



Lessons Learned: DO's, DON'Ts, and TIPS for Navigating the World of Title IX Litigation

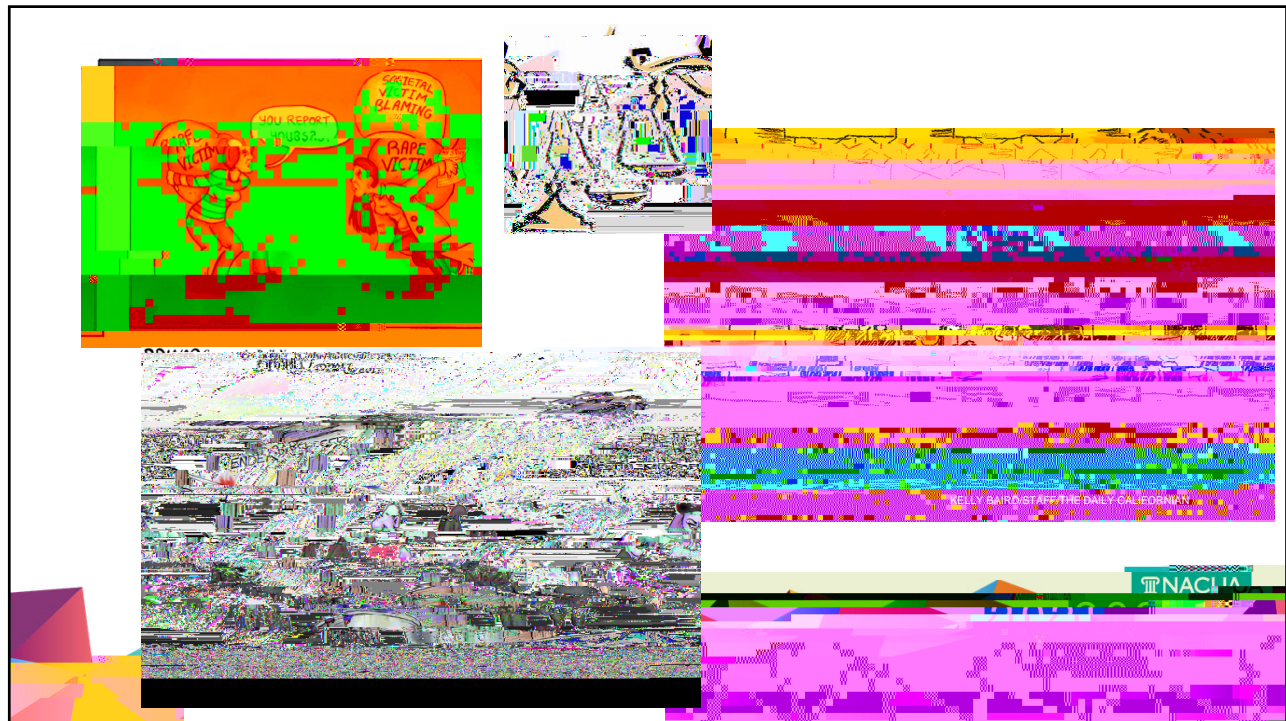
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How Did We Get Here? The Road to the 2020 Final Rule

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Title IX Litigation: The First 40 Years

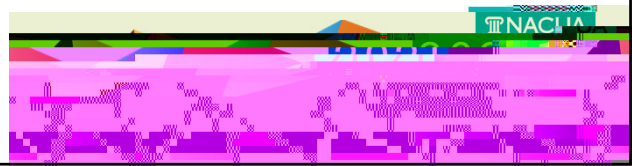
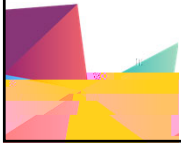
- From providing gender equity in athletics programs to prevention and response to sexual harassment
 - Alexander v. Yale University, Gebser, Davis v. Monroe
- Federal guidance
 - 1977 Sexual Harassment Guidance
 - 2001 DCL
 - 2011 DCL
- External factors
 - Sociopolitical Movements – #MeToo, #ItsOnUs
 - Criticism of process from all parties



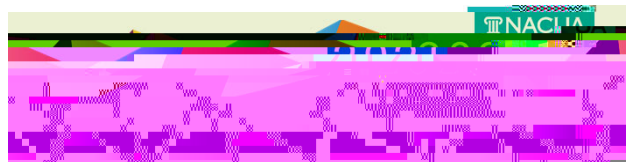
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Common Claims in Respondent Litigation

- Erroneous Outcome
- Selective Enforcement
- Plausible Inference
- Breach of Contract
- Negligence
- Petition for Writ of Administrative Mandamus

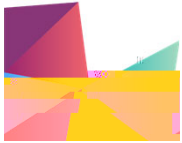


Alternative Dispute Resolution: New Opportunities, New Risks



One night in October...

- On October 1, Drew is hanging out with friends from the institution's pre-med living-learning community: Blake, Wallis, Sam, Kennedy



After Winter Break...

- Drew shares with Wallis, Sam, and Ryan what has happened. Drew reports that over break Drew reflected on Blake's lack of empathy. Once classes resume, Drew confronts Blake again in front of Wallis and Sam. The group continues to hang out over the course of the spring semester, though Drew avoids Blake.

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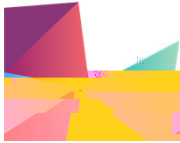
Report and Intake

- On June 8, Drew reports the conduct to the Title IX office. Drew asserts that over spring semester Drew has watched Blake's interactions with others and that Blake has a pattern of mistreating romantic partners. Drew asserts that Kennedy, Wallis, Sam, and Ryan will support Drew on this. Drew also retained and offers to provide the message sent to Kennedy and some group texts with Wallis, Sam, and Ryan that were sent after Winter Break. Drew demands that Wallis, Sam, Kennedy and Ryan be interviewed.
- On June 9, the University sends Blake a notice requesting a meeting, containing standard language about options for support. Blake schedules the meeting for July 10.
- On July 1, Drew submits the messages to Investigator. Their content is ambiguous, so the Investigator does not include them in the investigation.

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Meeting with Respondent

- Blake attends the interview with Investigator alone and does not request a support person. During the interview, Blake shares that some friends said Drew had feelings for Blake. Blake then reported that Drew fell asleep in Blake's room once and "screwed up." With minimal prompting, Blake described substantially the same facts as reported by Drew, including using one of Drew's hands to masturbate. Blake vehemently denies that Drew was "asleep". Blake acknowledged that Drew "did



Completing the Investigation

- Beginning on July 11, Investigator attempts to make contact with Wallis, Sam, Kennedy and Ryan, but connecting with them over summer break proves difficult. Kennedy schedules an appointment, but fails to attend.
- The investigation is still open after Labor Day, beyond the 45 calendar day timeline in the policy, without notice to Blake that the investigation is ongoing.
- After students return to campus, interviews are completed, and consistent with the institution's policy, Blake and Blake's attorney review and sign the investigative report prior to the hearing.

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The Hearing

- A hearing is held in October.
- Blake attempts to introduce evidence that Drew had romantic feelings for Blake, and that both Blake and Drew have been romantically involved with Kennedy. The hearing officer declines to admit this information. The hearing officer does allow Drew to testify about the message to Kennedy, though.
- Blake is found responsible for violating the institution's Title IX Policy.
- Blake appealed, disputing the validity of the investigation and findings and alleging the institution violated due process requirements and procedural substantive standards.

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Respondent's Appeal Arguments

- The University failed to initiate a disciplinary proceeding accusing Blake of a violation of the Code of Student Conduct within a reasonable period of time.
- The University failed to provide a copy of the message to Kennedy or even make Blake aware of its existence prior to the hearing, and that the message contained a hearsay allegation from a third-party regarding an incident between Blake and another individual prior to the incident between Blake and Drew.
- Blake was denied the right to have an advocate at the July 10 meeting.

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Respondent's Appeal Arguments (cont'd)

- The University did not meet its notice obligations because the written interview request did not identify: (1) Drew, (2) the specific section of the Code of Student Conduct allegedly violated, (3) the precise conduct allegedly constituting the potential violation, or (4) the date and location of the alleged incident prior to the initial meeting with the Investigator.
- The hearing panel did not let Blake present evidence of Drew and Kennedy's sexual history.
- The Hearing Panel's decision was not supported by the evidence, namely that there is uncontroverted evidence tendered at the hearing showing that: (1) Blake requested consent and (2) Drew continued to engage in kissing.

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Considerations for Counsel

- Was the time frame to complete the investigation and initiate the conduct proceedings reasonable? (October to August/October) (June to October)?
- How can the failure to provide notice of an extension be cured?
- How can the failure to provide the ambiguous text messages be cured?
- Was Blake entitled to an advocate at the July 10 meeting?
- Was the specificity of notice for the July 10 meeting sufficient?
- Is the Hearing Panel's decision not supported by the evidence?

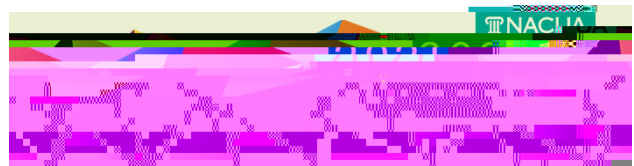
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Case Study 2: The Friendly Faculty Advisor

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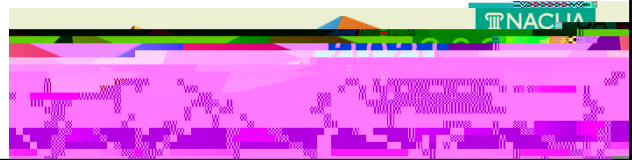
Student – Faculty Scenario

- Title IX Coordinator receives an email from Carla, a graduate student pursuing her MFA in musical theater, alleging that her faculty advisor, Dr. Robinson, has been sexually harassing her for over two years, spanning the entirety of her program—making sexual advances, asking her to dinner, pressuring her in social settings to come home with him, and placing his hands on her on several occasions.
- Carla is nearing the conclusion of her program, with just a few



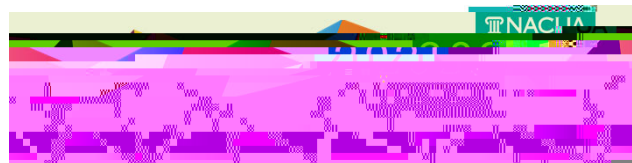
University Process

- The institution adheres to a hybrid investigator-hearing model for all cases involving faculty, staff and students; where an initial investigation is conducted to gather information to determine whether there is a basis to proceed to a hearing. Once that occurs, a hearing panel of two (2) faculty and one (1) staff member are convened to assess the evidence and make a determination regarding responsibility.



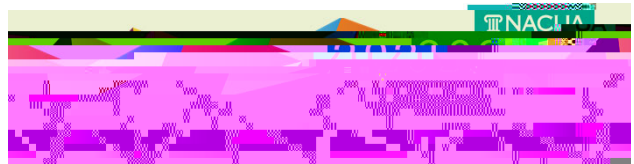
Considerations at the Outset of Investigation

- Are there any jurisdiction issues to consider?
- Concerns about timing of report?
- Is this a case that can be informally resolved?
- Assigning an investigator—what should the institution consider?
 - Relationship with either parties?



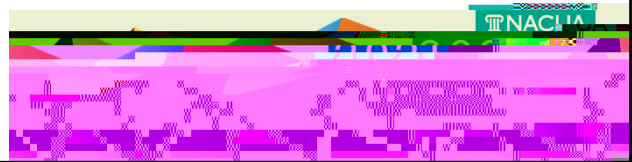
Initial Meeting with Student

- An investigator is assigned and conducts an initial meeting with Carla, who shares the following:
 - Carla knew Dr. Robinson before commencing her MFA program, as



Initial Meeting with Student (cont'd)

- At the close of the initial meeting, Investigator shares the following:
 1. Explains the institution's investigation and hearing processes;
 2. Asks Carla to provide any written/electronic communications she may have with the Dr. Robinson;
 3. Asks for names of others with relevant information;
 4. Urges Carla not to discuss the investigation with others so as to not compromise the process.



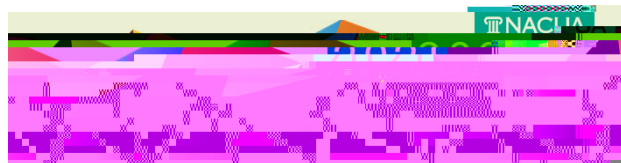
Meeting with Faculty Member

- After sending written notification to Dr. Robinson of the allegations, providing him with a copy of the institution's sexual misconduct policy, and informing him of his right to have an attorney/advisor present, Dr. Robinson meets with Investigator.
- Accompanied by an attorney, Dr. Robinson acknowledges:
 - He knew Carla before she began her MFA program and admits to having flirted with her;
 - He admits to having dinners at his home and having students do read-throughs of scripts;



Meeting with Faculty Member (cont'd)

- Dr. Robinson denies asking Carla to dinner and to stay on longer after student dinners/read-throughs, but admits that she and another student requested to do so on a couple of occasions.
- Dr. Robinson shares that he believes Carla has mental health problems, that she has shared with him details about having been diagnosed with a mood disorder and seeing a therapist at the institution's Wellness Center. Dr. Robinson and his attorney request that Investigator speak with that therapist.
- At the close of the meeting, Investigator explains the next steps in the investigation process and prohibition on retaliation, and identifies support measures like the EAP program.
- Dr. Robinson asks for assistance with identifying a new advisor for Carla for the remainder of her program.



Witness Interviews

Investigator makes contact with several students about Carla's allegations, but the students are only willing to meet with Investigator as a group and do not want their names used in the investigation. Investigator, in consultation with Title IX Coordinator, concludes that if this is the only way to get students to participate, they will allow it.

- Good or Bad Idea? How could this help or hinder the investigation moving forward? How might the Investigator approach the students who wish to remain anonymous and participate as a group?

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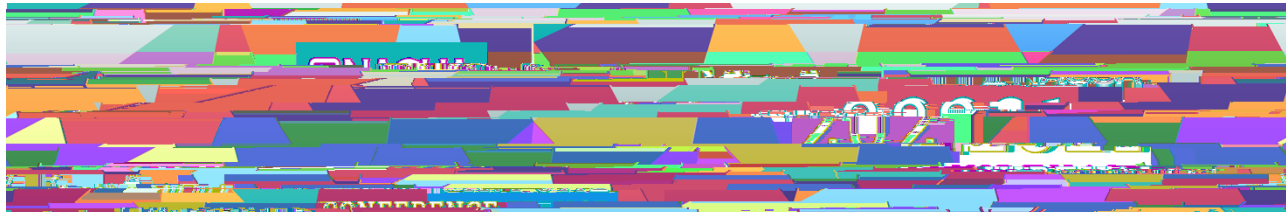
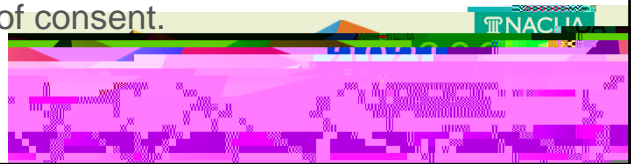
Concluding the Investigation

- Investigator interviews several more witnesses identified by both parties and has an "informal and off-the-record conversation" with a student affairs employee who has had contact with Carla's therapist. The student affairs employee also shares with Investigator her beliefs about Dr. Robinson and his reputation for inappropriate relationships with students.
- Investigator provides draft reports with summaries of all interviews and sends to the parties for review and comment.
- Parties submit follow-up questions for Investigator to pose of one another and of witnesses.
- Carla objects to the student affairs employee's statements being included and/or considered as evidence.

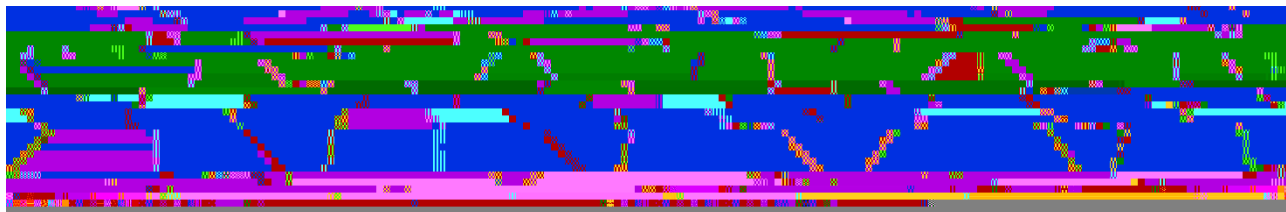
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Hearing Reminders

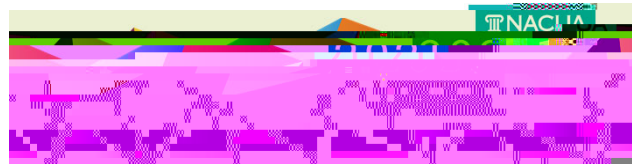
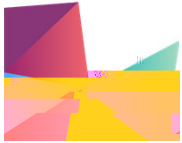
- A summary of relevant evidence should be prepared at least 10 days prior to any hearing;
- Hearing must be recorded;
- Parties' advisors/attorneys are permitted to pose questions to parties and witnesses;
- Mental health history – check your state's jurisdiction on whether/how this can/cannot be considered;
- Exclude questions about a complainant's sexual history, unless to prove someone other than respondent is responsible for alleged acts or to prove prior acts as evidence of consent.



Navigating Title IX Litigation: Tips for



Suggestions for Investigators and





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