

COLLEGE SEXUAL MISCONDUCT AND PRIVATE FOUNDATIONS: BETTER SAFE THAN SORRY

Timothy J. Heaphy, Esq.
Trevor T. Garmey, Esq.
Hunton Andrews Kurth LLP

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Private foundations affiliated with colleges and universities face potential legal, regulatory and reputational risks due to the heightened attention given to sexual misconduct on campus. While private foundations may be legally separate from their affiliated colleges and universities, no federal court has squarely addressed whether an affiliate foundation is subject to Title IX of the Education Amendments Act of 1972 (Title IX)¹ or other relevant statutes. Nor has the Department of Education addressed this issue in its recent guidance on Title IX enforcement.

Given that employees at affiliate foundations often interact with students, the lack of legal clarity on their obligations to disclose, report or address allegations of sexual misconduct involving students creates significant risk.

In this article, we will briefly review the various federal statutes that govern how colleges and universities must respond to allegations of sexual misconduct and consider whether private foundations affiliated with a college or university that receives federal funds may fall under the scope of these provisions. We then recommend a number of best practices that private foundations can adopt to mitigate the risk of legal, regulatory or reputational consequences and ensure the protection of the students they serve.

¹ 20 U.S.C. §§ 1681–1688 (2012).

Federal and State Laws Governing Campus Sexual Assault

In this section, we will examine the various federal and state statutes that govern how colleges and universities must respond to allegations of sexual assault involving students. We also consider theories of common-law civil liability that may apply in these situations.

Title IX – Education Amendments of 1972

Enacted as a portion of the Education Amendments of 1972, Title IX states that “[n]o 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 educational program or activity receiving Federal financial assistance”² This language has been broadly interpreted to apply to gender-based sexual misconduct. Pursuant to Title IX, any educational institution that receives federal funding must protect its students from sex-based harassment and violence.

Compliance with the broad mandate of Title IX has been informed by interpretative guidance published by the Office of Civil Rights within the United States Department of Education.³ Generally, the Department of Education requires colleges and universities that receive federal funds to have an impartial and prompt process for resolving allegations of sexual misconduct.⁴ This includes designating at least one employee to coordinate the institution’s efforts to carry out its responsibilities under Title IX.⁵

When an allegation of sexual misconduct is made, an institution must take steps to “understand what occurred and respond appropriately.”⁶ If appropriate, a school may take “interim

² 20 U.S.C. § 1681 (2012).

³ See, e.g., US Dep’t. of Educ., Office of Civil Rights, Dear Colleague Letter on Title IX Grievance Procedures, Postsecondary Education (Aug. 4, 2004). On September 22, 2017, the Department of Education issued new interim guidance on campus sexual misconduct. See <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct>. The Department of Education simultaneously withdrew its “Dear Colleague” letter of April 4, 2011, as well as its “Questions and Answers on Title IX Sexual Violence”, dated April 29, 2014, and published a new “Q&A on Campus Sexual Misconduct”. *Id.* In its press release, the Department of Education announced its intention to engage in rulemaking on Title IX responsibilities arising from complaints of sexual assault. *Id.* In light of this regulatory uncertainty, we have omitted from this article reference to policies set forth in the April 4, 2011 Dear Colleague letter that have been expressly replaced by the most recent “Q&A on Campus Sexual Misconduct,” in particular, the mandate that colleges and universities use a “preponderance of the evidence” standard in adjudicating allegations of sexual misconduct. We encourage readers of this article, however, to review the “Dear Colleague” letter of April 4, 2011, in light of the possibility that certain policies contained therein may be resurrected by the rulemaking process.

⁴ U.S. Dep’t of Educ., Office of Civil Rights, Q&A on Campus Sexual Misconduct, September 22, 2017.

⁵ 34 C.F.R. § 106.8(a) (2017).

⁶ U.S. Dep’t of Educ., Office of Civil Rights, Q&A on Campus Sexual Misconduct, September 22, 2017, at 1.

measures” to address the complaint during the pendency of an investigation, including restrictions on contact between the parties involved, increased security on certain areas of campus, and changes in work and housing locations.⁷

In conducting an investigation, institutions should rely on grievance procedures that ensure a “prompt and equitable resolution” of complaints.⁸ Elements of a “prompt and equitable” grievance process include proper notice, an adequate, reliable, and impartial investigation, including the opportunity to present witnesses, and assurances that steps will be taken to prevent the recurrence of sexual misconduct.⁹ Other critical elements include the use of a “trained” investigator that is “free of actual or reasonably perceived conflicts of interest,” consideration of exculpatory and inculpatory evidence, and providing all parties with equal access to “rights or opportunities.”¹⁰

At the conclusion of an investigation, the adjudicator must make findings of fact regarding responsibility for violations of the institution’s sexual misconduct policy.¹¹ In making conclusions, the adjudicator must apply the same evidentiary standard used in all other institutional disciplinary proceedings, and must offer each party equal access to information used in the adjudication process.¹² The Department of Education recommends that each party be given simultaneous, written notice of the outcome of disciplinary proceedings, including a description of any sanctions imposed and the rationale for each sanction.¹³

Family Educational Rights and Privacy Act of 1974

The Family Educational Rights and Privacy Act of 1974 (FERPA) regulates the keeping and dissemination of educational records at all institutions that receive federal funds.¹⁴ FERPA gives parents or a student 18 years of age or older the right to inspect and review educational records maintained by the school.¹⁵ The parent or student can also request that a school correct records which he or she believes to be inaccurate or misleading.¹⁶ FERPA requires written permission from

⁷ *Id.* at 2.

⁸ *Id.* at 3.

⁹ *Id.* at 4.

¹⁰ *Id.*

¹¹ *Id.* at 5.

¹² *Id.* at 5.

¹³ *Id.*

¹⁴ 20 U.S.C. § 1232g (2012).

¹⁵ *Id.*

¹⁶ *Id.*

the parent or student prior to the release of any information from a student’s educational record, although there are a number of exceptions to this privacy rule.¹⁷

FERPA intersects with Title IX in a number of ways. The Department of Education interprets FERPA to permit a school to disclose to a student-victim information about the sanction imposed upon a student when the sanction directly relates to the student-victim. However, disclosure of other information in the student’s record, including information about unrelated sanctions, may violate FERPA. If there is a direct conflict between the requirements of FERPA and the requirements of Title IX, federal agencies have suggested that Title IX may override any conflicting FERPA provisions.¹⁸

Clery Act

The Clery Act requires universities to disclose “[s]tatistics concerning the occurrence on campus, in or on noncampus buildings or property, and on public property” concerning certain criminal offenses reported to campus security authorities or local police agencies, including “sex offenses, forcible and nonforcible.”¹⁹ The act includes a timely warning provision, which states that universities must “immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on the campus ... unless issuing a notification will compromise efforts to contain the emergency.”²⁰ Additionally, universities are required to report, among other things, incidents of dating violence, domestic violence and crimes where “the victim is intentionally selected because of the actual or perceived race, gender, religion, national origin, sexual orientation, gender identity....”²¹

Mandatory Reporting Statutes

Many states have mandatory reporting statutes which establish a legal obligation to report known or suspected child abuse. Knowing failure to comply with the mandatory reporting requirement may result in a criminal penalty. The mandatory reporting statutes apply beyond the

¹⁷ *Id.*

¹⁸ See U.S. Dep’t of Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, Or Third Parties, Title IX, January 19, 2001.

¹⁹ 20 U.S.C. § 1092(f) (2012).

²⁰ *Id.*

²¹ *Id.*

educational context and may cover any person or organization that has interaction with underage persons.

Some states also impose a mandatory duty to report sexual assault against any known victim. Virginia has established a mandatory reporting structure for sexual violence at public colleges and universities.²² Under Virginia law, all public universities must convene an incident review committee to receive and evaluate information related to acts of alleged sexual violence. This committee must include a representative from law enforcement, who has a duty to immediately disclose information to a law enforcement agency if the representative believes it necessary to protect the “health or safety” of the victim or other individuals. While Virginia’s statute applies only to public universities, other states could conceivably go further in enacting mandatory reporting requirements.

Common Law Remedies

Aside from federal and state statutes, affiliated organizations should be mindful of the potential risks they face with regard to common law and state civil remedies. For instance, almost every state recognizes a right to recover in tort for negligent infliction of emotional distress. Under this theory, a plaintiff asserts that the emotional distress of a traumatic event, such as being sexually assaulted, has caused them mental or physical harm. If a student is able to show that the university-affiliated foundation owed the student an independent duty of care, and breached that duty of care by failing to prevent the traumatic event, a foundation could be subject to civil liability.²³

Application of Federal Statutes to Private Foundations

The receipt of federal funds is an essential prerequisite to the application of Title IX, FERPA and the Clery Act. If a private foundation receives no federal funds, it is not bound by the requirements of these statutes. As discussed below, there may be exposure pursuant to other statutes or common law torts. It is clear, however, that a private foundation that receives no federal funds is not subject to the requirements of Title IX, FERPA or the Clery Act.

²² Va. Code Ann. §23.1-805–806 (2017).

²³ *Cf. Burrow By & Through Burrow v. Postville Cmty. Sch. Dist.*, 929 F. Supp. 1193, 1210–11 (N.D. Iowa 1996) (finding a genuine issue of material fact with respect to whether school was liable for negligent infliction of emotion distress on account of student’s suffering sexual harassment by fellow students).

If, however, a private foundation receives any federal money for any purpose or program, it may incur the obligation to comply with these three statutes. The federal funds received need not be devoted to the particular program impacted by the alleged misconduct. In 1987, Congress passed the Civil Rights Restoration Act, which explicitly expanded the definition of “program or activity” within Title IX to include “all of the operations of an institution ... any part of which” receives federal funding. This statute overruled *Grove City College v. Bell*, 465 U.S. 555 (1984), where the Supreme Court had more narrowly interpreted the federal funds requirement of Title IX. Whether a covered program or activity receives “federal financial assistance,”²⁴ is determined by reference to the “entire” entity or “whole” organization.²⁵

Assuming a foundation does receive federal funds, Title IX exposure will hinge upon an inquiry as to whether the particular program where the allegation of sexual misconduct arose furthered an “educational mission.” University-affiliated foundations are frequently in close contact with students. For many students, these foundations provide an additional layer of support and mentoring. Affiliated foundations that sponsor scholarship programs often host independent enrichment opportunities for students. Allegations of sexual misconduct at these student events or in these student programs will likely trigger Title IX exposure, as they fall within a foundation’s “educational mission.” Other foundation endeavors may be more distinct from direct student support or other programs that have an “educational mission.” For instance, an allegation of sexual misconduct between employees who perform functions distinct from student programs may not trigger the requirements of the federal statutes. A foundation’s Title IX exposure may consequently turn on whether the allegation involves a particular program or endeavor with an “educational mission”—a necessarily fact-specific inquiry.

A recent case from the United States Court of Appeals for the Third Circuit illustrates how a broad interpretation of “educational institutions” could potentially expand the applicability of Title IX. In *Doe v. Mercy Catholic Medical Center*, No. 16-1247, 850 F.3d 545 (3d Cir. Mar. 7, 2017), the court found that a medical resident working for a private hospital *affiliated* with a university could file a claim under Title IX because operation of a residency program gave the hospital, at least in part, an “educational” mission under Title IX. Since the private hospital received federal Medicaid funds, the court found Title IX liability despite the fact that the federal funds did not support the residency program. This ruling suggests that courts may broadly interpret the reach of Title IX and

²⁴ 20 U.S.C. § 1681(a).

²⁵ *Id.* § 1687.

extend it to organizations (like Mercy Catholic Medical Center) which are not in the regular business of providing educational services.

The other provisions of law mentioned above do not depend upon a foundation's receipt of federal funds. If a foundation operates in a state like Virginia with a mandatory reporting requirement, it must report information about sexual misconduct involving minors. Failure to do so is unlawful, regardless of a foundation's financial independence. If a private foundation has contact with students under the age of 18, it must be aware of and comply with the mandatory reporting laws that are broadly applicable.

Similarly, common-law tort theories are available to students and others who allege that a foundation did not sufficiently protect students from sexual misconduct or appropriately handle information regarding such misconduct when it came to light. A foundation that hosts enrichment activities for students could also be at risk for civil liability for sexual misconduct that occurs at such activities under a theory of negligent supervision. In these instances, a student may assert that a university-affiliated foundation had an independent duty to supervise and protect students during organization-sponsored events. If a student is sexually assaulted during an event sponsored by a university-affiliated foundation, the affected student could allege that the organization breached its duty by failing to properly supervise the event.²⁶ Moreover, the foundation's failure to appropriately counsel an affected student or refer information about alleged sexual misconduct to responsible decision makers may similarly trigger a negligence claim. The foundation's civil exposure may turn upon the specific language in its contracts with students and marketing materials, as such documents may create a reasonable expectation that the foundation will exercise a duty of care and supervision over the participants in its programs. As above, these are fact-specific inquiries that will turn upon the specific circumstances presented in a particular matter.

Foundations should be cognizant that universities have repeatedly faced liability in tort for failing to adequately supervise student activities. In *Furek v. University of Delaware*, a freshman fraternity pledge brought suit against his fraternity, fellow fraternity members and the University of Delaware after he was permanently scarred during an ill-fated hazing episode.²⁷ The plaintiff alleged that his injuries were caused in part by the university's awareness of prior hazing incidents and

²⁶ See *Collins v. Sch. Bd.*, 471 So. 2d 560, 566 (Fla. Dist. Ct. App. 1985) (finding a school board's liability for injuries suffered by a student who was sexually molested by two classmates, based on its negligent failure to properly supervise the students, was supportable).

²⁷ *Furek v. University of Delaware*, 594 A. 2d 506 (Del. 1991).

subsequent failure to control the fraternity's hazing practices.²⁸ In affirming a jury verdict in the plaintiff's favor, the Supreme Court of Delaware held that "established principles of tort law" and premises liability can require a university to use reasonable care to "protect resident students from the dangerous acts of third parties."²⁹

Similarly, the Florida state courts have found that universities have a "special relationship" with students sufficient to create a duty to warn students of unreasonably dangerous conditions creating an "unreasonable risk of harm."³⁰ In *Gross v. Family Medical Services Agency, Inc.*, a female student at Nova Southeastern University brought suit against the university after she was robbed and sexually assaulted while completing an off-campus internship at a local nonprofit.³¹ The student alleged that the university breached a duty of reasonable care by failing to warn her that the internship site, where similar crimes had occurred on multiple occasions, was unreasonably dangerous.³² In affirming a finding for the plaintiff, the District Court of Appeal reversed, finding that "a student can certainly be ... within the foreseeable zone of known risks" when a university assigns the student to a mandatory internship site, and that the university had a duty to "use ordinary care in providing educational services and programs to one of its adult students."³³

The duty of care owed by colleges and universities to students was recently recognized in a matter involving sexual misconduct by athletes at a major university.³⁴ A plaintiff alleged, *inter alia*, that the university knew that an alleged student perpetrator had a propensity for sexual assault, and failed to take any action to prevent further assaults against her or other female students.³⁵ When the university moved to dismiss these claims, the district court denied the motion, finding that in light of the facts as alleged by the plaintiff, a factfinder "could conclude that the risk, likelihood, and foreseeability that [the alleged perpetrator] might sexually assault another student should have been apparent ..." and that "the social utility of [the university's] alleged conduct in responding to this knowledge was minimal."³⁶

²⁸ *Id.*

²⁹ *Id.* at 510.

³⁰ *Gross v. Family Services Agency, Inc.*, 716 So.2d 337, 339 (Fla. 4th Dist. Ct. App. 1998).

³¹ *Id.* at 337.

³² *Id.*

³³ *Id.*

³⁴ *Hernandez v. Baylor University*, 2017 WL 132262 (W.D. TX. April 7, 2017).

³⁵ *Id.*

³⁶ *Id.* at *10.

While these cases all involve claims against universities, the negligence theories could apply to affiliated foundations as well. These cases illustrate that there is a plausible basis for students to assert tort claims against foundations, particularly for injuries suffered on foundation premises or while participating in activities sponsored by the foundation. Foundations should therefore carefully consider potential civil liability when developing risk management procedures, including policies

Best Practices for University-Affiliated Organizations

Private foundations that support colleges and universities face an uncertain landscape in the area of sexual misconduct. Given that uncertainty, every foundation should enact a policy to guide its approach to this difficult subject. These policies should contemplate effective coordination with university processes and officials. They should further the paramount goal of protecting students and providing due process and fair treatment of all people involved in a particular incident. In this section, we review several best practices that foundations may want to consider in enacting or improving a policy for handling information regarding sexual misconduct.

Best Practices for Internal Management

Tone at the Top – In any organization, effective compliance with applicable policies and regulations starts at the very top. Foundation executives should articulate a strong priority on the protection of student and staff well-being. That priority should include assuming responsibility for informing the staff of the possibility that students could report allegations of sexual assault, ensuring that the foundation adopts rigorous internal procedures to manage such reports and requiring employees to receive comprehensive training in these procedures.

Establish Internal Procedures – Foundations should develop written internal procedures for addressing sexual misconduct situations. While these policies will vary according to a foundation's specific focus and the existing systems at the affiliate university, they should include several basic provisions. Each policy should provide for the documentation of reports of sexual assault and other criminal conduct and define the circumstances when such reports will be shared with university officials and law enforcement. Foundations should distribute these policies to all stakeholders to provide fair notice and consider specific notification to parents in certain circumstances. To ensure the policies minimize the risk of civil liability, we recommend that foundations consult with internal or outside counsel in developing these procedures.

Use University Resources – In preparing written procedures, foundations should consider establishing a formal relationship with the Title IX coordinator for their affiliated college or university. Universities have increasingly adopted rigorous Title IX compliance procedures and provide ample resources to victims. Foundations should encourage student victims to use the university’s Title IX process and access those services. To memorialize this coordination, foundations may consider preparing a Memorandum of Understanding with the Title IX office of the affiliated college or university. Regardless, foundations should ensure that both the educational institution and the foundation have clarity on the procedures the foundation will use in the event it receives information from a student about a sexual assault or other crime.

Designate a Title IX Liaison – Foundations should designate an internal Title IX point of contact for the organization. This staff member should be given sufficient training in Title IX and the foundation’s internal procedures so that the staff member can properly advise foundation employees that receive information from a student about a sexual assault or other crime. Foundation staff members should also be instructed to report all potential allegations of sexual assault or other related issues to the foundation’s liaison. The liaison should work with senior management to evaluate the reporting of allegations of sexual assault or child abuse to law enforcement or to the university’s Title IX coordinator.

Train All Employees – Effective procedures are of no use if employees are unfamiliar with the procedures. Therefore, foundations should ensure that all foundation employees receive thorough training in the procedures for reporting and documenting information about sexual assault or other criminal conduct provided by students. Preferably, such training will be provided in coordination with the foundation’s counsel and the Title IX liaison.

Best Practices for Managing Student Reporting

Protect – Staff members should always be conscious of the student’s safety. If a staff member believes the student’s physical or mental health may be in danger, the staff member should immediately notify the Title IX liaison and consider notifying law enforcement. In making this determination, foundations should consider whether they are bound by a mandatory reporting statute, or what additional notifications are necessary to protect the health and safety of impacted students or the community.

Educate – Foundations should also provide students with information about Title IX resources and encourage notification and participation in the Title IX process. Students may be unfamiliar with

the Title IX process and be reluctant to report information about possible victimization. Foundation staff should be available to help affected students navigate the issues involved in reporting and understand that the process is not the same as “pressing charges.” While informing students about the adjudicative process is important, staff members should also include information about services that the university provides to victims, including counseling and peer support.

Document – Staff members should always document their interactions with students regarding sexual misconduct. Staff members should carefully record all information gathered during any interaction, including the facts obtained from the student, the steps the staff member took and whether any resolution was reached. Creating a template ensures accurate and consistent recording of information. All information should be submitted to the organization’s Title IX point of contact. These records should always be kept confidential.

Conclusion

Foundations that work with college students and support an educational mission will almost assuredly encounter information about sexual misconduct on campus. Failure to anticipate this issue and approach it thoughtfully and prospectively subjects the foundation and its affiliate university to substantial risk of legal liability and reputational harm. Accordingly, affiliate foundations are well-advised to enact policies that guide decisions when these issues arise.

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