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November 17, 2016

Re: *Title IX Investigations Program Violates Ethical Tenets, Increases Universities' Liability Risk, and Invites OCR Intervention*

Gary J. Margolis, Ed.D.
Jeffrey J. Nolan, Esq.
Margolis Healy
128 Lakeside Ave, Suite 302
Burlington, VT 05401

Dear Dr. Margolis and Mr. Nolan:

The Center for Prosecutor Integrity is a 501(c)(3) organization dedicated to preserving the presumption of innocence, assuring equal treatment under the law, and ending wrongful convictions. We are particularly interested in the way that higher education institutions handle allegations of sexual assault and harassment.

We are writing in regards to a Margolis Healy training program on "Title IX Investigations," which is available on your website.¹

We acknowledge the sound advice presented in the program that investigators conduct their work impartially (Slide No. 5); with no malice, bias, or conflict of interest (Slide No. 21); corroborate the details of the investigation (Slide No. 27); examine all evidence (Slide No. 26), and conduct "thorough" investigations (Slide No. 30).

However, we are deeply concerned that other recommendations presented in your program violate recognized tenets of ethical investigations, are logically contradictory, and predispose to flawed investigational outcomes.

We first cite relevant sections from the codes of ethics of leading investigator organizations:

- **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."
- **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."

¹ <http://www.slideshare.net/margolishealy/mha-title-ix-investigations-2012-legal-issues-in-higher-education>

- National Council of Investigation and Security Services: “A member shall observe, and adhere to the precepts of honesty, integrity, and truthfulness.”
- National Association of Legal Investigators: The investigator “Will make all reporting based upon truth and fact and will only express honest opinions based thereon”
- 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.”

These codes emphasize the need for impartiality, integrity, and honesty of investigations. Unfortunately, in advocating use of a “victim-centered” approach (Slide No. 22), many recommendations found in your Title IX Investigations training program violate these ethical tenets:

- Slide 22: Investigations should “Start by believing” the complainant -- This violates the fundamental notion that investigators should approach their work without bias or preconception.
- Slide 26: “Always approach a case believing that ‘something’ occurred.” -- This contradicts the statement that “The recipe for a bad investigation is to form a hypothesis and try to prove it” (Slide No. 26).
- Slide 27: “Documentation of sensory and peripheral details from the victim’s perspective” – This statement implies that sensory and peripheral details should *not* be obtained from the accused student, which contradicts the program’s repeated advice to be “thorough” (Slides No. 16 and 30) and to avoid bias (Slide 21).
- Slide 28:
 - “Focus on offender behavior, not victim behavior” – This statement contradicts recommendations that the investigator must have “no bias” (Slide No. 21), “Ensure investigators understand their role as neutral parties, not advocates” (Slide No. 23), and obtain “Thorough Documentation” (Slide No. 30)
 - “‘He said, she said’ becomes ‘he said, they said’” – The clear implication is that the investigator is expected to seek out multiple witnesses to corroborate the complainant’s account, but not multiple witnesses to support the accused’s statements. This is manifestly unfair and negates ethical requirements that investigators be neutral and even-handed.
 - “Why did he choose/target the victim? . . .” and “How did the respondent manipulate the environment and circumstances to get the victim into a position of vulnerability?” – This wrongfully implies that the accused student has already been determined to be the culprit, and contradicts the statement to “Pursue Justice & Fairness” (Slide No. 30).
- Slide 29:
 - “Forensic exam of suspect” – Why does the training program omit a recommendation for a forensic examination of the *complainant*? Again, this undermines program recommendations to be “thorough.”
 - “[C]onsider apology letter” – It is the investigator’s role to collect and analyze all relevant evidence, not to consider remediation strategies. Placing an investigator

in an adjudicatory role violates the recommendation of “no conflict of interest” (Slide No. 21).

We are also deeply concerned with the improper use of conclusory words such as “victim” and “offender.” The presumption of innocence is eroded when such terms used prior to an adjudication determination. We instead recommend the use of neutral, unbiased terms such as “complainant,” “accused student,” or “respondent.”

Victim-Centered Investigations Increase Liability Risk

Because of these above concerns, recent court decisions have reflected the problematic nature of victim-centered investigations.² In at least three cases, judges have issued rulings favorable to the accused student, commenting specifically on the truncated and flawed investigational procedures:

John Doe v. Georgia Board of Regents:³

- 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....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)

John Doe v. Washington and Lee University:⁴

- 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)

John Doe vs. Brown University:⁵

- [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

² <http://www.saveservices.org/wp-content/uploads/Victim-Centered-Investigations-and-Liability-Risk.pdf>

³ <http://boysmeneducation.com/wp-content/uploads/2015/12/Georgia-Institute-of-Technology-Order-re-motion-for-preliminary-injunction-12-16-2015.pdf>

⁴ <http://www.avoicemalestudents.com/wp-content/uploads/2014/12/john-doe-verified-complaint-washington-lee-university.pdf>

⁵ https://www.scribd.com/document/325728872/Doe-v-Brown-University#from_embed

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.”

Finally, conducting victim-centered investigations and either avoiding, failing, or trying to alter investigative steps may potentially be a violation of federal law, specifically Title 18 U.S. Code § 1512, of “Tampering with a witness, victim, or an informant.”

Victim-Centered Investigations Invite Adverse OCR Determinations

On October 12, 2016, the Department of Education Office for Civil Rights (OCR) issued a press release, stating that Wesley College in Delaware violated Title IX as it applies to sexual violence and harassment.⁶

The OCR investigation followed after a complaint of an accused student regarding the school’s disciplinary proceedings. OCR reviewed the College’s handling of cases for 2013-2015, and determined that the “college violated Title IX in failing to provide procedural safeguards and *equitable investigations* for other accused students, including several incidents in which the college provided no evidence that accused students were interviewed before receiving interim suspensions, some on the same day.” [emphasis added]

OCR sharply criticized the way that Wesley College conducted the hearing in question, and particularly how the college failed to interview the student during the investigation of the complaint. As stated in the press release, “OCR found that the accused student about whom the complaint was filed was not provided a full opportunity to respond to the charges, rebut the allegations, or defend himself at his hearing.”

The use of victim-centered investigations only serves to invite an investigation such as the one conducted against Wesley College. The Office for Civil Rights has made it clear that both complainants and accused students should have a neutral investigation and fact-finding period. This is impossible when the investigator is told to “start by believing” the complainant (Slide No. 22).

Conclusion

The Center for Prosecutor Integrity urges you to modify the *Title IX Investigations* program to correct the numerous and severe biases and contradictory recommendations enumerated above.

We would like to set up a teleconference to discuss these concerns on November 29th at 9 a.m. EST. Please contact me at glauterio@prosecutorintegrity.org to confirm your availability.

Sincerely,

Gina R. Lauterio, Esq.
Policy Program Director

⁶ <http://www.ed.gov/news/press-releases/students-accused-sexual-misconduct-had-title-ix-rights-violated-wesley-college-says-us-department-education>

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