

# GRADUATE STUDENT LEGAL ISSUES

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# TOP STUDENT LEGAL ISSUES

- Title IX of the Education Amendments of 1972
- Americans with Disabilities Amendments Act (ADA) and Section 504 of the Rehabilitation Act



- Due Process



# WHAT YOU NEED TO KNOW ABOUT TITLE IX: UNDERSTANDING AND PREVENTING SEXUAL MISCONDUCT

Title IX was an amendment to the Education Amendments of 1972 and it states:

“No 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 education program or activity receiving federal financial assistance.”



# WHAT YOU NEED TO KNOW ABOUT TITLE IX: UNDERSTANDING AND PREVENTING SEXUAL MISCONDUCT

Title IX prohibits:

- Sex and Gender Based Discrimination
  - Sexual Harassment (unwelcome conduct of a sexual nature, including unwelcome sexual advances, requests for sexual favors, and other verbal, non-verbal, or physical conduct of a sexual nature)
  - Hostile Environment (unwelcome conduct that unreasonably interferes with a student's ability to learn or creates an intimidating, hostile or offensive learning environment)
- Sexual violence (sexual assault, rape, exploitation)
- Stalking (cyber stalking)
- Interpersonal violence (domestic violence, dating violence)
- Pregnancy and parenting discrimination
- Bullying/Hazing
- Retaliation (punishing individuals because of their complaints or participation in the investigation)



# WHAT YOU NEED TO KNOW ABOUT TITLE IX: UNDERSTANDING AND PREVENTING SEXUAL MISCONDUCT

- “A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty”
- Nancy Chi Cantalupo, Assistant Professor of Law at Barry University
- William C. Kidder, Associate Vice President and Chief of Staff at Sonoma State University
- Study focused on complaints by graduate students
- Analyzed 300 faculty-student harassment cases for commonalities



# WHAT YOU NEED TO KNOW ABOUT TITLE IX: UNDERSTANDING AND PREVENTING SEXUAL MISCONDUCT

Two major findings:

(1) Most faculty harassers are accused of physical –not verbal—harassment

\* Ranged from sexual groping to criminal levels of sexual assault and even some domestic violence-like behaviors

(2) More than half the cases involve alleged serial harassers

\* 45% involved allegations of multiple victims over time



# WHAT YOU NEED TO KNOW ABOUT TITLE IX: UNDERSTANDING AND PREVENTING SEXUAL MISCONDUCT

- *AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Association of American Universities, 2015), which polled more than 150,000 students at 27 elite private and public research institutions
  - female graduate students who experienced sexual harassment identified the offender as a teacher or adviser at more than three times the rate of female undergraduates
- One in 10 female graduate students at major research universities report being sexually harassed by a faculty member



# JENKINS V. UNIV. OF MINNESOTA (SEPT. 18, 2015)

- Stephanie Jenkins was a PhD graduate student at the University Minnesota's Department of Fisheries, Wildlife and Conservation Biology
- She was also employed as a researcher by the University on an Alaska Peregrine Falcon Project
- Ted Swem worked for the United States Fish and Wildlife Service and collaborated with the University on Jenkin's research project
- She sued the University and Swem for sexual harassment and intentional infliction of emotional distress (IIED)



# **JENKINS V. UNIV. OF MINNESOTA (SEPT. 18, 2015)**

- She took two mostly solo seventeen day field research trips into the Alaskan Wilderness with Swem
- She claims that she endured repeated sexual advances and harassment from him on these trips
- She alleges that Swem made crude sexual jokes, directly (and repeatedly) expressed his romantic interest in her, asked her if he could be her strong, attractive pool boy, talked to her about kissing her, encouraged her to drink more alcohol with the hopes of a sexual advance, and suggested they share a tent
- She claims his conduct caused her to suffer severe depression and PTSD
- When she returned from the trips, she learned she would have to share an office with Swem while studying for her PhD and work with him on a shared research project
- Back on campus, Swem continued to ask her out on dates



# **JENKINS V. UNIV. OF MINNESOTA (SEPT. 18, 2015)**

- A few months after her return, she reported Swem's behavior to her advisor
- She claims that her advisor told her "he didn't want to know the details" of Swem's behavior
- She also claims she was told that she would sometimes have to work with people professionally that she did not personally like
- The University did give her separate work space after she complained and ensured that any collaborative work done with Swem was supervised or done in public
- However, she ultimately left the program due to the alleged hostile environment



# **JENKINS V. UNIV. OF MINNESOTA (SEPT. 18, 2015)**

- The University denied it employed Swem but the Court didn't find that persuasive
- The Court took into account that Swem possibly had the ability to take additional actions that would affect her employment/education based on his control of the project data and his possible role in her dissertation committee
- The Court denied summary judgment because it believed that a reasonably jury could find that Swem created a hostile environment
- A jury ruled in Jenkins' favor finding that Swem had created a hostile environment based on sexual harassment and that he caused IIED



# **IMPACT AND PENALTIES OF TITLE IX VIOLATIONS**

- Administrative action by OCR
  - Revocation of federal aid
  - Resolution Agreement
- Private right of action against the University
  - Monetary judgment and financial cost to defend
- Individual/personal liability under state law
  - Cost of private attorney



# IMPACT AND PENALTIES OF TITLE IX VIOLATIONS

- Between 2011 and 2015, United Educators reported losses (payments to claimants and defense costs) of nearly \$22 million in claims from alleged victims.
  - The average settlement in the cases that went to court was nearly \$350,000, and some were over \$1 million
- Michigan State University will pay \$500 million to settle lawsuits brought by 332 victims of Larry Nassar, the former associate professor and doctor who sexually abused hundreds of young girls and women.
  - The terms of the settlement include \$425 million paid to current claimants, and \$75 million set aside in a trust fund to protect "any future claimants alleging sexual abuse by Larry Nassar"



# IMPACT AND PENALTIES OF TITLE IX VIOLATIONS

- A West Coast University settled for \$1.15 million with a student allegedly sexually assaulted by a former faculty member
- UCLA paid \$460,000 to two graduate students who said they were harassed by a professor
- A mid-Atlantic medical school settled for \$1.3 million in connection with the behavior of a department chair



# IMPACT AND PENALTIES OF TITLE IX VIOLATIONS

- Publicity/Reputational damage for University and individual
- Impact on the graduate student (depression, PTSD)
- Impact on the work environment/morale
- Loss of responsibilities/employment status
- Time, effort, and stress of defending lawsuit



# WHAT YOU NEED TO KNOW ABOUT TITLE IX: PREVENTING SEXUAL MISCONDUCT

- Maintain Professional Relationships with Students
- TITLE IX Training for Faculty and Staff
  - <https://www.youtube.com/watch?v=NFzmxh97FcQ>



# WHAT YOU NEED TO KNOW ABOUT TITLE IX: PREVENTING SEXUAL MISCONDUCT

- Maintain Professional Relationships with Students
- Faculty and staff who become aware of possible sexual misconduct or harassment must promptly notify the Title IX Coordinator even if an individual requests confidentiality.
- The Title IX Coordinator will:
  - Ensure that complainant and/or reporting party are safe and in contact with a confidential resource
  - Explore interim measures and accommodations for all parties
  - Conduct an impartial, fair review and investigation, including gathering relevant documents, witness interviews, etc...



# AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT

- Both statutes are designed to prevent discrimination against individuals with disabilities
- Title II of the ADA applies to state and local government entities, including public universities
- The statutes define disability as a physical or mental impairment that substantially limits one or more major life activities
- Students must be able to perform the essential functions of the program with or without accommodations



# UNDERSTANDING UAB'S RESPONSIBILITY

- UAB is required to provide access to its programs and activities to qualified individuals who have a documented disability
- Providing accommodations is a collaborative effort between Disability Support Services, faculty, staff, and the student
- UAB must conduct an individualized assessment when making determinations regarding accommodations for students with disabilities
- UAB must engage in an interactive process with each student to determine reasonable accommodations



# **EMANUELSON V. UNIV. OF N.C. AT GREENSBORO**

## **(APRIL 12, 2018)**

- Student was enrolled in UNCG's graduate nursing program. The program consisted of both academic and practicum courses. Student was diagnosed with generalized anxiety disorder, obsessive compulsive disorder, and major depressive disorder. Student was granted accommodations for testing, but was not granted any accommodations for his clinical practicum courses.
- Student reported multiple incidents of harassment by his preceptors, including an instance of the Program Director addressing the student's testing accommodations in front of other students. The student also reported that a preceptor made disparaging comments about his capabilities as a nurse.
- Student's doctor wrote letters to both UNCG and student's clinical site indicating his diagnoses. His doctor also indicated that the incidents of harassment were traumatic and could exacerbate his symptoms.



# **EMANUELSON V. UNIV. OF N.C. AT GREENSBORO** **(APRIL 12, 2018)**

- Student filed a complaint with the graduate school Dean regarding the incidents of harassment and his denial of clinical accommodations. UNCG and the student agreed to a learning contract that provided for the student's reassignment to another preceptor in the event of any concerns of mistreatment or abuse.
- Student reported, per the learning contract, disparaging comments made by the preceptor. The student requested reassignment and was denied.
- Student felt increasing anxiety due to his clinical assignment and was sent home for "poor performance." Student was ultimately dismissed from the program.



# *EMANUELSON V. UNIV. OF N.C. AT GREENSBORO*

## *(APRIL 12, 2018)*

- UNCG argues that the student has not plead facts that sufficiently support allegations of discrimination under the ADA and Section 504.
- The Court ruled that the following allegations were sufficient to make a claim of discrimination under the ADA and Section 504:
  - UNCG denying clinical accommodations to the student
  - Student becoming the target of harassment as a result of his request for accommodations
  - UNCG's refusal to help the student resolve the concerns about harassment and discrimination
  - UNCG's discriminatory acts and omissions which led to the student's dismissal from the program



# TAKEAWAYS

- Always engage in the interactive process with your students
- Do not create any blanket policies for denying approved accommodations (example: we never provide accommodations in the clinical setting)
- Maintain confidentiality regarding students who have accommodations and do not treat them differently because they have requested to use accommodations
- If an accommodation is not reasonable based on your program's requirements, work with the student and DSS to explore alternatives
- Call DSS if you have questions about implementing approved accommodations or your obligations under the ADA and Section 504!



# DUE PROCESS

- The 14<sup>th</sup> Amendment provides in part: “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.”
- Courts have assumed that students have a protected interest in pursuing graduate education that cannot be taken away without adequate due process
- Courts pay special attention when suspension or expulsion are at stake or when a **graduate student** is involved



# DUE PROCESS

- Courts distinguish between academic dismissals and disciplinary dismissals
- The more serious the charge and potential penalty, the greater the protections that must be given to the student
- At a minimum, there must be at least an informal give and take between the student and school that provides the student with the opportunity to respond to the charges, explain his conduct and put it in the proper context
- As a general rule, the notice and hearing should precede removal of the student from the university or college



# **Behne v. Union County College (January 26, 2018 D.N.J)**

- Matthew Behne was a student enrolled in Union College's Physical Therapy Assistant Program.
- He sued the University and several individual defendants for breach of contract and violation of his due process rights after he was dismissed from the Program.
- The Program involved both classroom-based and clinical courses.
- Throughout the program, there were numerous issues with Behne's behavior.
  - This included: placing his personal items on faculty desks and classroom podiums, personal space issues, being disrespectful to other students, using office supplies that belonged to college staff, and having emotional outbursts during exams.



# **Behne v. Union County College (January 26, 2018 D.N.J)**

- Behne's behavioral issues continued at his clinical placements.
- After issues at one placement, the Program insisted that he meet with a school counselor and sent him a letter outlining his performance deficiencies.
- He was also informed that he could be dismissed from the program if he had any lapses in professionalism during his clinical rotations.
- Plaintiff began a second clinical rotation with the Wayne Orthopedic Physical Therapy clinic. The Wayne Clinic dismissed him on his second day of the rotation.



# **Behne v. Union County College (January 26, 2018 D.N.J)**

- The Plaintiff let Dr. Kellish, the Academic Coordinator of Clinical Education, know of his dismissal from the clinic. She told him that they would meet to discuss his dismissal (from the clinic) after she learned more from the clinic.
- The Wayne Clinic sent an email to Dr. Kellish stated that Behne had displayed some inappropriate behavior on his first day. The clinic reported that he was inappropriately questioning many of their methods, he resisted guidance from his supervisor, and he made inappropriate comments or questions in front of patients. The clinic also reported that the next day Behne set up a patient without being cleared to do so by his supervisor. The clinic further stated that when they addressed the issue with the plaintiff that he lied about someone asking him to set up the patient.
- Dr. Kellish also spoke to someone at the clinic but could not recall if it was before or after the email. When they did speak, the clinic did not say that Plaintiff was dismissed for patient safety issues and Dr. Kellish did not recall if the clinic had indicated that Behne had actually touched the patient.



## *Behne v. Union County College (January 26, 2018 D.N.J)*

- Dr. Kellish forwarded the email from the clinic to her supervisor and wrote:

“FYI. Can I use this to dismiss him at this point?”

Her supervisor responded:

“As we discussed, he has ongoing issues that are precluding him from practicing in a safe and appropriate manner within the clinic environment. Send me the statement from your handbook that addressed dismissal and we can connect the dots.”



# *Behne v. Union County College (January 26, 2018 D.N.J)*

- Dr. Kellish met with Behne to inform him of his dismissal. Before the meeting, Plaintiff was asked to write a reflection paper about what he thought happened and what he would do in the future to be successful.
- Dr. Kellish testified that she was certain plaintiff would be dismissed from the program once she learned there was a safety issue with patient set up but also stated she did not decide to dismiss him until the day of her meeting with the plaintiff. (\*\*\*)**So he didn't know he was being dismissed from the program when he went to this meeting**)
- Plaintiff claims at the meeting he asked for a new placement but this request was denied. He was also denied an appeal even though this was allowed under the student handbook.



# **BEHNE V. UNION COUNTY COLLEGE (JANUARY 26, 2018 D.N.J)**

- The Court denied summary judgment to the Defendants on Plaintiff's breach of contract claim and due process claim.
- The breach of contract claim was based largely on the University's failure to follow its policies and procedures and failure to adequately investigate what occurred at the clinic. The Court stated:

**“If Kellish acted solely on Wayne Clinic’s email, then Kellish’s actions can be reasonably interpreted as indicating that she had already decided to try to terminate Plaintiff from the program based on the email from Wayne Clinic alone, *i.e.* without performing any substantive follow-up with either the Wayne Clinic or Plaintiff.”**

- The Court also noted it was unclear if a safety violation actually occurred. Plaintiff denied setting up the patient and the email from the clinic doesn't mention patient safety. The Court went on to state that if the Plaintiff *had set up the patient* the Defendants failed to demonstrate how this was a safety issue.



## *Behne v. Union County College (January 26, 2018 D.N.J)*

- The Court held:

**“Plaintiff should have been able to address UCC’s concerns directly before he was terminated from the Program. Of course, if it turns out that patient safety was not compromised, then the sanction imposed (termination from the Program) would not be commensurate with the severity of the violation.”**

- This similar reasoning was applied to the due process claim. Even though the plaintiff was provided with a “formal hearing”, the defendants were unable to establish what happened at the meeting and whether he really had the opportunity to at least answer the allegations against him.
- Because there was questions as to whether or not the plaintiff was given proper notice of the anticipated termination, whether or not he was provided an opportunity to be heard, and provided an appropriate appeal the Court denied summary judgment.



# TAKEAWAYS

- Provide more than adequate information in advance for charged student related to notice and hearing
- Publish procedures related to academic and disciplinary misconduct and dismissal, KNOW and FOLLOW these procedures
- Be Careful What You Write and Say: Do not be careless and casual in emails
  - Public Record Requests/FERPA
  - Discoverable in litigation
  - Be Respectful and civil
  - Avoid stray off-hand discriminatory or retaliatory comments



# **BEHNE V. UNION COUNTY COLLEGE (JANUARY 26, 2018 D.N.J)**

- Follow-up/conduct thorough investigations



# **FINAL TAKEAWAY**

**Use UAB resources to help you navigate issues:**

Graduate School Dean

Title IX Office

Disability Support Services

University Compliance Office

Diversity, Equity and Inclusion

Student Rights, Advocacy and Conduct

International Student and Scholar Services

Provost's Office

Office of Counsel

**CALL ME UAB!**



# GRADUATE STUDENT LEGAL ISSUES UPDATE

# QUESTIONS?

