some authority or control over the situation, assuming unnecessary liability for a duty it does not have. That's not a good idea. However, the institution should take reasonable steps to prevent the hostile environment from transferring to on-campus or to its education programs or activities. In other words, the institution bears some responsibility to keep the situation from escalating into a Title IX issue in the context it controls. Addressing the on-campus downstream programmatic effects of an off-campus assault does not require taking jurisdiction over the assault itself, though taking jurisdiction over the underlying incident may be the most effective way to ensure a hostile environment is not created or perpetuated on-campus.

This is why we prefer policies on sexual misconduct, rather than "Title IX" policies. That title is too narrow given the additional applicability of VAWA Section 304, but it also implies that Title IX applies, whereas you can take discretionary jurisdiction over an incident via a sexual misconduct policy while still explicitly noting that you do not believe Title IX is applicable to a particular incident. Document in all investigations whether you believe the behavior is or is not covered by Title IX.

The incident described earlier occurred off-campus and is not part of the school's education programs or activities. Title IX does not protect students here, though it does provide protections against possible downstream effects, which can be addressed through a number of means, including investigating and addressing the allegations or offering remedies. Indeed,

Title IX may necessitate a response if the hostile environment from off-campus conduct transfers to the campus, but this is not always the case. Additionally, institutions should offer remedies that help ensure that a hostile environment is not created. The 2011 Dear Colleague Letter supports this.

The key issue is that the harassment must transfer on-campus in some additional manner. Absent continued hostile environment harassment on-campus (not just the possibility of such), Title IX does not *require* off-campus reach. Initially, we won't know if there are downstream programmatic effects to off-campus misconduct unless we investigate to determine that, and we should do so when given notice.

OCR states: "Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus." This makes sense when you recall that both OCR and the courts ask us to consider the "totality of the circumstances" when evaluating whether a hostile environment exists.

In its 2014 Q&A, OCR reinforced this, stating that, "Once a school is on notice of off-campus sexual violence against a student, it must assess whether there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment and, if so, address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct." Accordingly, off-campus, non-programmatic conduct on its own does not create a hostile environment under Title IX. Off-campus conduct could contribute to a hostile environment if there are

downstream effects or actions on-campus or in a program or activity controlled by the institution.

OCR's 2014 Q&A on Title IX and Sexual Violence summarizes the situation nicely, by indicating that under Title IX an institution must investigate all complaints in order to determine whether Title IX is implicated. OCR also added that, "Even if the misconduct did not occur in the context of an education program or activity, a school must consider the effects of the off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity because students often experience the continuing effects of off-campus sexual violence while at school or in an off-campus education program or activity."

Title IX requires determining whether the incident occurred within its educational programs or activities. This is one of the purposes of the preliminary inquiry, our so-called, "small i" investigation. If it did not, Title IX does not apply, though the institution may (and often should but not must) continue the investigation, provide appropriate remedies, and use its sexual misconduct resolution process. Since we wind up taking jurisdiction over almost all student-on-student sexual assaults, why is the discussion in this article necessary at all? If we treat a situation as covered by Title IX, the courts are likely to hold us to that, even if our lawyers later want to make the argument that, strictly speaking, the allegation was addressed outside of the mandates of Title IX. You can continue to resolve misconduct allegations exactly the way you do now. We're just suggesting an initial step of vetting the allegation to determine whether the institution controls both the harasser *and* the context of the harassment. ♦



JUDI HENRY, M.ED.

Judi Henry is the Senior Athletics Director and Senior Woman Administrator at Texas Tech University, with more than 30 years of experience in collegiate athletics and student affairs.

KEY TAKEAWAYS

- » The focus shift towards sexual assault in Title IX compliance requires additional vigilance to ensure that athletics issues are not being overlooked.
- » It's critical for athletic departments to disseminate and reinforce messaging related to Title IX on a regular basis, and using student-athletes as peer educators can help.
- » Choose your battles with care, and know that every battle you fight related to Title IX over time creates a more generally equitable environment on campus.
- » Cultivating relationships on campus can help you ensure compliance, understand differing perspectives, and problem-solve. ♦

In collegiate athletics, 'doing the right thing' should be guiding principle

By Amy Murphy, Ph.D., Contributing Editor

Having previously served as the Dean of Students and Assistant Vice President for Student Affairs at Texas Tech University, as well as an adjunct faculty member and former junior high coach, Judi Henry, currently the Senior Athletic Director/Senior Woman Administrator and Deputy Title IX Coordinator at the institution, shares her insights regarding collegiate athletics and Title IX based on more than 30 years there.

Q What improvements have you observed related to Title IX, and what challenges remain?

A One of the biggest improvements has been in facility enhancements. There have also been improvements related to access to uniforms, comparable practice times, and travel experiences. Unfortunately, some places have made bigger strides than others. As for challenges, I would point to the impact of the "merger" of the Association for Intercollegiate Athletics for Women and the National Collegiate Athletic Association. Many of the women who were in positions as Directors of Women's Athletics at the time lost those positions or were shifted to Associate Athletic Director roles. During the early years of Title IX, there were many women coaching women's sports. As the positions were improved and funded better, women started to lose ground to male coaches. It's disheartening; not that men are not positive coaches for women, but that we are losing many excellent role models for female athletes.

Q Do you think the focus on sexual misconduct has

eroded the influence of Title IX on athletic equity?

A Probably. While much progress has been made, there were still discrepancies in athletic programs for men and women when the focus began to shift to sexual misconduct. There were already not enough investigators to review complaints. When you add the expanded focus on sexual misconduct, regardless of how valid and important, compliance may suffer without additional people and resources to handle the volume of concerns.

Q How does the leadership of the Athletic Director impact Title IX work?

A I have been lucky to serve under two ADs who both valued making a difference for women in sports. During my early experiences, athletic directors often came up through the coaching ranks and entered the position sometimes having fought against Title IX, so they may not have had a sensitivity to its importance. Today's athletic directors often have backgrounds in law or business. Our current athletic director's focus is on leadership development, the experience of every student-athlete, and what it means to be successful, without distinguishing between female and male athletes. His visibility, as well as his knowledge of our athletes, combined with his messaging around excellence and doing the right thing, makes a difference.

Q What are some ways that the department reinforces messages related to Title IX?

A We talk about ethics in athletics a great deal and at a lot of different levels. We cannot send that message

once and think that it is going to take. Annually, we hold a mandatory department meeting focused on Title IX. We also engage student-athletes across our leadership classes and student-athlete advisory committee. Title IX is on the agenda at every weekly executive-level staff meeting. We discuss current events related to Title IX incidents and consider our own policies and practices in those areas. When the University of North Carolina-Chapel Hill academic misconduct report was released, we studied the report to see how we could improve. We want to learn from others' mistakes and provide transparency. Our first guiding principle for the department is doing the right thing.

Using an external review every two years related to Title IX and athletics has been valuable. The resulting report considers everything down to the number of lockers in a locker room. We have an incredible relationship with student affairs, which supports doing the right thing when incidents arise with our athletes. This provides shared accountability, but also allows us to pick up the phone when issues arise and better understand the protocols that will be followed. My experiences as Dean of Students and background in student development offered me the perfect opportunities and training for my current position in athletics, but they also enabled me to understand the perspectives of both the student affairs units and the athletics department. I can see how easily the two units can work in isolation on some campuses, but we cannot be islands when it comes to serving our students.

Q Are there any specific programs that have helped?

A This year, we are implementing social media education and training

that will be mandatory for all students, coaches, and athletes. It is a 12-module program that they can take in segments or all at once. Training in this context is critical. We also had student-athletes lead the One Love Foundation relationship violence program. If you can have student-athletes who can be visible and assume leadership roles, programs will carry more weight. During our annual Athletic Department recognition, called the Techspy Awards, the One Love program and our campus partners received a special Title IX recognition.

Q What would you say to someone on a campus where there is disagreement on Title IX compliance issues?

A To prepare for these "gut-check moments," you have to know yourself and your core values. That is what will guide you. Accept that you cannot control some things, and that you decide the battles you can fight. Be prepared and ready to make your case. You will not win all of the battles, but with each interaction, you are making a difference. For me, persistence and

continuity over 30 years at the same institution has allowed me to be part of many changes.

Q What tips do you have for Title IX administrators on developing relationships with their Athletics Department?

A During a recent candidate interview for a position on campus, the candidate mentioned that he had discovered that the Senior Women's Administrator is a great resource if you need a place to start building a relationship with the Athletics Department. I would add that the administrator with responsibilities related to student-athlete academic success is also a helpful ally. I value joint meetings with other Deputy Title IX Coordinators, so that we can share perspectives and training opportunities. It's always about relationships and communication.

You also cannot educate yourself enough. Read current events and case studies. Talk to other Title IX Administrators with different perspectives. Ask questions. ♦

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Use these 5 five tips for conducting Title IX investigations



DAWN BARKER FLOYD

Whether you conduct Title IX investigations, supervise investigations, or oversee the process, Dawn Barker Floyd, the Director of Compliance and Title IX Coordinator at Lenoir-Rhyne University, provides the following five practical tips for ensuring sound investigations:

1. Request all potential evidence immediately. When you receive a report, identify and immediately request potential evidence from the appropriate sources. Otherwise, it may be gone later.

2. Be strategic with the order in

which you conduct interviews. In most cases, you interview the reporting party first. Beyond that, prioritize witnesses based on what they allegedly know and any documentary evidence they may have. Consider interviewing the respondent last, after you have collected and reviewed information from all other sources. This way, you can use all of the evidence in questioning the responding party.

3. An investigation is fluid, so move with it. If you are actively listening while conducting interviews, you will learn about additional potential witnesses and evidence during those interviews. Always follow-up on this potential additional evidence.

4. Ensure the accuracy of information in your report before

submitting it. Have interviewees review a type-written version of their interview and ask that they respond in writing about the accuracy of the information. This will help eliminate inaccuracies in the report and attempts by interviewees to change their stories during the conduct process or hearing.

5. Document everything you do. Consider placing a document at the front of every investigation file called “Actions and Notes.” There, you can document every step of your investigation, including correspondence sent and received, dates of interviews, evidence collection dates, etc. You will end up with timeline/summary of your investigation, which will be useful when drafting the investigation report. ♦