

# **2017 INTERIM GUIDANCE**

“We know this much to be true:

One rape is too many.

One assault is too many.

One aggressive act of harassment is too many.

**One person denied due process is too many.”**

- Honorable Betsy DeVos, Secretary of Education, September 7, 2017
- <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement>



- 2017 Dear Colleague letter
  - Withdrew the 2011 Dear Colleague Letter and 2014 Questions and Answers
  - Provides Interim Guidance, harkening back to OCR's 2001 Revised Sexual Harassment Guide.
  - “The era of rule by letter is over. The Department of Education will follow the proper legal procedures to craft a new Title IX regulation that better serves students and schools.”
- “An equitable investigation of a Title IX complaint *requires* a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including **both inculpatory and exculpatory evidence**—and take into account the unique and complex circumstances of each case.”

- **2017 Questions and Answers - Key Components**
  - **Focus on fairness:** Schools must ensure “adequate, reliable, and impartial investigation of complaints.”
  - **Interim Measures:** “In fairly assessing the need for a party to receive interim measures, a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party.”
  - **Preponderance of the evidence or clear and convincing evidence:** “the standard of evidence [for Title IX disciplinary matters]...should be consistent with the standard the school applies in other misconduct cases.” - *Doe v Brandeis Univ.*, 177F Supp. 36 561

- 2017 Questions and Answers - Key Components (Cont.)
  - Burden on the school to gather sufficient evidence to make a determination
  - Substantive notice - including details about the alleged incident sufficient to prepare a response
  - Allows for informal resolution of complaints
  - Meaningful access to information

- **The response from Universities has been tepid**
  - National Review, “Campus Kangaroo Courts: Blame Colleges, Not Just the Federal Government - <http://www.nationalreview.com/article/456157/campus-kangaroo-courts-history>
  - “The University of Chicago is not considering making changes to its disciplinary policies...” - <https://www.chicagomaroon.com/article/2017/9/8/read-uchicago-response-devos-pledge-roll-back-titl/>
  - “Harvard is ‘reviewing’ new federal Title IX guidance....[C]hanges to our policy made since the 2011 guidelines...will not be rolled back.” - <http://www.thecrimson.com/article/2017/9/25/harvard-responds-to-devos-guidelines/>
  - “UC Berkeley...stands firmly in support of the profoundly important policies enacted in recent years....” - <http://news.berkeley.edu/2017/09/07/uc-responds-to-trump-administrations-troubling-title-ix-changes/>
- *Equal Means Equal v. Department of Education* - lawsuit filed in the District of Massachusetts challenging the new guidance
- *SurvJustice v Dept of Education* - lawsuit filed in the Northern District of California challenging the new guidance
  - [https://www.washingtonpost.com/news/grade-point/wp/2018/01/25/lawsuit-challenges-trumps-rollback-of-guidance-on-campus-sexual-violence/?utm\\_term=.70a234ad3de6](https://www.washingtonpost.com/news/grade-point/wp/2018/01/25/lawsuit-challenges-trumps-rollback-of-guidance-on-campus-sexual-violence/?utm_term=.70a234ad3de6)
- **Increased public awareness**
  - Celebrity sexual assault accusations
  - #MeToo Campaign
  - #TimesUp Campaign

**“Rosen:** What about due process for the accused?

**Ginsburg:** Well, that must not be ignored and it goes beyond sexual harassment. The person who is accused has a right to defend herself or himself, and we certainly should not lose sight of that. Recognizing that these are complaints that should be heard. There's been criticism of some college codes of conduct for not giving the accused person a fair opportunity to be heard, and that's one of the basic tenets of our system, as you know, everyone deserves a fair hearing.

**Rosen:** Are some of those criticisms of the college codes valid?

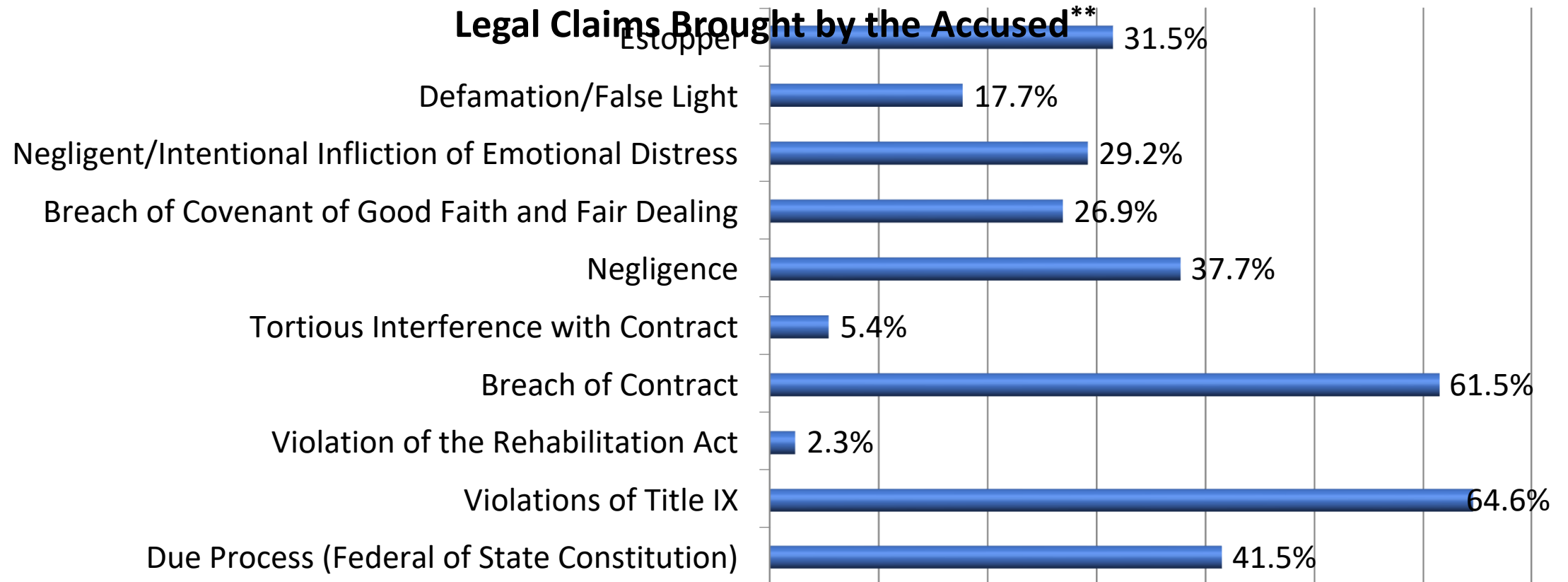
**Ginsburg:** Do I think they are? Yes.”

- Supreme Court Justice Ruth Bader Ginsburg, A Conversation with Justice Ruth Bader Ginsburg, 2018 Owen J. Roberts Memorial Lecture (February 12, 2018)(interview with Jeffrey Rosen)

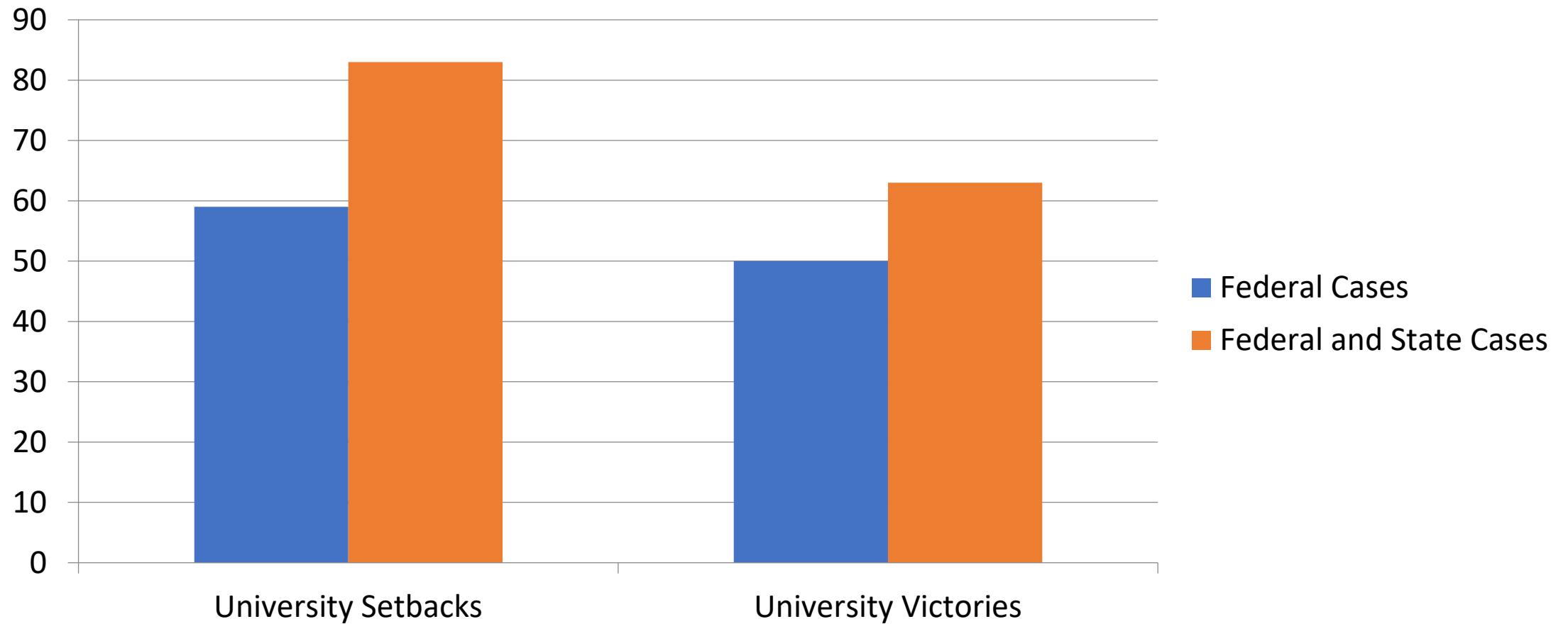


# **TITLE IX LITIGATION OVERVIEW: RECENT TRENDS AND CASES**





\*\* Proskauer Title IX Litigation Report (August 29, 2017)



-KC Johnson, 4<sup>th</sup> Annual Symposium on Representing Students Accused of Sexual Assault (March 23, 2018)