

**SPECIAL REPORT**

**Victim-Centered Investigations:  
New Liability Risk for Colleges and Universities**



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Investigations that are impartial, neutral, and honest lie at the very heart of any fair adjudication system, whether conducted under criminal or civil law, or under administrative policy. In recent years, a number of groups have endeavored to undermine the notion of impartiality in the investigation of allegations of sexual assault, thereby challenging the very notion of “fairness” in the context of campus adjudications.

This White Paper summarizes these efforts, analyzes 18 lawsuits by students accused of sexual assault that alleged investigational improprieties, highlights a recent Determination Letter from the federal Office for Civil Rights, and offers recommendations to university administrators.

### **Rise of Victim-Centered Investigations**

Ethics codes have traditionally called for objectivity and truthfulness in the conduct of criminal investigations:

- Criminal Defense Investigation Training Council: “The fundamental philosophical assumption upon which all CDITC policies are predicated is that the criminal defense investigator must be an impartial and objective seeker of truth.”<sup>1</sup>
- National Association of Legal Investigators: The investigator “Will make all reporting based upon truth and fact and will only express honest opinions based thereon”<sup>2</sup>
- National Council of Investigation and Security Services: “A member shall observe, and adhere to the precepts of honesty, integrity, and truthfulness.”<sup>3</sup>
- World Association of Detectives: “We will be faithful and diligent in carrying out assignments entrusted to us, and to determine the true facts and render honest, unbiased reports in reference thereto.”<sup>4</sup>
- Council of International Investigators: Members agree to “conduct myself in my profession with honesty, sincerity, integrity, fidelity, morality and good conscience in all dealings with my clients.”<sup>5</sup>

Similarly, implementing regulations of the federal Title IX, Education Amendments of 1972 require that procedures for the resolution of sex discrimination complaints at colleges and universities be “equitable.”<sup>6</sup> Over the years, the Department of Education Office for Civil Rights has issued a number of policy directives expounding on the meaning of “equitable:”

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<sup>1</sup> Criminal Defense Investigation Training Counsel Code of Ethics, *available at* <http://www.defenseinvestigator.com/CDITC%20Membership%20App%20Com2.pdf>.

<sup>2</sup> National Association of Legal Investigators, Code of Ethics, *available at* <http://nalionline.org/become-a-member/code-of-ethics/>.

<sup>3</sup> The National Council of Investigation and Security Services, Code of Ethics, *available at* [http://www.nciss.org/index.php?option=com\\_content&view=article&id=34:code-of-ethics&catid=20:site-content&Itemid=120](http://www.nciss.org/index.php?option=com_content&view=article&id=34:code-of-ethics&catid=20:site-content&Itemid=120).

<sup>4</sup> World Association of Detectives, Code of Ethics, *available at* <http://www.wad.net/code-of-ethics>.

<sup>5</sup> Council of International Investigators, Code of Ethics, *available at* <http://www.cii2.org/code-of-ethics>.

<sup>6</sup> 34 C.F.R. § 106.8(b). *Available at* <https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html#S8>.

- The 2001 Revised Sexual Harassment Guidance mandates that universities undertake “adequate, reliable, and impartial investigation of complaints” and employ “[p]rocedures that . . . will lead to sound and supportable decisions.”<sup>7</sup>
- The 2011 Dear Colleague Letter on campus violence explains, “a school’s investigation and hearing processes cannot be equitable unless they are impartial.”<sup>8</sup>
- A recent Determination Letter emphasizes that “OCR has identified a number of elements in the determining if grievance procedures are prompt and equitable for both parties, including whether the procedures provide for...(c) adequate, reliable, and impartial investigation, including an opportunity to present witnesses and evidence;”<sup>9</sup>

In recent years, an alternative investigational model has emerged. This approach, based on the assumption of “always believe the victim,” is often referred to as “victim-centered.” Following are examples of this novel approach:

In 2011, End Violence Against Women International (EVAWI) launched a campaign directed at police officers titled “Start by Believing.”<sup>10</sup> EVAWI urges “criminal justice professionals and others to start by believing [the complainant]. EVAWI also maintains that even though “‘Innocent until proven guilty’ is a critical foundation of our legal system,...it is not the starting point for a successful investigation.”<sup>11</sup>

A 2012 training program by the consulting firm Margolis Healy instructed college investigators to embrace the “victim-centered” approach (Powerpoint slide 22.)<sup>12</sup> The program instructed investigators to “Focus on offender behavior – not victim behavior” (slide 28), to “Always approach a case believing that ‘something’ occurred” (slide 26), and to obtain “Documentation of sensory and peripheral details from the victim’s perspective,” but presumably not from the accused student’s perspective (slide 27).

In 2013, Human Rights Watch published a 40-page report titled *Improving Police Response to Sexual Assault*.<sup>13</sup> The document instructs investigators to assume that “all sexual assault cases are valid unless established otherwise by investigative findings.” The

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<sup>7</sup> US Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (January 19, 2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

<sup>8</sup> US Department of Education, Office for Civil Rights, *Dear Colleague Letter* (April 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>9</sup> Gellman-Ber, Beth. “Wesley College Determination Letter.” Received by Robert E. Clark II, 12 October 2016, available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf>.

<sup>10</sup> End Violence Against Women International, *Start by Believing* (April 2011), available at <http://www.startbybelieving.org/TheMessage.aspx>.

<sup>11</sup> Id., available at <http://www.startbybelieving.org/CanIReallySayThat.aspx>.

<sup>12</sup> Margolis Healy & Associates, *Title IX Investigations* (October 8, 2012), available at <http://www.slideshare.net/margolishealy/mha-title-ix-investigations-2012-legal-issues-in-higher-education>.

<sup>13</sup> Human Rights Watch, *Improving Police Response to Sexual Assault* (2013), available at [https://www.hrw.org/sites/default/files/reports/improvingSAInvest\\_0.pdf](https://www.hrw.org/sites/default/files/reports/improvingSAInvest_0.pdf).

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report consistently refers to the accuser as a “victim,” instructs investigators to minimize questions that might be viewed as distressing, and recommends that investigators make statements to complainants such as “I believe you” and surely “something” happened.

More recently the University of Texas at Austin School of Social Work published a *Blueprint for Campus Police* that promotes the victim-centered concept. The 170-page document argues the complainant should control the pace of the investigation, despite the fact that timely collection of evidence is critical in sexual assault investigations. The report promotes unsubstantiated stereotypes of accused students, claiming “alleged perpetrators often don’t feel badly about it, except for being caught.” The *Blueprint* even delineates a series of recommendations how the investigator can anticipate and counter legal defense strategies (Table 7.4).<sup>14</sup>

These documents reveal that the victim-centered approach overtly seeks to undermine notions of impartiality and systematically bias investigations in favor of the complainant.

Amplifying these concerns, the White House *Not Alone* report<sup>15</sup> endorses a “single investigator” approach which merges the investigative and adjudicative roles:

Some [schools] are adopting different variations on the “single investigator” model, where a trained investigator or investigators interview the complainant and alleged perpetrator, gather any physical evidence, interview available witnesses – and then either render a finding, present a recommendation, or even work out an acceptance-of-responsibility agreement with the offender.

Conflating the investigative and adjudicative roles in this manner is likely to further compromise the independence and objectivity of campus investigators, leading to wrongful determinations of guilt.

### **Lawsuit Allegations**

In mid-2016, SAVE published the Special Report, *Lawsuits Against Universities for Alleged Mishandling of Sexual Misconduct Cases*.<sup>16</sup> The document analyzes 30 lawsuits filed against universities by students accused of sexual assault, for which a judge ruled at least partly in favor of the accused student. The report provides a detailed analysis of the causes of action and types of relief requested.

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<sup>14</sup> University of Texas at Austin & IDVSA, *The Blueprint for Campus Police: Responding to Sexual Assault* (2016), available at <http://sites.utexas.edu/idvsa/title-blueprint-for-campus-police-responding-to-sexual-assault/>.

<sup>15</sup> White House Task Force to Protect Students from Sexual Assault, *Not Alone: Together Against Sexual Assault*, Page 14 (April 2014), available at <https://www.notalone.gov/assets/report.pdf>.

<sup>16</sup> Stop Abusive and Violent Environments, *Lawsuits Against Universities for Alleged Mishandling of Sexual Misconduct Cases* (August 30, 2016), available at <http://www.saveservices.org/wp-content/uploads/Sexual-Misconduct-Lawsuits-Report2.pdf>.

The present Special Report focuses on the subset of lawsuits in which investigational improprieties were alleged. Out of the 30 lawsuits, 18 made specific allegations of investigational malfeasance. The lawsuits are listed here:

1. Amanda Hartley v. Agnes Scott College<sup>17</sup>
2. John Doe v. Brandeis University<sup>18</sup>
3. Vito Prasad v. Cornell University<sup>19</sup>
4. Benjamin King v. DePauw University<sup>20</sup>
5. Lewis McLeod v. Duke University<sup>21</sup>
6. John Doe v. Georgia Board of Regents<sup>22</sup>
7. Jeremiah Marshall v. Indiana University<sup>23</sup>
8. Luke Benning v. Marlboro College<sup>24</sup>
9. Doe v. Middlebury College<sup>25</sup>
10. Ritter v. Oklahoma City University<sup>26</sup>
11. Brian Harris v. St. Joseph's University<sup>27</sup>

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<sup>17</sup> *Amanda Hartley v. Agnes Scott College*, Georgia Supreme Court, Case No. S13G1152, Appellant Brief (filed September 29, 2013) available at <http://www.avoicemalestudents.com/wp-content/uploads/2014/09/amanda-hartley-appellant-brief-agnes-scott-college.pdf>.

<sup>18</sup> *John Doe v. Brandeis University*, US District Court, District of Massachusetts, Civil Action No. 15-11557-FDS, Order (filed March 31, 2016), available at <http://boysmeneducation.com/wp-content/uploads/2016/04/Order-Brandeis-University-2016-3-31.pdf>.

<sup>19</sup> *Vito Prasad v. Cornell University*, US District Court, Northern District of New York, Civil Action No. 5:15-cv-322, Order (filed February 24, 2016), available at <http://boysmeneducation.com/wp-content/uploads/2016/04/Order-Cornell-University-2016-2-24.pdf>.

<sup>20</sup> *Benjamin King v. DePauw University*, US District Court, Southern District of Indiana, Terre Haute Division, Case No. 2:14-cv-0070-WTL-DKL, Brief in Support of Verified Motion (filed July 18, 2014), available at <http://boysmeneducation.com/wp-content/uploads/2015/10/Brief-in-support-of-verified-motion-for-preliminary-injunction-DePauw-University-Filed-2014-7-18.pdf>.

<sup>21</sup> *Lewis McLeod v. Duke University*, Superior Court Division or North Carolina, 14 CVS 003075 (filed 2014), available at <http://www.avoicemalestudents.com/wp-content/uploads/2014/12/lewis-mcleod-duke-university-verified-amended-complaint-part-1.pdf>.

<sup>22</sup> *John Doe v. Georgia Board of Regents*, US District Court, Northern District of Georgia, Case No. 1:15-cv-04079, Order (filed December 16, 2015), available at <http://boysmeneducation.com/wp-content/uploads/2015/12/Georgia-Institute-of-Technology-Order-re-motion-for-preliminary-injunction-12-16-2015.pdf>.

<sup>23</sup> *Jeremiah Marshall v. Indiana University*, US District Court, Southern District of Indiana, 2016 WL 1028362, Case No. 1:15-cv-00726-TWP-DKL, Order (filed March 15, 2016), available at <http://boysmeneducation.com/wp-content/uploads/2016/04/Indiana-University-Order-on-motion-to-dismiss-for-failure-to-state-a-claim.-2016-3-25.pdf>.

<sup>24</sup> *Luke Benning v. Marlboro College*, US District Court, District of Vermont, Case No. 2:14-cv-00071, Complaint (filed April 15, 2014), available at <http://www.avoicemalestudents.com/wp-content/uploads/2014/11/luke-benning-complaint-marlboro-college.pdf>.

<sup>25</sup> *Doe v. Middlebury College*, US District Court, District of Vermont, Case No. 1:15-cv-00192, Ruling (filed September 16, 2015), available at <http://boysmeneducation.com/wp-content/uploads/2015/11/Ruling-on-emergency-motion-for-preliminary-injunction-Middlebury-College-filed-2015-9-16.pdf>.

<sup>26</sup> *Ritter v. Oklahoma City University*, US District Court, Western District of Oklahoma, Case No. 5:16-cv-00438, Amended Complaint (filed June 7, 2016), available at <http://www.titleixforall.com/wp-content/uploads/2016/07/28.-Amended-Complaint17-REDACTED.pdf>.

<sup>27</sup> *Brian Harris v. St. Joseph's University*, US District Court, Eastern District of Pennsylvania, Case 2:13-cv-03937, Complaint (filed July 8, 2013), available at <http://www.avoicemalestudents.com/wp-content/uploads/2014/06/Brian-Harris-Full-Lawsuit-against-Saint-Josephs-University.pdf>.

12. John Doe v. Salisbury University<sup>28</sup>
13. John Doe v. University of California Regents<sup>29</sup>
14. Sterrett v. Cowan<sup>30</sup>
15. John Doe v. University of Southern California<sup>31</sup>
16. Bryce Dixon v. Kegan Allee, et. al.<sup>32</sup>
17. John Doe v. Washington and Lee University<sup>33</sup>
18. Wells v. Xavier University<sup>34</sup>

The following tables present the allegations of investigational bias, which are grouped into 10 categories. The allegations enumerated in the tables are extracted directly from the lawsuits, with the wording edited slightly to facilitate proper analysis and categorization:

Table 1: Multiple, Conflicting Roles and Inadequate Investigator Qualifications

	<i>Allegation</i>	<i>Case Name</i>
1	Under the Special Examiner Process, a single individual was essentially vested with the powers of an investigator, prosecutor, judge, and jury.	John Doe v. Brandeis University, Page 69
2	The investigators improperly participated in the Panel's deliberations.	Jeremiah Marshall v. Indiana University, Page 3-4
3	University administrator who was vested with the sole authority to investigate and adjudicate the alleged claim also conducted	Ritter v. Oklahoma City University, Page 5

<sup>28</sup> *John Doe v. Salisbury University*, Circuit Court of Maryland for Wicomico County Civil Division, Case No. 22-C-14-810 Amended Complaint (filed 2014), available at <http://www.avoicemalestudents.com/wp-content/uploads/2014/11/Austin-Morales-Salisbury-University-Amended-Complaint.pdf>.

<sup>29</sup> *John Doe v. University of California Regents*, US District Court, Central District of California, Case No. 2:15-cv-02478, Complaint (filed April 3, 2015), available at <http://www.avoicemalestudents.com/wp-content/uploads/2015/04/Complaint-John-Doe-versus-University-of-California-Santa-Barbara-filed-2015-4-3.pdf>.

<sup>30</sup> *Sterrett v. Cowan et. al.*, US District Court, Eastern District of Michigan, Southern Division, Case No. 2:14-cv-11619, Complaint (filed April 23, 2014), available at <http://www.avoicemalestudents.com/wp-content/uploads/2014/06/Drew-Sterrett-Complaint-against-University-of-Michigan-Ann-Arbor.pdf>.

<sup>31</sup> *John Doe v. University of Southern California*, Court of Appeal of the State of California, Second Appellate District, Division Four, Case No. B262917, Opinion (filed April 5, 2016), available at <http://boysmeneducation.com/wp-content/uploads/2016/04/Decision-California-Court-of-Appeals-University-of-Southern-California-2016-4-5.pdf>.

<sup>32</sup> *Bryce Dixon v. Kegan Allee, et. al.*, Superior Court of the State of California for the County of Los Angeles, Central District, Case No. BS157112, Petition (filed September 12, 2015), available at <http://www.avoicemalestudents.com/wp-content/uploads/2015/09/Petition-for-Writ-of-Administrative-Mandate-University-of-Southern-California-filed-9-12-2015.pdf>.

<sup>33</sup> *John Doe v. Washington and Lee University*, US District Court, Western District of Virginia, Verified Complaint (filed December 12, 2014), available at <http://www.avoicemalestudents.com/wp-content/uploads/2014/12/john-doe-verified-complaint-washington-lee-university.pdf>.

<sup>34</sup> *Dezmine Wells v. Xavier University*, US District Court, Southern District of Ohio, Western Division, Case No. 1:13-cv-00575-SAS-SKB, Opinion and Order (filed March 12, 2014), available at <http://www.avoicemalestudents.com/wp-content/uploads/2015/08/Opinion-and-order-Dezmine-Wells-Xavier-University-filed-2014-3-12.pdf>.

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	the investigation.	
4	Use of the single investigator model with one person acting as police, prosecutor, and judge.	Bryce Dixon v. Kegan Allee, et. al., Page 10
5	The investigator lacked the knowledge, training, and experience to conduct a fair and competent fact-finding investigation.	Lewis McLeod v. Duke University, Page 13

*Comment:* The White House endorsement of the single-investigator model led many universities to adopt this controversial method. In addition, there is no nationally recognized training curriculum or code of ethics for campus investigators. Given these facts, it is not surprising that five lawsuits alleged investigational shortcomings of this nature.

Table 2: No Reasonable Basis for Initiating the Investigation

	<i>Allegation</i>	<i>Case Name</i>
1	When a reasonable investigation was undertaken, all of the charges were revealed as complete and utter fabrications by a deranged Agnes Scott student with a known propensity for making false accusations.	Amanda Hartley v. Agnes Scott College, Page 6
2	Investigator ignored the significance of the medical tests that were administered to the complainant that failed to establish any evidence of sexual assault.	John Doe v. Salisbury University, Page 4
3	Examination of complainant at the hospital showed no sign of trauma as a result of the sexual encounter. Witnesses indicated the complainant was acting normal. Local police doubted the allegation and did not file charges. Despite all of this, the school investigator proceeded.	Wells v. Xavier University, Pages 2-3
4	The university’s investigation into the case, despite the evidence, is due to the previous investigations of Xavier by the Office for Civil Rights was based on the school's prior failure to properly handle allegations of sexual assault.	Wells v. Xavier University, Page 10

*Comment:* The Office for Civil Rights has directed universities to investigate all allegations of sexual misconduct, regardless of their possible merit. These allegations spring from this overly broad policy.

Table 3: Lack of Proper Notice and Improper Preliminary Actions

	<i>Allegation</i>	<i>Case Name</i>
1	Preliminary investigation began without notice to the accused.	Ritter v. Oklahoma City University, Page 2
2	The accused was interviewed over Skype without being told the allegations against him.	Sterrett v. Cowan, Pages 6-7
3	Investigators were not forthright with the nature of the investigation when questioning the accused. Thus, there was no "notice."	John Doe v. University of Southern California, Page 28
4	When asked if he needed a lawyer, the accused was warned that if he didn’t participate, the investigation would move forward without his input.	Sterrett v. Cowan, Pages 6 -7



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*Comment:* Adequate notice of the allegations, including a delineation of the specific charges against the student, is one of the most fundamental due process protections. The absence of appropriate notice for accused students is troubling, especially at public universities.

Table 4: Accused Student Not Allowed to Contact Potential Witnesses to Testify on His Behalf

	<i>Allegation</i>	<i>Case Name</i>
1	The university administrator who led the investigation into the charges prohibited the accused student from contacting any of the witnesses and instructed him that he should not contact other university students to testify on his behalf.	Jeremiah Marshall v. Indiana University, Page 2
2	The accused was told he couldn't speak to his roommate, the "most important witness," about the complaint.	Sterrett v. Cowan, Page 12

*Comment:* The allegations enumerated in Table 4 suggest university confidentiality policies should not be used to preclude an accused student from mounting a proper defense.

Table 5: Incomplete/Inadequate Collection of Evidence

	<i>Allegation</i>	<i>Case Name</i>
1	A "reasonable investigation" would have established that Hartley was not at Agnes Scott College at the time of the alleged assault and that she had never been to the dormitory of the alleged victim.	Amanda Hartley v. Agnes Scott College, Page 5
2	The investigators used an unverified on-line Blood Alcohol Content calculation tool from Cornell's Gannett Health Services to determine complainant Doe's blood alcohol content on the night in question.	Vito Prasad v. Cornell University, Page 12
3	The investigator only interviewed the witnesses provided by the complainant, and no one else.	Benjamin King v. DePauw University, Page 4
4	Investigator did not request text messages.	Benjamin King v. DePauw University, Page 4
5	Investigator only spoke to complainant's witnesses before making a determination that she was intoxicated.	John Doe v. Georgia Board of Regents, Page 5
6	Investigator only spoke to one of six witnesses identified by the accused.	John Doe v. Georgia Board of Regents, Page 6
7	Plaintiff was not permitted to offer questions for the investigator to pose to the witnesses.	John Doe v. Georgia Board of Regents, Page 17

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8	Investigator failed to clearly define the term drunk, as opposed to drinking, being used by witnesses.	John Doe v. Salisbury University, Page 6
9	Investigators essentially ignored the witness statements and new evidence provided by the accused.	Sterrett v. Cowan, Pages 12-13

*Comment:* Among the 18 lawsuits, allegations of incomplete or inadequate collection of evidence were among the most common. Proponents of victim-centered approaches encourage investigators to “focus on offender behavior – not victim behavior,”<sup>35</sup> meaning investigations should accord greater credibility to complainants’ statements. As a result, investigators are at greater risk of allegations of incomplete or inadequate collection of evidence.

Table 6: Faulty Inferences from the Evidence, or Failure to Consider Relevant Evidence

	<i>Allegation</i>	<i>Case Name</i>
1	Plaintiff asserts that Doe demonstrated her consent to the sexual activity by her words and her actions, yet the Investigative Report “disregarded these key aspects of the sexual encounter, in finding that a preponderance of the evidence supported [Doe’s] factual allegations that she did not consent to ‘sexual intercourse’ (even though it was undisputed that the parties did not have sexual intercourse).”	Vito Prasad v. Cornell University, Pages 23-24
2	The initial investigator disregarded the text messages provided by the accused student that served to corroborate his account.	Brian Harris v. St. Joseph’s University, Pages 5-6
3	Investigator failed to verify information received from the complainant, and accepted it as true.	John Doe v. Salisbury University, Page 2
4	Investigators ignored or failed to uncover exculpatory material.	Sterrett v. Cowan, Pages 12-13
5	Investigators declared the complainant credible despite her repeated confirmations that she was intoxicated and had spotty/blurred memory, but declared the accused’s story not credible due to inconsistencies, despite the fact that he too was intoxicated like the complainant.	John Doe v. University of Southern California, Page 14

*Comment:* Fair-minded investigators are enjoined to avoid preconceptions and confirmation biases, and instead to “follow the evidence.” In contrast, victim-centered investigators are advised to assume that “all sexual assault cases are valid unless established otherwise by investigative findings.”<sup>36</sup> This may explain why five lawsuits alleged faulty inferences or failure to consider relevant evidence.

<sup>35</sup> Margolis Healy & Associates. Title IX Investigations. 2012. <http://www.slideshare.net/margolishealy/mha-title-ix-investigations-2012-legal-issues-in-higher-education>

<sup>36</sup> Human Rights Watch, *supra* note 13.

Table 7: Failure to Reconcile Inconsistent Accounts by the Complainant and Witnesses

1	The investigators disregarded at least four witness statements that demonstrated that Doe was not exhibiting visible signs of intoxication during the time leading up to the intimate encounter with Prasad.	Vito Prasad v. Cornell University, Page 18
2	Investigator failed to follow up on witness inconsistencies on critical issues.	Lewis McLeod v. Duke University, Page 15
3	Complainant had numerous inconsistencies in her testimony, including how much alcohol was consumed.	Benjamin King v. DePauw University, Page 5
4	The complainant's narrative of events and subsequent written statement contained inconsistencies, but the investigator did not consider the inconsistencies because he did not view the narrative as "evidence."	John Doe v. Georgia Board of Regents, Page 10-11
5	Investigator did not amend his report when confronted with contradictory evidence from the accused about inaccuracies in the witness statements and case narrative.	John Doe v. Georgia Board of Regents, Page 8
6	Investigators failed to resolve inconsistencies in the report when notified by the accused.	John Doe v. University of California Regents, Page 16

*Comment:* Victim-centered investigations are based on the concept of “always believe the victim.” If the investigator presumes that the complainant is in fact a “victim” and always should be believed, that would likely dissuade an investigator from making the necessary efforts to reconcile conflicting evidence.

Table 8: Overt Bias/Predetermination of Guilt

	<i>Allegation</i>	<i>Case Name</i>
1	During the course of the investigation and subsequent proceedings, the school received incontrovertible evidence of the young woman pressuring plaintiff for sex, inviting him for future sexual encounters, and fondly discussing the prior intimate encounter she alleged was nonconsensual.	Luke Benning v. Marlboro College, Page 6
2	From the outset, the investigator abused her authority. Rather than proceeding in a fair and impartial manner, the investigator set out to find Ritter responsible for sexual misconduct. The investigator conducted the entire process in favor of the complainant and with a presumption of guilt placed on the plaintiff.	Ritter v. Oklahoma City University, Page 5
3	The investigator acted with hostility and compared accused student to the convicted child molester and former football coach Jerry Sandusky.	Brian Harris v. St. Joseph's University, Pages 5-6
4	The investigative Report's cherry-picked statements from the witnesses' observations; the omission of key, qualifying facts; and the manipulation of supporting facts; combined with the investigator's mischaracterizations of the witnesses' accounts, led to the predetermined conclusion that Jane Doe was not	John Doe v. University of California Regents, Page 21

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	capable of consenting to the sexual activity with John Doe.	
5	Investigator Cowan had made her mind up early on, based solely on complainant’s meeting with her, that plaintiff was “guilty.” The result of her investigation was pre-ordained and she devoted little time or energy to seeking facts.	Sterrett v. Cowan, Page 27
6	The investigator provided Jane, but not John, with all witness statements, and met with Jane, but not John, multiple times to “clarify” inconsistencies.	John Doe v. University of Southern California, Page 15
7	Sexual assault victim advocates are assigned as the investigator, which show implicit bias.	Bryce Dixon v. Kegan Allee, et. al., Page 11
8	University Title IX personnel act more as advocates for alleged victims and focus on validating the initial allegations of sexual misconduct, rather than arriving at a fair and impartial determination of the facts.	Bryce Dixon v. Kegan Allee, et. al., Page 11
9	Given Ms. Kozak’s October 5, 2014 presentation to SPEAK and her stated position that "regret equals rape," Ms. Kozak’s involvement in Plaintiff’s investigation was highly improper and demonstrated an inherent bias and predetermination of guilt of plaintiff as the male accused in such a similar scenario.	John Doe v. Washington and Lee University, Page 9 Complaint
10	The accused student’s removal was ordered before any investigation took place.	John Doe v. Washington and Lee University, Page 2 Complaint

*Comment:* Overt Bias/Predetermination of Guilt is the category with the largest number of allegations. A perusal of these cases suggests the bias induced by “victim-centered” approaches is not a result of inadvertent error, but rather is systematic and intentional.

Table 9: Undue Investigational Delays

	<i>Allegation</i>	<i>Case Name</i>
1	University did not begin to investigate the claim until eight weeks after the alleged incident.	Benjamin King v. DePauw University, Page 4
2	College hired a lawyer who took approximately five months to complete her investigation.	Doe v. Middlebury College, Page 3

*Comment:* The Office for Civil Rights urges that investigations be conducted within a period of days, not months.

Table 10: Improper Record Keeping or Reporting

	<i>Allegation</i>	<i>Case Name</i>
1	None of the communications with witnesses were recorded, and summaries were not verified by witnesses after they were written up.	Lewis McLeod v. Duke University, Page 15.
2	Notes taken by the investigator were withheld from the panel and the accused.	Lewis McLeod v. Duke University, Page 16

3	Investigator Croslin presented a skewed version of the facts by failing to apprise Ritter of an additional female witness and her observations of the complainant.	Ritter v. Oklahoma City University, Page 11
4	After the complainant expressed a desire to remove herself from the process, investigators did not cite the reason for the complainant withdrawing.	John Doe v. Salisbury University, Page 7
5	The report included inflammatory hearsay testimony from a witness who was not at the alleged incident, but was included to reiterate the testimony of the complainant and discredit the accused's character.	John Doe v. University of California Regents, Page 17
6	The notes of the initial intake investigator were not made available to the accused student.	Sterrett v. Cowan, Pages 11 and 18
7	Upon review of the investigation report, Plaintiff noticed that investigator Kozak's summary of his verbal account of the events was incomplete and did not include all facts. Plaintiff advised Ms. Kozak of this omission, but the change was never made.	John Doe v. Washington and Lee University, Page 12
8	Statements from witnesses were reduced to summaries, without transcripts or contemporaneous notes and susceptible to inaccuracies.	John Doe v. Washington and Lee University, Page 13

*Comment:* The eight instances of alleged improper record keeping or reporting appear to be a consequence of the many improprieties associated with “victim-centered” approaches, as enumerated above. Some of the allegations hint at possible spoliation of evidence.

The 18 lawsuits made a total of 55 allegations of investigational impropriety. Collectively, these allegations represent egregious violations of Office for Civil Rights requirements to conduct investigations that are equitable, and represent a departure from the most rudimentary notions of fairness.

### **Judicial Findings**

In most of the 30 cases, the judicial ruling addressed broad concerns regarding lack of due process, breach of contract, and Title IX violations. But in four decisions, the judge specifically highlighted flaws in the schools’ investigational approach:

*John Doe vs. Brown University:*

[Investigator] Perkins’ assessment that there was insufficient evidence to support [accused student] Doe’s fabrication claim was particularly problematic given that she had refused to ask for evidence that might have proven it so and been exculpatory to Doe. ...

The problem here was that Perkins made the initial decision to include the conspiracy claim and corresponding character evidence, but then chose not to complete the evidence-gathering, and went on to say that there was insufficient evidence to support Doe’s fabrication claim. Because of this, her failure to request the text messages between Ann and Witness 9 was a violation of Doe’s right “[t]o

be given every opportunity to . . . offer evidence before the hearing body or officer.”

*Comment:* In this case, the judge chided the university investigator for failing to obtain potentially exculpatory evidence.

*John Doe v. University of Southern California:*

But it is not too heavy a burden to require that students facing disciplinary action be informed of the factual basis for the charges against them. A charge of “encouraging or permitting others to engage in misconduct” that can penalize completely different behavior based on the decision-maker (SJACS versus the Appeals Panel), without notice to the student, is indeed as standardless as the undefined “gross incompetence” in *Wheeler*. (Pg. 25)...Requiring John to request access to the evidence against him does not comply with the requirements of a fair hearing. (Pg. 29)

*Comment:* This judicial opinion highlighted the deeply flawed notice procedures, the unfairness of placing the burden on the accused to obtain evidence, and the gross baselessness of the charge of sexual misconduct.

*John Doe v. Georgia Board of Regents:*

The Student Sexual Misconduct Policy at Georgia Tech does not allow for a hearing and does not allow for any kind of cross-examination, but rather vests all power in one individual who both investigates and adjudicates. The other due process violations alleged by Plaintiff are also arguably more pressing in light of the single investigator/adjudicator model. The inclusion of admittedly extraneous innuendo from witnesses concerning rumors of Plaintiff’s general character and the refusal to interview certain witnesses is potentially more problematic in an investigator/adjudicator model. (Pg. 25-26)...

To put it bluntly, Mr. Paquette’s [Investigator] testimony at the preliminary injunction hearing about the course of the investigation and the manner in which he made certain investigatory decisions was very far from an ideal representation of due process. (Pg. 37)...Much remains for the Court’s consideration as to whether Mr. Paquette’s investigation veered so far from the ideal as to be unconstitutional. (Pg. 37-38)

*Comment:* The judge’s decision centered on the problems of reliance on hearsay evidence and the investigator’s flawed decision-making process, which were further compounded by the use of the single-investigator model. These due process shortcomings served to elicit a strongly-worded judicial reproach.

*John Doe v. Washington and Lee University:*

In the course of the investigation, Ms. Kozak and Mr. Rodocker ultimately interviewed at least nine people. These witnesses included two of Plaintiff’s four recommended witnesses and at least eight witnesses recommended by Jane Doe,

although it is unclear from the pleadings if Jane Doe recommended additional individuals who were not interviewed. When Plaintiff questioned why two of his suggested witnesses were not interviewed, Ms. Kozak stated that the interviews would not be necessary, as they already had enough facts. (Pg. 7 - Opinion)

*Comment:* In a case riddled with overt bias, the judge highlighted the arbitrary nature of the investigators' decision to interview only two of the accused student's recommended witnesses.

### **Regulatory Liability**

Taken to its logical conclusion, a victim-centered approach would obviate the need to interview the accused or obtain his version of the alleged incident, since the accuser's account is believed to be true and her "victim" status presumed. It is not difficult to imagine how this approach could open the door to serious injustice. In at least two cases, a student accused of sexual misconduct has been summarily expelled without any hearing or opportunity to present his case.<sup>37</sup>

In a third case, a student at Wesley College in Delaware was accused of live-streaming a sexual encounter among several students (the sexual encounter was consensual, the live-streaming was not). The student's expulsion without an interview or meaningful hearing resulted in a formal complaint to the Office for Civil Rights. After investigation, the Office for Civil Rights released a ground-breaking 29-page Determination Letter<sup>38</sup> and an 18-page Resolution Agreement<sup>39</sup> revealing a series of Kafkaesque investigational and adjudicative blunders.

Employing unusually blunt language, the OCR Determination Letter concludes (pages 23-24):

OCR determined that the accused Student was entitled to procedural protections that the College did not afford him. In processing the complaint against the accused Student, the College did not satisfy Title IX, the College did not comply with its own procedures and, in fact, the College acted in direct contradiction of its procedures and as a result the resolution of the complaint was not equitable. The College's failure to interview the accused Student impacted the College's investigation and resolution of the accused Student's case. Without any information regarding the accused Student's responses to the allegations, the College was limited in its ability to obtain all potential relevant evidence, which, in turn, made the decisions it undertook potentially based on insufficient

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<sup>37</sup> Joseph Roberts: Vindication for a Student Suspended from Savannah State University. March 23, 2016. [http://www.ifeminists.net/e107\\_plugins/content/content.php?content.1360](http://www.ifeminists.net/e107_plugins/content/content.php?content.1360) ; Jack Hunter: No Harassment, No Victim, No Investigation. Expelled Anyway. August 8, 2016. <http://www.saveservices.org/2016/08/no-harassment-no-victim-no-investigation-expelled-anyway/>

<sup>38</sup> Office for Civil Rights Letter to Robert E. Clark, October 12, 2016. Available at: <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf>

<sup>39</sup> Office for Civil Rights Resolution Agreement with Wesley College, September 30, 2016. Available at: <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-b.pdf>

information. Likewise, the College's failure to share information with the accused Student, as well as the College's provision of misinformation (the incorrect policy) to the accused Student, limited his ability to fully participate in the process. Finally, the College's deviation from its own process, as well as from process that would be consistent with Title IX, in the conduct of the hearing itself prevented the accused Student from receiving equitable treatment as required by Title IX.

Specifically, OCR's investigation disclosed evidence that the resolution of the complaint was not equitable in several ways:

*The accused Student was not given an opportunity to share his version of events and to benefit from an investigation of the accuracy of that version of events.* Because the College skipped the step in its policy providing for an educational conference at which accused students could be interviewed, the College could not have investigated – and did not investigate – facts the accused Student may have presented. In addition, because this step in the process never took place (coupled with the failure, discussed below, to share the incident report with the accused Student), the accused Student did not benefit from notice, in advance of the hearing, of the scope of issues under investigation and the information he could rebut if he so chose.

These investigational failures set the stage for a series of subsequent errors. As enumerated in the OCR letter:

- The accused Student was not provided with the opportunity to challenge evidence that the College relied upon in imposing his interim suspension.
- The accused Student was never afforded his resolution options.
- The Student was not provided an adequate opportunity to defend himself at the Hearing

The OCR Letter also commented on the potential conflict of interest for the college administrator who oversaw the investigation and participated in the adjudication procedures: "A key Title IX Team member participates in Judicial Board Hearings as a non-voting member, and also as the individual who determines whether an appeal should be forwarded to the appeal panel for processing. This may present a conflict of interest if the Title IX Team member has any oversight over the investigation of sexual misconduct complaints." (Page 13) This finding appears to question the legal acceptability of the single-investigator model.



The *Washington Post* summarized the Wesley College case in strong language:<sup>40</sup>

[F]ew, if any, of the alleged violations of a student’s rights compare in egregiousness to what happened at Wesley College in Delaware, as described in findings by the U.S. Department of Education’s Office of Civil Rights (OCR) made public Wednesday.

What makes the case so unusual, compared to others that have come before the courts and are public, is the sheer number of important procedural protections denied to the accused. In most cases, courts have found one or two things wrong, for example, inadequate access to witnesses or a failure of a school to adhere to the letter of its own written procedures.

In this case, the OCR found virtually everything wrong and, therefore, a violation of Title IX’s protections against discrimination.

In summary, the OCR Determination Letter documents egregious flaws in Wesley College’s investigational and adjudicative procedures. Many of these shortcomings are consistent with the “victim-centered” approach to “always believe the victim.”

### **Restoring Justice to Campus Investigations**

In the 1980s, a veritable hysteria arising from allegations of child satanic sex abuse swept the nation. Investigators, police officials, and prosecutors were enjoined to “believe the child.” Dozens of parents and child care center workers were soon wrongfully indicted, convicted, and imprisoned.<sup>41</sup>

Thirty years later, a similar refrain is heard in the context of campus sexual assault investigations: “believe the victim.” Such victim-centered approaches are believed to have become the norm.

But the allegations of investigational improprieties from the 18 lawsuits, the four judicial opinions, and the recent Wesley College case point to such approaches as a new source of legal liability for institutions of higher learning.

Repeated instances of investigational malfeasance are also likely to undermine and discredit the broader effort to curb campus sexual assault. Harvard Law School professor Jeannie Suk has derided the always-believe-the-victim mantra as a “near-religious teaching” that is likely to harm future rape victims: “When the core belief is that accusers

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<sup>40</sup> Barbash, Fred. “College Expels Student for Sex Misconduct without Bothering to Interview Him, Draws Sharp Government Rebuke.” *Washington Post*, October 13, 2016. Available at <https://www.washingtonpost.com/news/morning-mix/wp/2016/10/13/egregious-unfairness-to-student-in-sexual-misconduct-case-brings-unusual-government-rebuke/>.

<sup>41</sup> Beck, Richard. “We Believe the Children: A Moral Panic in the 1980s.” 2015.

never lie, if any one accuser has lied, it brings into question the stability of the entire thought system, rendering uncertain all allegations of sexual assault.”<sup>42</sup>

SAVE urges university administrators to take prompt measures to end so-called “victim-centered” investigations at their institutions. *Simply put, such approaches are inconsistent with the most basic notions of fairness, repudiate the presumption of innocence, and are likely to lead to wrongful determinations of guilt, thereby increasing schools’ liability exposure.*

SAVE further recommends that institutional officials who investigate alleged sexual conduct violations adhere to procedures that can be described as “justice-centered:”

- Discharge their duties with objectivity and impartiality.
- Make reasonable efforts to contact all potential witnesses, in addition to those recommended by the complainant or accused student.
- Seek to gather and disclose both inculpatory and exculpatory evidence, and make all such evidence available to the complainant and the accused.
- Thoroughly document and/or videotape all communications with the complainant and accused, as well as with potential witnesses, evidence collected, and interviews conducted, which shall be made available to the complainant and accused prior to any institutional disciplinary hearing.
- Compile and evaluate evidence in an impartial manner before rendering an opinion.
- Not also serve as victim advocate, prosecutor, adjudicator, or appellate adjudicator for the same case.

## ACKNOWLEDGEMENTS

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<sup>42</sup> Gerson, Jeannie Suk. “Shutting Down Conversations about Rape at Harvard Law.” The New Yorker, December 11, 2015. Available at <http://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school>.