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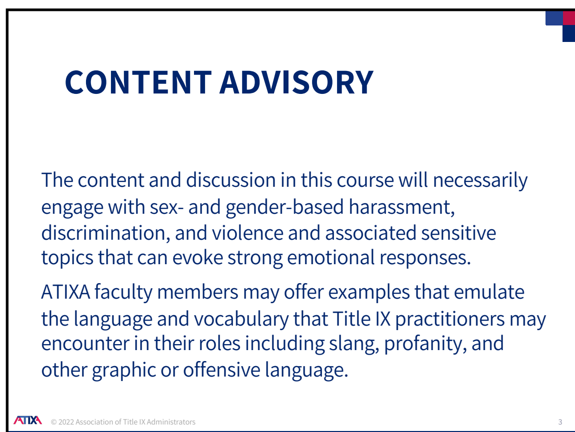

3

AGENDA

1. Brief Legal Primer
2. Deliberate Indifference
3. Retaliation
4. First Amendment and Title IX
5. Case Study
6. Due Process

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4

AGENDA

7. Erroneous Outcome and Selective Enforcement
8. LGBTQIAA+ Topics
9. Title IX Potpourri
10. Title IX and Athletics

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5

TITLE IX

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

"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 educational program or activity receiving federal financial assistance."

IX

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6

BRIEF LEGAL PRIMER

- Court System
- Laws, Courts & Regulations

7

COURT SYSTEM IN A NUTSHELL

Federal Court

- **U.S. District Court**
  - Trial Court; Single judge or magistrate judge; Decisions binding only on single District
- **U.S. Courts of Appeals ("Circuit Courts")**
  - 12 Geographic Circuits: 11 + DC Circuit
  - Panel of three judges (also *en banc* option)
  - Decisions binding on entire Circuit
- **U.S. Supreme Court**
  - Final appellate court (both federal and state)
  - Nine justices

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8

U.S. COURTS OF APPEALS MAP

Source: https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf

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9

LAWS, COURTS & REGULATIONS

- **Laws** passed by Congress (e.g., Title IX) – Enforceable by Courts and Office for Civil Rights (OCR)
  - Federal Regulations – **Force of law**; Enforceable by Courts and OCR
    - Regulatory Guidance from OCR – Enforceable only by OCR (e.g., 2001 Guidance)
    - Sub-Regulatory Guidance from OCR – Enforceable only by OCR (e.g., 2011 Dear Colleague Letter)
- Federal Case Law – **Force of law** based on jurisdiction
  - Supreme Court – binding on entire country
  - Circuit Courts of Appeal – binding on Circuit
  - District Court – binding on District
- State Case Law – **Force of law**; binding only in that state based on court jurisdiction

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10

CODE OF FEDERAL REGULATIONS

Proposed Rule Making

- Congress grants rulemaking authority to federal agencies (e.g., OCR) to implement statutory programs such as Title IX requirements.
- Agencies submit their "significant" proposed and final rules to Office of Information and Regulatory Affairs (OIRA) for budget impact and cost-benefit analysis of the rule.
- The agency then publishes a notice of proposed rulemaking in the *Federal Register*. The notice must provide:
  1. the time, place, and nature of the rulemaking proceedings;
  2. a reference to the legal authority under which the rule is proposed; and
  3. either the terms or subject of the proposed rule.

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11

CODE OF FEDERAL REGULATIONS

Proposed Rule Making (Cont.)

- Agency then allows "interested persons" an opportunity to comment. Typically, an agency will provide at least **30 days** for public comment.
- The agency is required to review the public comments and respond to "significant" comments received, and it may make changes to the proposal based on those comments.
- Then the agency may publish the final rule in the Federal Register along with a "concise general statement" of the rule's "basis and purpose."
- The rule may not go into effect until at least **30 days** after it is published in the Federal Register, with certain exceptions.

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12

CODE OF FEDERAL REGULATIONS PROCESS

- Draft proposed rule
- Review for Budget
- Publish Fed. Reg.
- Receive Comments (30 Days)
- Make Changes
- Publish Final Rule (30 days to implement)

The Rulemaking Process

Statute Authorizes Rulemaking
Agency Develops Draft Proposed Rule
OIRA Reviews Draft Proposed Rule
Agency Publishes Proposed Rule
Agency Receives Comments and Makes Changes to Proposed Rule
OIRA Reviews Draft Final Rule
Agency Publishes Final Rule
Judicial Review
Congressional Review

Graphic adapted from original source: InFocus (2021, March 19), Congressional Research Service

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13

CODE OF FEDERAL REGULATIONS

Judicial Review

- The Administrative Procedure Act (APA) provides judicial recourse for a person aggrieved by final agency action unless a statute precludes judicial review or if a decision is left to agency discretion by law.
- **Scope of Judicial Review**. Under the APA, a court may compel any agency action that is unreasonably delayed or unlawfully withheld. A court may vacate an agency rule if the agency acted:
  1. arbitrarily or capriciously,
  2. in excess of statutory authority,
  3. contrary to a constitutional right, or
  4. in violation of procedures required by statute.

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14

CASE LAW CATEGORIES

- Deliberate Indifference
- Retaliation
- Due Process
- First Amendment and Title IX
- Erroneous Outcome and Selective Enforcement
- LGBTQIAA+ Topics
- Title IX Potpourri
- Title IX and Athletics

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15

DELIBERATE INDIFFERENCE

- *Farmer v. Kansas State University*
- *Kollaritsch v. Michigan State University*
- *Doe v. Fairfax County School Board*
- *Hall v. Millersville University*
- *Karasek v. Regents of Univ. of California*
- *Karasek v. Univ. of California*
- *Cavalier v. Catholic Univ. of America*
- *Doe v. Rhode Island School of Design*

DELIBERATE INDIFFERENCE STANDARD

- In *Gebser* (1998) and *Davis* (1999), the Supreme Court held that a funding recipient is liable under Title IX for deliberate indifference only if:
  - The alleged incident occurred where the funding recipient controlled both the harasser and the context of the harassment
    AND
  - Where the funding recipient received:
    - Actual Notice
    - To a person with the authority to take corrective action
    - Failed to respond in a manner that was clearly unreasonable in light of known circumstances

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FARMER V. KANSAS STATE UNIVERSITY

918 F.3D 1094 (10TH CIR. 2019)

Facts (Pre-2020 Title IX Regulations)

- Two female students sued K-State alleging deliberate indifference in response to reported off-campus rapes.
  - One incident occurred at a fraternity house. Student A had consensual sex with Complainant 1, but Student B emerged from the closet and sexually assaulted Complainant 1.
  - In the second case, the assaults occurred at an off-campus fraternity event and at the fraternity house. At the fraternity house, Student C raped Complainant 2 and left her naked and passed out; Complainant 2 was then raped by Student D.
- Both Complainants reported to K-State and to the police.

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FARMER V. KANSAS STATE UNIVERSITY

918 F.3D 1094 (10TH CIR. 2019)

Facts (Cont.)

- K-State told both Complainants they could not investigate because the incidents occurred off-campus.
- In one case, a school official told the two male students about the complaint, and another school official forwarded a detailed email from the Complainant to the Interfraternity Council.
- Plaintiffs stated they lived in fear of encountering their assailants on campus, they withdrew from campus activities, their grades suffered, and they suffered significant anxiety.
- K-State filed motions to dismiss, which were denied by the District Court.

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19

FARMER V. KANSAS STATE UNIVERSITY

918 F.3D 1094 (10TH CIR. 2019)

Decision

- K-State appealed to the Tenth Circuit regarding the proper interpretation of "deliberate indifference." The Tenth Circuit affirmed the decision:
  - Rejected K-State's claim that the Plaintiffs must allege that K-State's deliberate indifference caused actual further harassment; rather, it was sufficient for Plaintiffs to allege that K-State's deliberate indifference left them vulnerable to harassment
  - Reaffirmed the Supreme Court's ruling in *Davis v. Monroe County Bd. of Ed.* that a person need not be assaulted again for Title IX to apply; making a student "vulnerable to" further harassment or assault is sufficient

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20

FARMER V. KANSAS STATE UNIVERSITY

918 F.3D 1094 (10TH CIR. 2019)

Status

- Plaintiffs permanently dropped all claims in November 2019
- K-State claims it provided no monetary payment or other form of compensation

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21

FARMER V. KANSAS STATE UNIVERSITY

918 F.3D 1094 (10TH CIR. 2019)

Takeaways

- K-State's potential liability arises from its own conduct (failure to address TIX in fraternity), not from the underlying harm caused by the alleged assaults
- Even if an institution cannot address off-campus conduct under its policies, it still must remedy the effects of discrimination
- If your policy is very narrow regarding off-campus conduct, consider supervision, funding, and other mechanisms where the institution exerts control over the harasser or the context

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22

FARMER V. KANSAS STATE UNIVERSITY

918 F.3D 1094 (10TH CIR. 2019)

Takeaways (Cont.)

- The U.S. Departments of Education and Justice submitted a statement of interest in this matter, arguing that K-State's fraternities are "education activities" covered by Title IX
- The 2020 Title IX regulations cite to *Farmer* re: "covered activity" & student organization residences

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23

KOLLARITSCH V. MICHIGAN STATE UNIVERSITY

944 F.3D 613 (6TH CIR. 2019)

Facts

- Case involves several plaintiffs: EK, SG, and Jane Roe 1. Each student was sexually assaulted by a male student, made a formal report, and used MSU's sexual misconduct complaint resolution process.
- **EK**
  - Respondent was found responsible for violating MSU's sexual misconduct policy and was disciplined accordingly.
  - After, EK encountered the respondent on campus at least nine times. EK claimed the respondent stalked and/or intimidated her. She filed a retaliation complaint.
  - MSU evaluated EK's reports of retaliation and determined that she was "just seeing him" around campus. MSU found no facts to support retaliation.

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24

KOLLARITSCH V. MICHIGAN STATE UNIVERSITY
944 F.3D 613 (6TH CIR. 2019)

Facts (Cont.)

- **SG**
  - SG was assaulted by another MSU student. She engaged the sexual misconduct complaint resolution process; the respondent was found responsible and expelled.
  - The respondent filed an appeal that was denied. He filed a second appeal, and the Vice President for Student Affairs (VPSA) ordered a new investigation by an outside law firm.
  - The new investigation found no sexual assault and the respondent was reinstated.
  - SG had no further contact with the respondent but claimed she was "vulnerable to" further harassment because she could have encountered him at any time due to his mere presence on campus.

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25

KOLLARITSCH V. MICHIGAN STATE UNIVERSITY
944 F.3D 613 (6TH CIR. 2019)

Facts (Cont.)

- **Jane Roe 1**
  - Jane Roe 1 was assaulted and engaged the sexual misconduct complaint resolution process.
  - MSU's investigation found insufficient evidence to hold the respondent responsible.
  - Roe 1 had no further contact with the respondent; in fact, he withdrew from MSU.

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26

KOLLARITSCH V. MICHIGAN STATE UNIVERSITY
944 F.3D 613 (6TH CIR. 2019)

Decision

- The Sixth Circuit analogized the "deliberate indifference" standard to tort law (common law legal theory of (duty) injury, causation, and harm).
- Like *Farmer*, this case confronts the legal question of what the U.S. Supreme Court meant in *Davis* when it used the phrase "vulnerable to further harassment."
- The decision also addresses whether the administrators involved should be entitled to qualified immunity.
- The Sixth Circuit reached an arguably different conclusion than the Tenth Circuit in *Farmer*.

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27

KOLLARITSCH V. MICHIGAN STATE UNIVERSITY

944 F.3D 613 (6TH CIR. 2019)

Decision (Cont.)

- To successfully bring a deliberate indifference claim, a plaintiff must plead and ultimately prove:
  - The school had actual knowledge of actionable sexual harassment
  - The school's deliberately indifferent response to the known harassment resulted in further actionable harassment
  - "Title IX injury is attributable to the post-actual-knowledge further harassment"
- To overcome an assertion of qualified immunity, a plaintiff must allege facts showing the official being sued violated clearly established constitutional rights

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28

KOLLARITSCH V. MICHIGAN STATE UNIVERSITY

944 F.3D 613 (6TH CIR. 2019)

Takeaways

- Emerging circuit split on whether "vulnerable to" requires an actual "second incident" of harassment or whether the effects of co-existing on campus on one's educational experience and access is sufficient to state a claim under Title IX.
- Only the Supreme Court can resolve a split of opinion among U.S. Circuit Courts of Appeals.
- There is a high bar when alleging deliberate indifference and, in some jurisdictions, the plaintiff must allege further harassment resulting from a deliberately indifferent response.

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29

KOLLARITSCH V. MICHIGAN STATE UNIVERSITY

944 F.3D 613 (6TH CIR. 2019)

Takeaways (Cont.)

- Although students are entitled to have an institution respond in a manner that is not deliberately indifferent, a complainant has no right to their **preferred** remedy or preferred sanction
- 2020 Title IX regulations refused to require specific sanctions or remedies
- Decision-makers, particularly in public institutions, should maintain some knowledge of clearly established constitutional rights that may bear upon their decisions

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30

DOE V. FAIRFAX COUNTY SCHOOL BOARD
1 F.4TH 257 (4TH CIR. 2021)

Facts
- Doe alleged that, while on a bus trip, Smith repeatedly touched Doe's breasts and genitals and penetrated her vagina with his fingers despite her efforts to physically block him.
- Doe provided a written statement to the Assistant Principal indicating that it was nonconsensual.
- Smith was interviewed and admitted he grabbed Doe and touched her breasts.

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31

DOE V. FAIRFAX COUNTY SCHOOL BOARD
1 F.4TH 257 (4TH CIR. 2021)

Facts (Cont.)
- In a meeting between Doe's parents and the Assistant Principal, Doe's mother stated that Smith's touching of Doe was nonconsensual and thus "a sexual assault."
- The school responded that the administration had concluded that "the evidence that [they] had didn't show that [they] could call it a sexual assault."
- Doe brought Title IX action against the School Board, asserting that school had acted with deliberate indifference to reports of her sexual assault. At trial, the jury found that the School Board did not have **actual knowledge** of the alleged sexual harassment, and therefore, the School Board did not act with deliberate indifference.

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32

DOE V. FAIRFAX COUNTY SCHOOL BOARD
1 F.4TH 257 (4TH CIR. 2021)

Decision Regarding Actual Notice
- The court determined "**actual notice**" is an objective test that can be met by being advised of facts or allegations that could rise to the level of harassment.
- This is true regardless of if the school believes the report fully alleges sexual harassment, or whether the school believed the allegations to be true.
- Reports from other individuals and Doe's mother described the incident as a "sexual assault" and "sexual harassment." The court found a reasonable person hearing those descriptions would understand such reports as alleging misconduct under Title IX.

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33

DOE V. FAIRFAX COUNTY SCHOOL BOARD

1 F.4TH 257 (4TH CIR. 2021)

Decision Regarding Deliberate Indifference

- Schools may be found deliberately indifferent when the school's failure to act causes the student to undergo harassment and where the school's failure to act makes the student **vulnerable** to harassment.

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34

DOE V. FAIRFAX COUNTY SCHOOL BOARD

1 F.4TH 257 (4TH CIR. 2021)

Takeaways

- Ensure that a process is in place for the Title IX Coordinator to receive and examine all reports of sexual misconduct.
- Be aware that being advised of facts or allegations may be enough to trigger an investigation. Whether a school believes the report fully alleges sexual harassment is irrelevant to the need to investigate.
- Deliberate indifference includes where the school's failure to act makes the student **vulnerable** to harassment.

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35

HALL V. MILLERSVILLE UNIVERSITY

22 F. 4TH 397 (3D CIR. 2022)

Facts

- Family of student murdered on campus by non-student boyfriend brought action under TIX for deliberate indifference.
- Millersville's Title IX policy defined sexual misconduct to include dating and domestic violence and covered the conduct of employees, students, and visitors.
- Hall and boyfriend had a history of staying together in the residence hall on campus.
- Resident Assistant (RA) had previously submitted a Title IX report after hearing a struggle in Hall's room. Boyfriend answered the door and indicated that it had "got a little physical." Police responded and drove boyfriend off campus and no police report was filed.

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36

HALL V. MILLERSVILLE UNIVERSITY

22 F. 4TH 397 (3D CIR. 2022)

Facts (Cont.)

- Hall's roommate called her own mother to tell her Hall was given a black eye by her boyfriend. The roommate's mother called University Police, the Millersville's counseling department, and the Area Coordinator.
- Deputy TIX Coordinator reviewed and filed away report, but report was not forwarded to anyone else, and no investigation was conducted.
- Several months later, residents and the RA heard noises from Hall's room, including the sound of a woman screaming for help. The RA knocked on the door, but heard nothing, and did not inquire further.
- That night, the boyfriend killed Hall by "strangulation and multiple traumatic injuries."

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HALL V. MILLERSVILLE UNIVERSITY

22 F. 4TH 397 (3D CIR. 2022)

Decision

- The Third Circuit reversed on appeal, finding that "Millersville knew, and intended, for its Title IX policies to apply to nonstudents."
- The appellate court relied on *Davis* and found that the notice requirement does not apply where the funding recipient **intentionally** violates Title IX.
- The Third Circuit explained that the *Davis* court's holding could apply to violations committed by non-students. To succeed on a deliberate indifference claim, the plaintiff must establish that the funding recipient had "[substantial] control over the harasser and the context of harassment."

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HALL V. MILLERSVILLE UNIVERSITY

22 F. 4TH 397 (3D CIR. 2022)

Takeaways

- *Hall* appears to be the first time a federal appeals court has found that a Title IX funding recipient can be liable for deliberate indifference to sexual harassment perpetrated by a **non-student guest** on campus.
- The Third Circuit reinforced that schools have a duty to protect students when the school has prior knowledge of (i.e., known) sexual misconduct. To succeed on a deliberate indifference claim, the plaintiff must establish that the funding recipient had "[substantial] control over the harasser and the context of harassment."

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HALL V. MILLERSVILLE UNIVERSITY

22 F. 4TH 397 (3D CIR. 2022)

Takeaways (Cont.)

- The court pointed to the University's dormitory guest policies, which it used twice to exclude the boyfriend from campus. It also noted that the University had the ability to issue "No Trespass Orders." All factors in indicating "substantial control" over the non-student.

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40

KARASEK v. REGENTS OF UNIV. OF CALIFORNIA

956 F.3D 1093 (9TH CIR. 2020)

Facts

- Three women alleged that they were sexually assaulted while students at UC Berkeley in 2012
- Two of the women reported that another student was their assailant; the third woman reported that she was assaulted by a male who was an occasional guest lecturer on campus
- Each student reported to the University; the responses by the University varied, but included:
  - Lack of communication with reporting parties
  - Delays
  - Lengthy processes

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41

KARASEK v. REGENTS OF UNIV. OF CALIFORNIA

956 F.3D 1093 (9TH CIR. 2020)

Facts (Cont.)

- The women filed suit under Title IX for the handling of their individual claims under two theories:
  - The response to their reports was deliberately indifferent
  - The University's policy of indifference to reports of sexual misconduct created a sexually hostile environment and heighted the risk that they would be sexually assaulted (a "pre-assault" claim)
- The District Court dismissed and granted summary judgment to UC Berkeley on the majority of the claims
- The women appealed to the Ninth Circuit

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42

KARASEK v. REGENTS OF UNIV. OF CALIFORNIA

956 F.3D 1093 (9TH CIR. 2020)

Decision

- Affirmed the District Court's ruling as to the University's response to the individual women's claims, finding that although the University's actions were problematic, the University **was not deliberately indifferent in its response**
- A **pre-assault claim** survives a motion to dismiss if the plaintiff plausibly alleges that:
  - A school maintained a policy of deliberate indifference to reports of sexual misconduct
  - Which created a heightened risk of sexual harassment
  - In a context subject to the school's control, and
  - The plaintiff was harassed as a result

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43

KARASEK v. REGENTS OF UNIV. OF CALIFORNIA

956 F.3D 1093 (9TH CIR. 2020)

Takeaways

- The court was deferential regarding the reasonableness of the University's action taken in response to the individual claims
- The court was more critical regarding the widespread use of an Early Resolution Process for reports and lack of prevention education, as was noted in the State Auditor's report
- This ruling marks a significant expansion of **"pre-assault"** liability
- Higher education institutions in the Ninth Circuit may be open to legal challenge regarding the effectiveness of their policies
- Implications for "special admits"

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44

KARASEK v. UNIV. OF CALIFORNIA

534 F.SUPP.3D 1136 (N.D.CAL. 2021)

Facts

- Commins, one of the plaintiffs, specifically argued that the University's systemic failure to educate its students about sexual assault and appropriate sexual interactions (substantiated by an audit conducted by the California State Auditor), created an obvious risk and led to her assault.
- Following the Ninth Circuit decision that set the pre-assault claim standard, the case went back to the district court to determine whether the plaintiff alleged facts to survive a motion to dismiss.

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45

KARASEK v. UNIV. OF CALIFORNIA
534 F.SUPP.3D 1136 (N.D.CAL. 2021)

Decision

- The court held that Commins's claim survived the University's motion to dismiss based on the alleged (and, in the Audit, established) failure to provide *any* sexual misconduct training to a significant portion of students, plausibly and obviously placed students at risk and caused Commins harm.
- "The failure to educate such a large percentage of the student body about any of the fundamentals of sexual misconduct would plausibly create an obvious risk: an increase in sexual misconduct. That obvious risk plausibly shows deliberate indifference, provided that Commins can ultimately show that University officials were or should have been aware of it."

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46

KARASEK v. UNIV. OF CALIFORNIA
534 F.SUPP.3D 1136 (N.D.CAL. 2021)

Takeaways

- Higher education institutions, especially those in the Ninth Circuit, may be open to legal challenge regarding the effectiveness of their training and education programs for students.
- Higher education institutions must not forget about the Violence Against Women Act (VAWA) Section 304 requirements for training and prevention programming.
- An annual assessment and detailed documentation is important for tracking your institution's training and prevention efforts and should be maintained by the Title IX Coordinator.

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47

CAVALIER V. CATHOLIC UNIV. OF AMERICA
513 F. SUPP.3D 30 (D.D.C. 2021)

Facts

- Cavalier and John Doe were both first-year students at the Catholic University of America in the fall of 2012.
- On December 14, 2012, both Cavalier and Doe attended an on-campus party. Cavalier drank two to three cups of wine, two to three shots of tequila, and a mixed drink of Sprite and vodka that contained three shots of vodka, both before the party and within an hour of arriving at the party.
- After leaving the party, Doe and Cavalier decide to walk back to Cavalier's residence hall where they engaged in vaginal sexual intercourse. Midway through the sexual encounter, the condom broke, and Doe ceased penetration.

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48

CAVALIER V. CATHOLIC UNIV. OF AMERICA

513 F. SUPP.3D 30 (D.D.C. 2021)

Facts (Cont.)

- Doe informed Cavalier that the condom broke, told Cavalier that he would purchase the morning after pill for her the next morning, and then he left.
- Cavalier was later found on the residence hall bathroom floor by another student, and she alleged that she was raped.
- Cavalier framed her original complaint to Catholic University as non-consensual sexual contact because she alleged Doe refused to use a condom.

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49

CAVALIER V. CATHOLIC UNIV. OF AMERICA

513 F. SUPP.3D 30 (D.D.C. 2021)

Facts (Cont.)

- Although she told investigators that she had been drinking heavily and couldn't remember parts of the night, investigators focused solely on her framing of the allegations around consent and disregarded statements and evidence that suggested Cavalier's incapacitation.
- First responders found a used condom in Cavalier's garbage the night of the incident. When asked about the condom, Cavalier stated that she guessed it was from her encounter with Doe.
- The hearing panel subsequently found Doe not responsible for a policy violation.
- Cavalier appealed this decision within the University process on the basis of procedural irregularities. The appeal was denied.

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50

CAVALIER V. CATHOLIC UNIV. OF AMERICA

513 F. SUPP.3D 30 (D.D.C. 2021)

Decision

- Student brought action against the University asserting discrimination and retaliation claims under Title IX based on its handling of her rape allegation against fellow student. The University moved for summary judgment.
- The court found that the University was not clearly unreasonable in:
  - the training it provided to the Title IX team
  - the hearing it conducted
  - the enforcement of the no-contact order
  - instituting an inequitable hearing process

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51

CAVALIER V. CATHOLIC UNIV. OF AMERICA

513 F. SUPP.3D 30 (D.D.C. 2021)

Decision (Cont.)

- In determining whether the University's response to the alleged rape was deliberately indifferent, the court found that a reasonable jury could find that the initial investigation into Cavalier's complaint was clearly unreasonable on the ground that the investigator did not give "serious consideration" to the possibility that Cavalier was incapacitated after multiple drinks in a short time.
- Title IX process did not show deliberate indifference sufficient for a state negligence claim.

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52

CAVALIER V. CATHOLIC UNIV. OF AMERICA

513 F. SUPP.3D 30 (D.D.C. 2021)

Takeaways

- Investigators should explore and investigate every angle of a complaint, regardless of how a party might frame their allegations. The complaint starts the investigation process but is not the sole determinant of its scope.
- Courts will continue to scrutinize investigations that fail to consider all relevant evidence within an investigation.
- Decision-makers should consider the totality of the evidence and circumstances when making a policy violation determination. Courts will continue to scrutinize decisions that lack such considerations.

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53

CAVALIER V. CATHOLIC UNIV. OF AMERICA

513 F. SUPP.3D 30 (D.D.C. 2021)

Takeaways (Cont.)

- Where an institution conducts an investigation, holds a hearing, and offers an appeal; courts are rarely willing to find deliberate indifference, even if the alleged victim is disgruntled by the outcome. This court found a fairly unique basis within this suit to keep Cavalier's claim alive, but her likelihood of success at trial will depend very much on her ability to prove that Catholic University's actions subjected her to or made her vulnerable to continued harassment.

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54

DOE V. RHODE ISLAND SCHOOL OF DESIGN
516 F.SUPP.3D 188 (D.R.I. 2021)

Facts

- Jane Doe was a graduate student at RISD. In 2016, she attended a RISD-sponsored three-week art program in Ireland. For the program, RISD secured lodging in several four-bedroom houses at a local hotel and resort. Each house had a lock on the exterior door, but the interior bedroom doors did not have working locks. No person from RISD, the hotel, or the partnering Irish institution inspected the houses or informed the students on how to access keys to lock their bedroom doors. RISD made the housing assignments for the houses.

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55

DOE V. RHODE ISLAND SCHOOL OF DESIGN
516 F.SUPP.3D 188 (D.R.I. 2021)

Facts (Cont.)

- On her first night in Ireland, Doe went to nearby pub with other students, including the male who is referred to as “the perpetrator” in the lawsuit.
- The perpetrator was assigned to live in the same house as Doe. Doe and the perpetrator walked back to their house at the end of the evening, and the perpetrator requested a kiss from Doe. She told him he could kiss her on her cheek. He asked for another; she said no and escorted him out of her bedroom. Doe closed her bedroom door, tried but could not lock it, and went to sleep.

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56

DOE V. RHODE ISLAND SCHOOL OF DESIGN
516 F.SUPP.3D 188 (D.R.I. 2021)

Facts (Cont.)

- Doe woke in the middle of the night to find the perpetrator on top of her, smelling of vomit and alcohol. She no longer had on any clothing. He sexually assaulted her in her bed, using his mouth on her vagina and penetrating her with his penis.
- The next day Doe disclosed what occurred to the on-site teaching/resident assistant.
- RISD promptly arranged for Doe to receive medical care and a forensic examination.

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57

DOE V. RHODE ISLAND SCHOOL OF DESIGN
516 F.SUPP.3D 188 (D.R.I. 2021)

Facts (Cont.)
- Within days RISD dismissed the perpetrator from the Ireland program, and following an investigation and hearing, he was found responsible for the sexual assault.
- Doe has continued to experience effects of the assault in the subsequent four years, including post-traumatic stress disorder (PTSD) and effects on her academics, her artwork, and her personal relationships, among others.

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58

DOE V. RHODE ISLAND SCHOOL OF DESIGN
516 F.SUPP.3D 188 (D.R.I. 2021)

Decision
- The court found that RISD owed Doe a duty to exercise reasonable care in providing secure housing.
  - Typically, courts are reluctant to burden universities with special duties to protect their students, generally recognizing that the era of *in loco parentis* has all but disappeared.
  - The court analyzed the relationship between Jane and RISD and held that a "special relationship" existed such to create a duty for RISD to exercise care to ensure students' safety while on the program. RISD organized an international program in a foreign country and required students to live in the housing it arranged. Therefore, Doe was forced to rely on RISD for her housing while on the program.

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59

DOE V. RHODE ISLAND SCHOOL OF DESIGN
516 F.SUPP.3D 188 (D.R.I. 2021)

Decision (Cont.)
- In other words, the very nature of this international trip altered the typical university-adult student relationship giving rise to a duty that RISD exercise reasonable care in providing secure housing.
- Furthermore, RISD could foresee the risk here, having had a stunningly similar incident occur three years earlier on a program in Italy. There, a student was sexually assaulted in RISD-provided housing with bedrooms that did not have workable locks. This analogous earlier incident "increases the duty RISD owed its students."

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60

DOE V. RHODE ISLAND SCHOOL OF DESIGN

516 F.SUPP.3D 188 (D.R.I. 2021)

Decision (Cont.)

- The court found that RISD breached its duty. Ample testimony from RISD officials confirmed that no institutional officials did any due diligence to ensure that students were able to lock their bedroom doors. The plaintiff's expert witness, a security consultant, further testified that RISD failed to meet the standard of care for the provision of safe housing. Although persuaded by the plaintiff's expert, the court held that "the breach of duty by RISD was obvious to anyone."
- The court concluded that RISD's breach caused Doe's injuries. Had she been able to lock her door, the perpetrator would not have gained access to her room.

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61

DOE V. RHODE ISLAND SCHOOL OF DESIGN

516 F.SUPP.3D 188 (D.R.I. 2021)

Decision (Cont.)

- Ample evidence in the record documented Doe's injuries and losses. The court awarded Doe $2.5 million in compensation for her pain and suffering.
- Doe was also awarded compensation for her litigation costs and attorneys' fees.

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62

DOE V. RHODE ISLAND SCHOOL OF DESIGN

516 F.SUPP.3D 188 (D.R.I. 2021)

Takeaways

- Title IX is not the only legal risk facing institutions.
- States are increasingly applying negligence standards to incidents of sexual assault and misconduct when the risks were foreseeable and gave rise to some duty on the institution's part to prevent the incident.
- In certain, limited circumstances, courts are increasingly finding that universities have a "special relationship" with students such to trigger duties to reduce the risk of potential injury.

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63

DOE V. RHODE ISLAND SCHOOL OF DESIGN

516 F.SUPP.3D 188 (D.R.I. 2021)

Takeaways (Cont.)

- When the institution manages and controls all aspects of a program due diligence matters; take steps to mitigate risks and document the efforts to do so.
  - Risk management should include a full inspection of housing and other facilities, including by the on-site staff.
- The earlier incident certainly affected the court's view of RISD's negligence. "Continuous improvement" may seem like a management buzzword, but it matters.
  - Institution leaders need to be committed to learning from past incidents to improve safety measures and prevent recurrence.

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64

RETALIATION

- 2020 Title IX Regulations
- Elements of a Retaliation Claim
- *Mary Doe & Nancy Roe v. Purdue University, et al.*
- *Aslin v. University of Rochester*

65

RETALIATION – TITLE IX REGULATIONS

- No recipient or other person may:
  - Intimidate, Threaten, Coerce, or Discriminate
  - Against any individual for the purpose of interfering with any right or privilege secured by Title IX, or
  - Because the individual has:
    - Made a report or complaint, testified, assisted, or participated or refused to participate
    - In any manner in an investigation, proceeding, or hearing under Title IX.

Source: 34 C.F.R. § 106.71

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66

RETALIATION – TITLE IX REGULATIONS (CONT.)

- Intimidation, threats, coercion, or discrimination, **for the purpose of interfering with any right or privilege secured by Title IX or this part**, constitutes retaliation.
- Charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, **for the purpose of interfering with any right or privilege secured by Title IX or this part**, constitutes retaliation.

Source: 34 C.F.R. § 106.71

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67

RETALIATION – TITLE IX REGULATIONS (CONT.)

- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under 34 C.F.R. § 106.8(c).
- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation as long as a policy recognizes that determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

Source: 34 C.F.R. § 106.71

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68

ELEMENTS OF A RETALIATION CLAIM

- The following elements establish an inference of retaliation:
  - Did the reporting party engage in protected activity?
  - Was the reporting party subsequently subjected to adverse action?
  - Do the circumstances suggest a connection between the protected activity and the adverse action?
- What is the stated non-retaliatory reason for the adverse action?
- Is there evidence that the stated legitimate reason is a pretext?

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69

MARY DOE & NANCY ROE V. PURDUE UNIVERSITY, ET AL.

4:18 -CV-89-JEM, 2022 WL 124644 (N.D. IND. JAN. 13, 2022)

Facts

- Purdue University students Mary Doe and Nancy Roe alleged that they were assaulted in unrelated incidents by the same male student.
- Doe and Roe filed suit against the University. In Doe's suit, the University's motion to dismiss was granted in part. The remaining counts allege several violations, including claims of retaliation under Title IX.
- Purdue University investigated both claims and determined that Doe had "fabricated" her allegation and that Roe had "reported [her] assault maliciously."
- Both Doe and Roe were expelled from the University. The expulsions were later reduced to two-year suspensions.

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70

MARY DOE & NANCY ROE V. PURDUE UNIVERSITY, ET AL.

4:18 -CV-89-JEM, 2022 WL 124644 (N.D. IND. JAN. 13, 2022)

Facts (Cont.)

- Doe claimed the University separated her in retaliation for reporting the alleged assault and declining to participate in the investigation, which are both protected activities under Title IX.
- The University argued that there was no evidence to support Doe's allegation. Therefore, her report did not constitute protected activity and adjudication as a violation of the University's False Statement Rule was allowed.
- False Statement Rules establishes that "a good faith report of discrimination or harassment that is not later substantiated" is not considered to be a false report.

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71

MARY DOE & NANCY ROE V. PURDUE UNIVERSITY, ET AL.

4:18 -CV-89-JEM, 2022 WL 124644 (N.D. IND. JAN. 13, 2022)

Facts (Cont.)

- The Court cites *Jackson,*[1] "Where the retaliation occurs because the complainant speaks out about sex discrimination, the 'on the basis of sex' requirement is satisfied" because "[r]eporting incidents of discrimination is integral to Title IX enforcement."
- Doe was told her participation in the investigation was voluntary and was never informed that the investigation was regarding her conduct rather than the conduct of the male student she reported.

[1] *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005).

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72

MARY DOE & NANCY ROE V. PURDUE UNIVERSITY, ET AL.

4:18 -CV-89-JEM, 2022 WL 124644 (N.D. IND. JAN. 13, 2022)

Decision

- The Court noted that the University did not seek to investigate or punish other witnesses for their differing accounts of what happened; however, Doe was considered less credible without ever being interviewed and then punished for reporting.
- The judge issued orders denying the motion for summary judgment, finding that a jury might find Purdue's investigatory process "flawed" in the two cases.
- After a motion to dismiss was granted in part, the remaining counts alleged violations of Title IX, retaliation under Title IX, deprivation of civil rights under 42 U.S.C. § 1983 against the individuals in their official capacity, and individual § 1983 liability rights.

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73

MARY DOE & NANCY ROE V. PURDUE UNIVERSITY, ET AL.

4:18 -CV-89-JEM, 2022 WL 124644 (N.D. IND. JAN. 13, 2022)

Takeaways

- A **good faith** report of discrimination or harassment that is not later substantiated is protected activity.
- Provide a separate notice of investigation and allegations specific to any party or witness for false statements
- Institutions should ensure that Title IX policy addresses deliberately false or malicious accusations and refer the case to student conduct or human resources for a separate process
- Institution can pursue a TIX investigation to conclusion while also exploring institutional code of conduct violations for knowingly making materially false statements in bad faith

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74

ASLIN V. UNIVERSITY OF ROCHESTER

NO. 6:17-CV-06847, 2019 WL 4112130 (W.D.N.Y. AUG. 28, 2019)

Facts

- A group of faculty members, former faculty members, and graduate students in the Brain and Cognitive Sciences Department (BCS) reported rampant sexual behavior by a BCS professor at Rochester, spanning years
- The University conducted an internal investigation that cleared the professor
- Following the issuance of the investigation report, a faculty member complained that the report had "named her and shamed her" in retaliation for speaking out in the investigation process

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75

ASLIN V. UNIVERSITY OF ROCHESTER

NO. 6:17-CV-06847, 2019 WL 4112130 (W.D.N.Y. AUG. 28, 2019)

Facts (Cont.)

- The University hired an outside investigator to review the retaliation claim
- The outside investigator found that the University did not mitigate the risk that the investigation report could result in retaliation
- The University rejected this finding
- The Provost circulated a memo categorizing ongoing talk as "rumors and gossip"

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76

ASLIN V. UNIVERSITY OF ROCHESTER

NO. 6:17-CV-06847, 2019 WL 4112130 (W.D.N.Y. AUG. 28, 2019)

Facts (Cont.)

- Plaintiffs alleged that conditions at the University worsened substantially after the second investigation report, including exclusion from BCS department meetings, shaming and criticism at BCS department meetings, disqualification from leadership positions, increased workloads, and exclusion from faculty dinners
- Plaintiffs sued the University alleging retaliation under Title IX and Title VII
- Plaintiffs also claimed the University's conduct exacerbated and contributed to a hostile work and educational environment

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77

RETALIATION ANALYSIS UNDER TITLE VII

- Plaintiff participated in protected activity
- The employer knew of the protected activity
- There was an adverse employment action by the employer against the employee
- A causal connection exists between the protected activity and the adverse action

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78

ASLIN V. UNIVERSITY OF ROCHESTER
NO. 6:17-CV-06847, 2019 WL 4112130 (W.D.N.Y. AUG. 28, 2019)

Decision on University's Motion to Dismiss:

- The District Court found that a pattern of possible retaliatory behavior exists, the impact of which cannot fairly be construed as trivial, e.g.,
  - Various forms of criticism about the Plaintiffs
  - Breach of confidentiality in how the University handled the two investigations
  - Searches of Plaintiffs' email accounts
  - Allowing the respondent to participate in the complainants' performance evaluations

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ASLIN V. UNIVERSITY OF ROCHESTER
NO. 6:17-CV-06847, 2019 WL 4112130 (W.D.N.Y. AUG. 28, 2019)

Decision on University's Motion to Dismiss (Cont.):

  - Failure to retain a tenured faculty member who was recruited by a competing university
  - Sabotaging a Plaintiff's planned move to a neighboring university
  - Exclusion from meetings
- Although some of the reported incidents occurred outside of the 300-day filing deadline set by the EEOC, the generic allegations of a hostile environment, which were not necessarily tied to any specific alleged incident, were sufficient to constitute a "continuing claim" of hostile work environment

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ASLIN V. UNIVERSITY OF ROCHESTER
NO. 6:17-CV-06847, 2019 WL 4112130 (W.D.N.Y. AUG. 28, 2019)

Decision on University's Motion to Dismiss (Cont.):

- The University's motion to dismiss was mostly denied; one set of retaliation allegations from a former employee was dismissed because that individual's protected activity occurred more than four years after they had left the University (i.e., after the employment relationship had ended)

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ASLIN V. UNIVERSITY OF ROCHESTER

NO. 6:17-CV-06847, 2019 WL 4112130 (W.D.N.Y. AUG. 28, 2019)

Resolution

- The case resulted in a $9.4 million settlement, a commitment from the University to overhaul its polices and practices and helped to change New York State law on sexual harassment, lowering the burden of proof required to succeed in a suit.

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82

ASLIN V. UNIVERSITY OF ROCHESTER

NO. 6:17-CV-06847, 2019 WL 4112130 (W.D.N.Y. AUG. 28, 2019)

Takeaways

- Institutional conduct that is usually otherwise permissible (e.g., email searches of university accounts and a provost's statements at meetings) can constitute retaliation in the context of "protected activity"
- It is crucial for someone with an independent purview to keep an eye out for patterns of retaliatory behavior beyond isolated incidents of retaliation
- Institutional leaders and supervisors should be trained to recognize when the institution's conduct could have the effect of dissuading employees or students from reporting harassment or participating in an investigation (i.e., engaging in protected activity)

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83

FIRST AMENDMENT AND TITLE IX

- *Feminist Majority Foundation et al. v. Hurley, Paino, and University of Mary Washington*
- *Speech First, Inc. v. Schlissel*
- *Intervarsity Christian Fellowship v. University of Iowa*
- *Mahanoy Area School District v. B.L.*

84

FIRST AMENDMENT & TITLE IX

- The 2020 Title IX regulations emphasize that Title IX cannot be enforced or used to infringe on First Amendment protections
- Time, place, and manner limitations on expression must be applied consistent with the forum in question
  - Content neutral
  - Narrowly tailored to serve a significant state/government interest
  - Leave ample alternative channels for communicating the information

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85

TYPES OF FORUMS

Traditional Public Forum
- campus mall
- public streets through campus
- public sidewalks

Designated Public Forum
- designated "free speech zones"
  - e.g., green spaces

Limited Public Forum
- auditoriums
- meeting rooms
- athletic facilities

Nonpublic Forum
- classrooms
- residence halls
- offices

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86

FIRST AMENDMENT & TITLE IX (CONT.)

- Protected Speech
  - Offensive language
  - Hate speech
  - Time, Place, Manner restrictions
  - Being a jerk
- Unprotected Speech
  - Fighting Words; Obscenity; True Threat; Defamation
  - Sexual and Racial Harassment (Hostile Environment)
  - Incitement of Imminent Lawless Action
- Controversial Speakers

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87

FEMINIST MAJORITY FOUND. ET AL V. HURLEY, PAINO, AND UNIV. OF MARY WASHINGTON

911 F.3D 674 (4TH CIR. 2018)

Facts

- Members of Feminist United, an affiliate of the Feminist Majority Foundation (FMF), at University of Mary Washington (UMW) raised vocal protests after UMW's student senate voted to authorize male-only fraternities
- During contentious campus debates spanning many months, FMF members were subjected to offensive and threatening anonymous messages posted on Yik Yak
  - FMF members were called "femicunts," "feminazis," "cunts," and "bitches," and there were threats to "euthanize," "kill," and "gang rape" FMF members
  - Specific FMF members were referenced by name on Yik Yak
  - Some Yaks articulated threats (with details) to specific FMF members

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88

FEMINIST MAJORITY FOUND. ET AL V. HURLEY, PAINO, AND UNIV. OF MARY WASHINGTON

911 F.3D 674 (4TH CIR. 2018)

Facts (Cont.)

- FMF members were also subjected to various incidents of verbal harassment by the rugby team after they raised concerns about a video showing team members chanting about sexual assault
- Although the UMW President suspended the rugby team and sent a communication to the UMW community, the harassing messages increased
  - Greater than 700 harassing messages were sent during the academic year and into the summer

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89

FEMINIST MAJORITY FOUND. ET AL V. HURLEY, PAINO, AND UNIV. OF MARY WASHINGTON

911 F.3D 674 (4TH CIR. 2018)

Facts (Cont.)

- The Title IX Coordinator told FMF members that the University had "no recourse" for anonymous online harassment. The school didn't initiate a Title IX investigation and didn't ask for law enforcement's assistance, citing concerns about infringing the First Amendment.
- FMF sued under Title IX, alleging UMW was deliberately indifferent to sex discrimination, which served to create and foster a hostile campus atmosphere.
- The federal district court dismissed the complaint, finding that the harassment took place in a context in which UMW had limited, if any, control.

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90

FEMINIST MAJORITY FOUND. ET AL V. HURLEY, PAINO, AND UNIV. OF MARY WASHINGTON

911 F.3D 674 (4TH CIR. 2018)

Decision

- The Fourth Circuit reversed, finding that FMF had raised sufficient concerns that UMW was "deliberately indifferent" to the sex discrimination
- Despite the harassment occurring online, UMW had substantial control over both the harassers and the context in which the harassment occurred:
  - Messages concerned events occurring on campus
  - Specifically targeted UMW students
  - Originated on or within the immediate vicinity of the UMW campus
  - Used the University's wireless network

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FEMINIST MAJORITY FOUND. ET AL V. HURLEY, PAINO, AND UNIV. OF MARY WASHINGTON

911 F.3D 674 (4TH CIR. 2018)

Decision (Cont.)

- UMW could, theoretically, discipline students who posted sexually harassing and threatening messages online and the court rejected UMW's claim that the messages were protected by the First Amendment
  - "(1) true threats are not protected speech, and (2) the University had several responsive options that did not present First Amendment concerns"

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FEMINIST MAJORITY FOUND. ET AL V. HURLEY, PAINO, AND UNIV. OF MARY WASHINGTON

911 F.3D 674 (4TH CIR. 2018)

Decision (Cont.)

- The court rejected UMW's argument that they were unable to control the anonymous harassers
  - UMW was obliged to investigate or engage law enforcement to investigate
  - UMW could have disabled Yik Yak campus-wide
- UMW could also have more "vigorously denounced" the harassment, offered counseling services to impacted students

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FEMINIST MAJORITY FOUND. ET AL V. HURLEY, PAINO, AND UNIV. OF MARY WASHINGTON

911 F.3D 674 (4TH CIR. 2018)

Takeaways

- Sets up a slippery slope – institutions may be held liable for failing to address discrimination/harassment that occurs online by unknown individuals within a forum not controlled by the institution
- Institutions must take reasonable steps to investigate anonymous behavior where they control the context and, likely, the harasser
- Institutions/schools may not "do nothing" on the basis that the posts are anonymous

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94

FEMINIST MAJORITY FOUND. ET AL V. HURLEY, PAINO, AND UNIV. OF MARY WASHINGTON

911 F.3D 674 (4TH CIR. 2018)

Takeaways (Cont.)

- Don't get distracted by First Amendment concerns initially. Title IX requires an investigation as to whether the conduct is severe, pervasive, and objectively offensive – and then the institution can determine if the First Amendment analysis requires the protection of speech.

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95

SPEECH FIRST, INC. V. SCHLISSEL

939 F.3D 756 (6TH CIR. 2019)

Facts

- University of Michigan policy prohibits "[h]arassing or bullying another person – physically, verbally, or through other means." Harassing and bullying are not defined in the University's policy but there were definitions on the school's website.
- The University also has a Bias Response Team (BRT).
- The University defines a "bias incident" as "conduct that discriminates, stereotypes, excludes, harasses or harms anyone in our community based on their identity (such as race, color, ethnicity . . .)."

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96

SPEECH FIRST, INC. V. SCHLISSEL
939 F.3D 756 (6TH CIR. 2019)

Facts (Cont.)

- Under University policy, a bias incident is not itself punishable unless the behavior violates some provision of the conduct code.
- The BRT does not determine whether conduct is a bias incident, but if a reporting party desires, the BRT invites the individual(s) alleged to have committed the behavior to meet with a member of the BRT. This meeting is not required.
- Speech First alleged the University's definitions of "harassing" and "bullying" are overbroad, vague, and "sweep in" protected speech.

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97

SPEECH FIRST, INC. V. SCHLISSEL
939 F.3D 756 (6TH CIR. 2019)

Facts (Cont.)

- Speech First also alleged that the term "bias incident" is overbroad and that the BRT's practices intimidate students and quash free speech.
- Speech First filed suit on behalf of its members (associational standing) to challenge the policy definitions and BRT.

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98

SPEECH FIRST, INC. V. SCHLISSEL
939 F.3D 756 (6TH CIR. 2019)

Decision

- The Court agreed with Speech First that students' speech is chilled by the BRT. Even though the BRT lacks disciplinary authority, the Court agrees that the invitation to meet with team member carries an implicit threat of punishment and intimidation such to quell speech.
- The Court supported Speech First's associational standing because it is challenging the definitions and BRT "on its face" as opposed to alleging the University applied the definitions in a manner that violated students' free speech rights.

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99

SPEECH FIRST, INC. V. SCHLISSEL

939 F.3D 756 (6TH CIR. 2019)

Decision (Cont.)

- Even though the University voluntarily removed the definitions from its website after Speech First sued, its actions were perfunctory and can be easily and/or discretionarily reversed. Thus, the issue is still subject to a court's review.
- "Both the referral power and the invitation to meet with students objectively chill speech."

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SPEECH FIRST, INC. V. SCHLISSEL

939 F.3D 756 (6TH CIR. 2019)

Takeaways

- Policies and practices like those of the BRT carry implied threats of discipline – even when the policy states otherwise.
- Institutions should clearly define prohibited behavior, particularly in policies that otherwise impact speech and expression.
- National organizations that have campus chapters may have associational standing to sue when challenging a policy or practice, even without a showing of injury.
  - E.g., FIRE, Speech First, etc.

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INTERVARSITY CHRISTIAN FELLOWSHIP V. UNIV. OF IOWA

408 F. SUPP. 3D 960 (S.D. IOWA 2019)

Facts

- Following a lawsuit involving the Business Leaders in Christ[2] student organization, Iowa reviewed all Registered Student Organization (RSO) constitutions. Although the review looked at all RSOs, it focused on religious student groups.
- InterVarsity was a religious national organization and a local chapter that was recognized as an RSO at Iowa.
- Although membership in the group was open to all, InterVarsity required that leaders affirm a statement of faith encompassing "the basic biblical truths of Christianity."

[2] *Business Leaders in Christ v. University of Iowa*, 360 F. supp. 3d 885 (S.D. IOWA 2019).

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INTERVARSITY CHRISTIAN FELLOWSHIP V. UNIV. OF IOWA

408 F. SUPP. 3D 960 (S.D. IOWA 2019)

Facts (Cont.)

- Iowa determined that InterVarsity's affirmation of faith violated its Human Rights Policy, which provided:
  - "[I]n no aspect of [the University's] programs shall there be differences in the treatment of persons because of race, creed, color, religion, national origin, age, sex, pregnancy, disability, genetic information, status as a U.S. veteran, service in the U.S. military, sexual orientation, gender identity, associational preferences, or any other classification that deprives the person of consideration as an individual, and that equal opportunity and access to facilities shall be available to all."

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INTERVARSITY CHRISTIAN FELLOWSHIP V. UNIV. OF IOWA

408 F. SUPP. 3D 960 (S.D. IOWA 2019)

Facts (Cont.)

- InterVarsity student leaders offered to change the requirement such that leaders could be "requested to subscribe" or "strongly encouraged to subscribe" to the group's beliefs rather than be required to do so.
- Iowa officials denied this offer and deregistered the group.
- Plaintiffs sued based on First Amendment rights to free speech, freedom of association, and freedom of religious exercise.

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INTERVARSITY CHRISTIAN FELLOWSHIP V. UNIV. OF IOWA

408 F. SUPP. 3D 960 (S.D. IOWA 2019)

Decision

- The HR Policy was not neutrally applied to all RSOs/was selectively enforced.
- Enforcing the HR Policy against faith-based groups violates the First Amendment:
  - Iowa violated InterVarsity's freedom of speech and freedom of association by disallowing the affirmation of faith.
  - Iowa violated InterVarsity's free exercise in allowing other student groups to have leadership requirements that were secular in nature.

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INTERVARSITY CHRISTIAN FELLOWSHIP V. UNIV. OF IOWA

408 F. SUPP. 3D 960 (S.D. IOWA 2019)

Decision (Cont.)

- Iowa's interest was not compelling and the decision to deregister was not narrowly tailored.
- Iowa officials should have known they were acting contrary to clearly established law, per *Business Leaders in Christ*, and were not entitled to qualified immunity.

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106

INTERVARSITY CHRISTIAN FELLOWSHIP V. UNIV. OF IOWA

408 F. SUPP. 3D 960 (S.D. IOWA 2019)

Takeaways

- Iowa had been admonished by the same court in *Business Leaders in Christ* yet engaged in similar actions, leading to the court's frustration and the potential for personal liability for school officials.
- Reliance on legal counsel is not always persuasive to a court:
  - "Given the clarity of the Court's preliminary injunction order [in *BLIC*], the individual Defendants' reliance on counsel—to the extent it has been established by the record—does not make their actions reasonable."

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107

INTERVARSITY CHRISTIAN FELLOWSHIP V. UNIV. OF IOWA

408 F. SUPP. 3D 960 (S.D. IOWA 2019)

Takeaways (Cont.)

- Uniform application of an "all comers" policy or a non-discrimination policy is key. The court left the door open to deregistering all RSOs that do not adhere to the HR Policy, provided the requirement is applied uniformly:
  - "[I]t would be less restrictive to prohibit all RSOs from excluding students on the basis of protected characteristics than it is to selectively enforce the Human Rights policy against InterVarsity."

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108

MAHANOY AREA SCHOOL DISTRICT V. B.L.

141 S. CT. 2038 (2021)

Facts

- B.L., a student, tried out for the varsity cheerleading team and instead only made the junior varsity team. While away from school she posted a picture of herself on Snapchat with the caption "Fuck school fuck softball fuck cheer fuck everything."
- B.L.'s snap violated team and school rules, which B.L. acknowledged before joining the team, and she was suspended from the junior varsity team for a year.
- B.L. sued the school under 42 U.S.C. § 1983 alleging that (1) her suspension from the team violated the First Amendment; (2) the school and team rules were overbroad and viewpoint discriminatory; and (3) those rules were unconstitutionally vague.

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109

MAHANOY AREA SCHOOL DISTRICT V. B.L.

141 S. CT. 2038 (2021)

Decision

- Schools retain a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others," but the interest is diminished for off-campus speech.
- The school's interest here was insufficient to justify regulation of the cheerleader's speech, which involved complaints about school which were outside of school hours, took place off-campus, and was directed at the student's Snapchat friends.
- Schools may regulate student speech on campus and in school:
  - indecent, lewd, or vulgar speech,
  - speech promoting illicit drug use during a class trip, and
  - speech that others may reasonably perceive as "bear[ing] the imprimatur of the school."

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110

MAHANOY AREA SCHOOL DISTRICT V. B.L.

141 S. CT. 2038 (2021)

Decision (Cont.)

- The Court identified three factors related to off-campus speech that should be considered in future litigation:
  - off-campus speech normally falls within the zone of parental responsibility, rather than school responsibility,
  - off-campus speech covers virtually any activity outside of the school facility, and
  - the school itself has an interest in protecting a student's unpopular off-campus expression because the free marketplace of ideas is a cornerstone of our democracy.

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111

MAHANOY AREA SCHOOL DISTRICT V. B.L.

141 S. CT. 2038 (2021)

Takeaways

- The Court overruled some of the Third Circuit's majority opinion in *Tinker* in that it was too broad towards off-campus speech, and that schools may have a legitimate interest to restrict off-campus speech, such as in relation to harassment and bullying.
- The Court stated, "the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory."
- In concurrence, Justice Alito noted that the opinion does not apply to **public colleges or universities, or private schools**.

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112

CASE STUDY

The iPhone

113

113

CASE STUDY: THE IPHONE

- Maris has been dating Greg for the past few months after the two of them began hanging out following their Psychology 101 class. Greg is a swimmer on the university team. Maris is a first-year student and Greg is a junior.
- Maris has had a few sexual partners in the past and was immediately attracted to Greg, who was outgoing and gregarious, and well-liked on the team and at the parties they frequented together.
- Maris and Greg enjoyed an adventurous sex life that often included having sex in public places (like the bathroom at a restaurant and even in the swimming pool after hours).

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114

CASE STUDY: THE IPHONE

- Maris purchases a product called the we-vibe (http://we-vibe.com) that allows Maris to insert the vibrator and have the speed, duration, and vibration intensity controlled by an app on both her and Greg's phone.
- Their sex life includes the use of vibrators and toys and some light BDSM play. Both Greg and Maris have very high sex drives (having sex four to five times a day), and this new toy is very much appreciated when they are apart.
- While Greg was at a party and Maris was in her residence hall room, Greg received a text message from Maris, saying that she had turned on and inserted the vibrator and wanted Greg to help "get her off."

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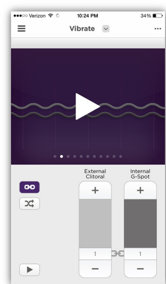
CASE STUDY: THE IPHONE

- Greg agreed and opened the app on his phone. Maris continued to text him while Greg adjusted the controls of the vibrator inside Maris.



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CASE STUDY: THE IPHONE

- Jeff, a swimming teammate, saw Greg on his phone and asked what he was doing. Greg initially tried to avoid the conversation but had consumed several drinks and eventually showed Jeff his phone.
- Greg showed him how the controls work on the phone — toggle slides for intensity — and how the top controls the pattern.
- A text notification from Maris popped up saying, "Want more. Harder." Jeff asked to set the controls and Greg shrugged and handed him the phone.

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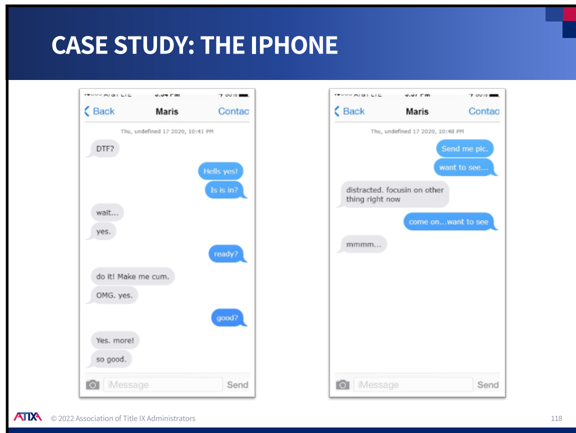
117



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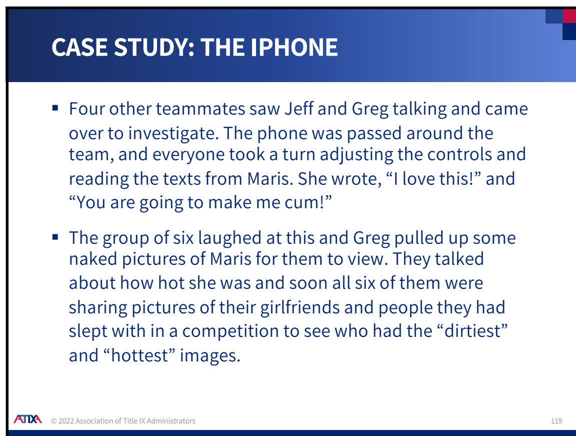

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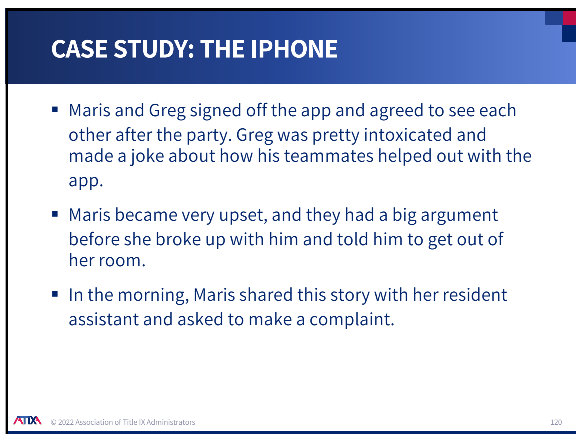

120

CASE STUDY DISCUSSION: THE IPHONE

- If you were in the role of taking the complaint, what additional questions or information would you need to know?
- What are the issues in this incident which fall under the Title IX regulations?
  - How would you categorize the issues?
  - Which issues involve Greg?
  - Which issues involve his friends?
  - What are the concerns with the other images on Greg's teammates' phones?
- How does Maris and Greg's past sexual behavior impact the case?
- What would be the likely outcome of this case at your institution?

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121

CASE STUDY DISCUSSION: THE IPHONE

- What kind of conversation could Greg and Maris have had before Greg shared the we-vibe app or the pictures on his phone?
- What kind of prevention or education messaging might VAWA like to see to prevent an incident like this from occurring?
  - Which group or department should be involved in creating and sharing this message?
- What are some of the challenges technology presents in sexual harassment cases?

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122

DUE PROCESS

- *Victim Rights Law Center v. Cardona*
- *Haidak v. University of Massachusetts Amherst*
- *Doe v. Purdue University*
- *Doe v. Syracuse University*

123

123

WHAT IS DUE PROCESS?

Two overarching forms of due process:

- Due Process in Procedure
  - Consistent, thorough, and procedurally sound handling of allegations
  - Institution substantially complied with its written policies and procedures
  - Policies and procedures afford sufficient Due Process rights and protections
- Due Process in Decision
  - Decision reached on the basis of the evidence presented
  - Decision on finding and sanction appropriately impartial and fair

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124

DUE PROCESS – TITLE IX REGULATIONS

Due process contained in 34 C.F.R. § 106.45

- Equitable treatment
- Formal complaint
- Written notice to the parties
  - Allegation(s)/investigation, meetings, report, determination, appeal, outcome
- Advisors – providing & role
- Separation of roles – investigator, decision-maker, appeal decision-maker
- Presumption of innocence
- Standard of evidence

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125

DUE PROCESS – TITLE IX REGULATIONS

Due process contained in 34 C.F.R. § 106.45 (Cont.)

- Robust investigation
- Prompt timeframes
- Report writing
- Report and evidence review – provide evidence
- Hearing
- Questioning and cross-examination
- Use of technology
- Appeals required; equitable
- Informal resolution
- Differences between Higher Ed and K-12

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126

VICTIM RIGHTS LAW CENTER V. CARDONA

NO. 20-11104-WGY, 2021 WL 3185743 (D. MASS. JUL. 28, 2021)

Facts

- Four organizations and three individual plaintiffs challenged the Title IX Final Rule (Regulation) as a violation of the Administrative Procedures Act (APA) and the Equal Protection Clause of the Fifth Amendment.
- The organizational and individual Plaintiffs (collectively, the "Advocates") challenged the Final Rule and argued that it violates the APA because (1) its provisions depart from established practice and procedure regulating educational institutions; (2) the provisions are the product of arbitrary and capricious decision making; (3) they were promulgated in excess of the Department of Education's (ED) authority; and (4) that provisions violate the Equal Protection Clause of the Fifth Amendment by discriminating on the basis of sex .

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127

VICTIM RIGHTS LAW CENTER V. CARDONA

NO. 20-11104-WGY, 2021 WL 3185743 (D. MASS. JUL. 28, 2021)

Facts (Cont.)

- The Advocates sought a preliminary injunction to halt the implementation of the Final Rule as soon as it was promulgated.
- The suppression provision precluded postsecondary institutions from considering any statement made by a party or witness who does not submit to cross-examination at a live adjudicatory hearing. If the party or witness refused to answer any question on cross-examination, none of their previous statements, or any other statements they made at the hearing could be relied upon.

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128

VICTIM RIGHTS LAW CENTER V. CARDONA

NO. 20-11104-WGY, 2021 WL 3185743 (D. MASS. JUL. 28, 2021)

Decision

- The U.S. District Court declined to invalidate most of the challenged provisions in the Final Rule but held that the "suppression provision" was invalid, finding ED had acted arbitrarily and capriciously in adopting it (thereby violating the federal APA).

Post Decision Action

- OCR, in response to a joint motion for clarification, issued a supplemental decision confirming that the preclusion rule was "vacated" and on August 24, 2021, the Department issued guidance confirming that it would immediately cease enforcement of the suppression clause.

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129

VICTIM RIGHTS LAW CENTER V. CARDONA

NO. 20-11104-WGY, 2021 WL 3185743 (D. MASS. JUL. 28, 2021)

Takeaways

- Institutions should have already rewritten their Title IX procedures to remove the suppression requirement.
- It is possible respondents could argue that although the suppression rule is no longer required, it is somehow necessary to afford a fair and unbiased process and decision. (See *Doe v. Rensselaer Polytechnic Institute*)
- While suppression is no longer appropriate, a party or witness who refuses to answer some or all questions may have their credibility questioned, and the value of their evidence may be diminished as a result.

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130

VICTIM RIGHTS LAW CENTER V. CARDONA

NO. 20-11104-WGY, 2021 WL 3185743 (D. MASS. JUL. 28, 2021)

Takeaways

- No one has to participate in a hearing, and parties and witnesses can choose not to attend, or not to answer (some or all) questions. In hearings where the parties or witnesses let their statements to the investigators stand, and they give no testimony at the hearing, the decision-makers will weigh whatever evidence is provided.
  - **Note:** Public institutions in the Sixth Circuit may not be able to find a policy violation if a Complainant does not attend the hearing and their credibility is at issue.

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131

HAIDAK V. UNIV. OF MASSACHUSETTS AMHERST

933 F.3D 56 (1ST CIR. 2019)

Facts

- UMass issued an immediate suspension of a male student after learning he violated the school's no contact order related to a complaint of dating violence made by a female student that had been issued two months earlier.
- The immediate suspension lasted five months, until a hearing was held on the assault allegations.
- The male student submitted 36 questions for the hearing; an administrator pared it down to sixteen prior to the hearing.
- A hearing board conducted the hearing.

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132

HAIDAK V. UNIV. OF MASSACHUSETTS AMHERST
933 F.3D 56 (1ST CIR. 2019)

Facts (Cont.)
- The Board questioned both parties using an iterative back-and-forth method of questioning. No cross-examination occurred directly or via Advisors.
- The Board rephrased the sixteen submitted questions in a manner intended to elicit the same information.
- Some of the male student's evidence was disallowed and the Board never saw the questions that had been rejected by the administrator.

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133

HAIDAK V. UNIV. OF MASSACHUSETTS AMHERST
933 F.3D 56 (1ST CIR. 2019)

Facts (Cont.)
- The Board's written procedures called for the Board to start by "calming" the [Complainant] by asking easy questions.
- The Board found the male student responsible for assault and failure to comply, and he was expelled.
- The male student sued, alleging violations of due process, equal protection, and Title IX.
- The District Court granted UMass's motion for summary judgment, dismissing the due process and Title IX claims.
- Plaintiff appealed to the First Circuit.

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134

HAIDAK V. UNIV. OF MASSACHUSETTS AMHERST
933 F.3D 56 (1ST CIR. 2019)

Decision
- Declined to adopt the Sixth Circuit's "direct confrontation" requirement from *Doe v. Baum*
- Upheld the expulsion, ruling that:
  - "[A] process that affords an opportunity for real-time cross-examination by posing questions through a hearing panel or other third party, like the process used by UMass, meets due process requirements"
- Found that the Board was so effective at questioning, it cured the errors related to the "calming" questions and the administrator paring down questions that never got to the Board

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HAIDAK V. UNIV. OF MASSACHUSETTS AMHERST

933 F.3D 56 (1ST CIR. 2019)

Decision (Cont.)

- Found no procedural harm resulted from the exclusion of the male student's evidence
- Found that the immediate suspension violated the male student's due process rights, returning the case to the District Court for monetary damages for the five-month suspension
  - Notice and a hearing must precede suspension except in extraordinary circumstances, not present in this case
  - When an emergency occurs, the post-suspension hearing must occur immediately thereafter

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136

HAIDAK V. UNIV. OF MASSACHUSETTS AMHERST

933 F.3D 56 (1ST CIR. 2019)

Takeaways

- This case arguably sets up a "circuit split" on direct cross-examination
- Clear guidelines for higher education institutions in the First Circuit (that arguably conflict with the 2020 Title IX Regulations)
- The Board's thorough and extended questioning of the parties and evaluation of credibility is instructive
- Probing of credibility issues should occur in the hearing in the presence of the parties

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137

HAIDAK V. UNIV. OF MASSACHUSETTS AMHERST

933 F.3D 56 (1ST CIR. 2019)

Takeaways (Cont.)

- Screening of questions prior to the Board should be done sparingly
- Rephrasing of questions by the Board may be permissible if the rephrased questions elicit the same information
  - Document the rationale for questions not posed

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138

DOE V. PURDUE UNIVERSITY
928 F.3D 652 (7TH CIR. 2019)

Facts
- John Doe and Jane Roe were students in Purdue's Navy ROTC program and were in a dating relationship.
- After they broke up, Roe reported that Doe had admitted to her that he digitally penetrated her while she was asleep on one occasion when they were dating.
- Purdue opened a Title IX investigation. During the investigation Doe was excluded from ROTC as an interim measure.
- Investigators submitted an investigation report to a three-person panel who reviewed the report and heard from the parties in a hearing before making a recommendation to the Title IX Coordinator.

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139

DOE V. PURDUE UNIVERSITY
928 F.3D 652 (7TH CIR. 2019)

Facts (Cont.)
- Doe did not have an opportunity to review the report and was not advised of its contents until moments before the hearing.
- The Title IX Coordinator chaired the hearing.
- Roe did not appear at the hearing or submit a statement.
- Two panel members had not read the report; questioning by the third panel member was accusatory in nature and presumed that Doe had committed a violation.
- The panel did not allow Doe to present witnesses, including Doe's roommate who was present at the time of the alleged assault.

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140

DOE V. PURDUE UNIVERSITY
928 F.3D 652 (7TH CIR. 2019)

Facts (Cont.)
- Doe was found responsible and suspended for one year. Doe appealed and lost.
- Doe involuntarily resigned from the Navy ROTC program, resulting in the loss of his scholarship and a future career in the Navy.
- Doe sued, alleging that flawed procedures violated his due process rights under Section 1983, and that sex bias in sanctioning was discrimination in violation of Title IX.
- The District Court granted Purdue's motion to dismiss on the basis that Doe failed to state a plausible claim under either theory.
- Doe appealed to the Seventh Circuit.

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141

DOE V. PURDUE UNIVERSITY
928 F.3D 652 (7TH CIR. 2019)

Decision

- The Seventh Circuit reversed and remanded, finding that:
  - Doe adequately alleged violations of Section 1983 and Title IX.
  - Doe had a protected liberty interest in a future career choice (Naval career) via the "stigma-plus" test, because the State:
    1. inflicted reputational damage and
    2. altered his legal status, depriving him of a right previously held
- Previously, the Seventh Circuit rejected the premise of a standalone property interest in higher education.

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142

DOE V. PURDUE UNIVERSITY
928 F.3D 652 (7TH CIR. 2019)

Decision (Cont.)

- The due process provided to Doe was inadequate; not providing the investigation report and evidence to Doe was a fundamental flaw
- Secondary issues included:
  - The failure of two panel members to read the report
  - The panel's failure to speak to Roe in person and examine her credibility directly
  - The panel's unwillingness to hear from Doe's witness

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DOE V. PURDUE UNIVERSITY
928 F.3D 652 (7TH CIR. 2019)

Decision (Cont.)

- The Court declined to decide whether direct cross-examination was fundamental to due process because there were numerous other errors.
- The Court found that Doe's claim of gender bias under Title IX was plausible due to the procedural errors in combination with pressure on Purdue to hold male students accused of sexual assault responsible in order to comply with the 2011 OCR Dear Colleague Letter and two pending OCR complaints against Purdue.

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144

DOE V. PURDUE UNIVERSITY
928 F.3D 652 (7TH CIR. 2019)

Decision (Cont.)

- The Court noted that the panel members and the Title IX Coordinator chose to believe Roe without directly hearing from her, raising the specter of gender bias and creating the possibility that the committee believed Roe because she is a woman and disbelieved Doe because he is a man.
- The court was not particularly concerned that the Title IX Coordinator had oversight over both the investigation and hearing, because Doe did not establish a foundation for actual bias.

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145

DOE V. PURDUE UNIVERSITY
928 F.3D 652 (7TH CIR. 2019)

Takeaways

- Trained decision-makers and hearing preparation are crucial. There is no excuse for not having read materials prior to the hearing.
- Due process protections include providing the parties with an opportunity to present information and witnesses, and to review the evidence that will be used in the decision.
- Credibility assessments should be based on the decision-makers hearing directly from the parties, and a clear rationale should be given for these assessments.

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146

DOE V. PURDUE UNIVERSITY
928 F.3D 652 (7TH CIR. 2019)

Takeaways (Cont.)

- Institutions in the Seventh Circuit should take heed of the “stigma-plus” test.
- Several other circuit courts have adopted the theory of Title IX liability applied here, which over time may have the effect of fewer institutions winning at the motion to dismiss stage of Title IX litigation.

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147

DOE V. SYRACUSE UNIVERSITY

5:18-CV-377, 2019 WL 2021026 (N.D.N.Y. MAY 8, 2019)

Facts

- Doe and Roe met at a bar, initially with a group of friends
- Roe invited Doe back to her residence hall where they began to kiss
- Roe performed what Doe believed to be consensual oral sex
- Roe asked her roommates to leave, and Doe and Roe then had vaginal intercourse in her bedroom
- They exchanged several texts over the next few days
- Several days later they had drinks and went to a local restaurant together

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148

DOE V. SYRACUSE UNIVERSITY

5:18-CV-377, 2019 WL 2021026 (N.D.N.Y. MAY 8, 2019)

Facts (Cont.)

- Four days later, Doe heard a rumor that he had done “unspeakable things” to Roe
- Doe avoided Roe
- Two months later, Roe made a formal complaint for alleged sexual misconduct
- Roe alleged that the oral sex was non-consensual, that she withdrew consent prior to vaginal sex, and that Doe had engaged in non-consensual anal sex
- Syracuse appointed an internal investigator

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149

DOE V. SYRACUSE UNIVERSITY

5:18-CV-377, 2019 WL 2021026 (N.D.N.Y. MAY 8, 2019)

Doe’s Allegations Regarding the Investigation

- Doe’s original notice did not provide details of the allegations
- Roe’s allegations had changed over time
  - She first reported that the vaginal sex was consensual, but she claimed in a later interview that she had withdrawn consent
- Doe claimed that the investigator was not neutral and impartial because of his extensive background with victims of sexual assault

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150

DOE V. SYRACUSE UNIVERSITY

5:18-CV-377, 2019 WL 2021026 (N.D.N.Y. MAY 8, 2019)

Doe's Allegations Regarding the Investigation (Cont.)

- The investigator characterized Roe's testimony as "consistent" despite the inconsistencies
- Doe told the investigator that Roe was giving different accounts of what had happened to different people on campus
  - The investigator only interviewed Roe once and did not investigate the issues Doe raised about Roe's credibility
- The investigator did not provide Doe with all of Roe's evidence
  - A letter from a nurse that relayed Roe's own report of the incident and reports of vaginal bleeding
  - However, in the investigation Roe reported anal bleeding

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151

DOE V. SYRACUSE UNIVERSITY

5:18-CV-377, 2019 WL 2021026 (N.D.N.Y. MAY 8, 2019)

Doe's Allegations Regarding the Investigation (Cont.)

- The investigator did not allow Doe to respond to all of Roe's evidence before it was provided to the Conduct Board
  - Doe did not have an opportunity to show the inconsistencies in Roe's story
- Doe did not know the identities of the other witnesses
- The investigator's report characterizes Roe's account as fully plausible and credible, despite witness testimony regarding the interactions between Roe and Doe, including her roommates who were present on the night in question

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152

DOE V. SYRACUSE UNIVERSITY

5:18-CV-377, 2019 WL 2021026 (N.D.N.Y. MAY 8, 2019)

Doe's Allegations Regarding the Hearing and Decision

- Doe and Roe each appeared separately at the Conduct Board hearing
- The investigator did not testify nor did any witnesses
- Doe had no opportunity to question Roe nor any witnesses
- Roe's interview was not recorded, despite SU policy
- The Conduct Board found Roe's claim of withdrawn consent during vaginal sex credible
  - "[Her] actions are consistent with a traumatic event such as she described in her statement."
- Doe was indefinitely suspended for one year or until Roe graduates.

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153

DOE V. SYRACUSE UNIVERSITY
5:18-CV-377, 2019 WL 2021026 (N.D.N.Y. MAY 8, 2019)

Doe's Allegations Regarding the Appeal Process

- Doe appealed even though he had not yet received a transcript of the hearing that he had requested
  - The transcript did not include Roe's testimony or questions asked of her due to the "technical difficulties" with the recording
- The Appeals Board upheld the decision and rejected Doe's procedural and substantive challenges to the investigation, hearing, and decision

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154

DOE V. SYRACUSE UNIVERSITY
5:18-CV-377, 2019 WL 2021026 (N.D.N.Y. MAY 8, 2019)

Decision

- Doe's allegations are enough to "cast an articulable doubt" on the outcome of his case, including ample allegations of gender bias
- The court points to several of Doe's allegations raising significant questions about Roe's credibility
- Syracuse officials, including the investigator and the adjudicators, did seem to be influenced by "trauma-informed investigation and adjudication processes"

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155

DOE V. SYRACUSE UNIVERSITY
5:18-CV-377, 2019 WL 2021026 (N.D.N.Y. MAY 8, 2019)

Takeaways

- Trauma-informed practices have a place in investigations, but not hearings
- Trauma-informed practices cannot be a substitute for credibility analyses
- Respondent should:
  - Have access to all evidence that will be seen by the decision-maker(s)
  - Have an opportunity to raise credibility issues regarding the Complainant and all witnesses
  - Have an opportunity to raise questions/concerns about the investigator

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156

ERRONEOUS OUTCOME AND SELECTIVE ENFORCEMENT

- *Doe v. New York University*
- *Doe v. Coastal Carolina University*

157

157

DOE V. NEW YORK UNIVERSITY

438 F. SUPP. 3D 172 (S.D.N.Y. 2020)

Facts

- Plaintiff Doe engaged in sexual activity with Jane Roe after a night of drinking in the residence hall. Roe alleged Doe sexually assaulted her because she was unable to give consent.
- An initial investigation found sufficient evidence to refer Doe to a hearing.
- After the parties reviewed the preliminary report and suggested additional witnesses, a second report was issued with additional witness testimony, and was referred to a hearing where Doe was found responsible for violating policy.

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158

DOE V. NEW YORK UNIVERSITY

438 F. SUPP. 3D 172 (S.D.N.Y. 2020)

Facts (Cont.)

- Doe appealed, and the NYU appeals panel found investigators had failed to interview witnesses with potentially probative information regarding Roe's intoxication.
- The case was remanded to the investigators, who produced another report finding sufficient evidence to refer Doe to a hearing.
- Doe was found not responsible for violating policy during the second hearing, Roe's appeal was denied, and the determination was finalized.

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159

DOE V. NEW YORK UNIVERSITY

438 F. SUPP. 3D 172 (S.D.N.Y. 2020)

Facts (Cont.)

- Doe filed suit against NYU for violation of Title IX (selective enforcement theory of liability), breach of contract, and breach of the covenant of good faith and fair dealing
- Doe also filed suit against NYU and individual administrators for violation of the New York State Human Rights Law, negligent infliction of emotional distress, and intentional infliction of emotional distress
- NYU filed a motion to dismiss

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160

DOE V. NEW YORK UNIVERSITY

438 F. SUPP. 3D 172 (S.D.N.Y. 2020)

Decision

- The court found Doe had not pled even a minimally plausible inference that NYU had treated similarly situated females differently.
- The court also found Doe had not pled a sufficiently minimal inference of discriminatory intent in NYU's decision to initiate investigative or adjudicative processes.
- The court held that NYU's deviation from published procedures, as it related to initially declining to interview witnesses, affected both Doe and Roe. Therefore, no sex bias could be inferred.

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161

DOE V. NEW YORK UNIVERSITY

438 F. SUPP. 3D 172 (S.D.N.Y. 2020)

Decision (Cont.)

- The court also observed that Doe's claim that he did not receive a timely notice of allegations prior to being interviewed by investigators was not persuasive, as the procedures gave no guarantee of a pre-interview notice.
- The court concluded that any deficiencies in the initial investigation and hearing were cured by NYU's decision to hold a second *de novo* hearing with a neutral arbitrator.

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162

DOE V. NEW YORK UNIVERSITY

438 F. SUPP. 3D 172 (S.D.N.Y. 2020)

Takeaways

- Thorough investigations are critical to appropriate institution-based resolution processes.
- Err on the side of evidentiary inclusion – if there is potentially relevant information, make a good faith effort to collect it.
- Appeals are now required (under the 2020 Title IX Regulations) but **should not be a rubber-stamp for the original decision**.
- Carefully consider appeal filings and be willing to redo all or part of the resolution process if there is a legitimate potential for error or an altered outcome.

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163

DOE V. COASTAL CAROLINA UNIVERSITY

359 F. SUPP. 3D 367 (D.S.C. 2019)

Facts

- John Doe was a student-athlete at Coastal Carolina beginning in spring 2016
- John Doe and Jane Doe attended a pool party in August 2016
- John Doe and Jane Doe left the party together and subsequently had sexual intercourse at Jane Doe's residence
- John Doe's roommate then entered Jane Doe's room and had sex with her
- Jane Doe alleged that she was unable to consent to sex with John Doe or his roommate on the basis of alcohol-induced incapacitation

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164

DOE V. COASTAL CAROLINA UNIVERSITY

359 F. SUPP. 3D 367 (D.S.C. 2019)

Facts (Cont.)

- A University investigation and disciplinary hearing determined that John Doe did not violate policy; his roommate was found in violation and dismissed from the institution
- Jane Doe appealed the finding in relation to John Doe
- The Title IX Coordinator reviewed the appeal and the investigation record prior to the Appeal Decision-maker issuing a decision; she opined that John Doe violated policy
- The Appeal Decision-maker granted the appeal and ordered a new hearing with a new panel

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165

DOE V. COASTAL CAROLINA UNIVERSITY

359 F. SUPP. 3D 367 (D.S.C. 2019)

Facts (Cont.)

- John Doe was no longer a student at the time of the second hearing; he was found responsible for the violation and dismissed from the University
- John Doe filed a lawsuit against the University alleging:
  - discrimination against a male student with respect to University discipline on the basis of an erroneous outcome theory and gender bias
  - "he had been deprived of a full-tuition scholarship at Coastal and also lost a 'full tuition athletic football scholarship for the 2017-2020 Coastal football seasons and academic years.'"

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166

DOE V. COASTAL CAROLINA UNIVERSITY

359 F. SUPP. 3D 367 (D.S.C. 2019)

Decision

- District court determined that the second panel reversing the first panel's decision without new evidence was a matter for a jury to consider
- **FIRST TITLE IX JURY TRIAL**
  - Asked to answer: "Did the plaintiff prove by a preponderance of the evidence CCU intentionally deprived [Doe] of educational opportunities or benefits because of his gender?"
  - Jury found in favor of the University

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167

DOE V. COASTAL CAROLINA UNIVERSITY

359 F. SUPP. 3D 367 (D.S.C. 2019)

Takeaways

- Institutions need to ensure independent decision-making can occur at all stages of the formal grievance process
- Appeal procedures should be followed, and decisions based on the proscribed grounds only
- If a decision is modified or remanded on appeal, a clearly articulated rationale for such action is required

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168

LGBTQIAA+ TOPICS

- *Meriwether v. Hartop*

169

MERIWETHER V. HARTOP

992 F.3D 492 (6TH CIR. 2021)

Facts

- Case against Shawnee State University (SSU) (Ohio).
- Meriwether is a tenured faculty member who has worked at SSU for 25 years.
- In 2016, SSU informed faculty "they had to refer to students by their 'preferred pronouns.'" If not, they were subject to discipline.
- School used existing policy re: discrimination based on gender identity.
- Meriwether complained to his Department Chair who told him, "Christians are primarily motivated by fear."

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170

MERIWETHER V. HARTOP

992 F.3D 492 (6TH CIR. 2021)

Facts (Cont.)

- Meriwether taught without incident until 2018.
- In the first class of the term, Meriwether referred to a student (Doe) who presented as male as "sir" (he used formal pronouns for all students).
- Following class, Doe approached Meriwether and demanded to be referred to using female titles and pronouns.
- Meriwether said his religious beliefs prevented him from communicating about gender identity that he believes to be false and therefore couldn't comply with the student's demands.

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171

MERIWETHER V. HARTOP
992 F.3D 492 (6TH CIR. 2021)

Facts (Cont.)
- The student became hostile and threatening.
- Meriwether reported incident; the Title IX Office was informed.
- Meriwether was advised to eliminate use of all sex-based pronouns. Meriwether proposed a compromise to call Doe by her last name.
- This worked for two weeks, but Doe again complained. Meriwether was told to comply or be in violation of school policy.

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172

MERIWETHER V. HARTOP
992 F.3D 492 (6TH CIR. 2021)

Facts (Cont.)
- Meriwether proposed using the preferred pronouns if he could put a disclaimer in his syllabus saying he was compelled to do so, and it was against his religious beliefs.
- This proposal was rejected.
- SSU initiated an investigation and found Meriwether responsible for creating a hostile environment. He was given a formal, documented warning that could lead to additional progressive discipline.
- Meriwether argued that he couldn't use the female pronoun with Doe because of his religious convictions.

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173

MERIWETHER V. HARTOP
992 F.3D 492 (6TH CIR. 2021)

Facts (Cont.)
- Doe received a high grade in Meriwether's course.
- Meriwether filed a grievance, but the Provost would not discuss academic freedom and religious discrimination aspects of the case.
- Meriwether alleged he could not address a "high profile issue of public concern that has significant philosophical implications." He filed a lawsuit under the First Amendment.

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174

MERIWETHER V. HARTOP
992 F.3D 492 (6TH CIR. 2021)

Decision

- Meriwether lost at the trial court level.
- The Court of Appeals overturned the decision and found in favor of Meriwether.
- The court held that under Supreme Court decisions and Sixth Circuit precedent, the First Amendment protects the academic speech of university professors.
  - "The First Amendment protects the right to speak freely and right to refrain from speaking…and the government may not compel affirmance of a belief with which the speaker disagrees."

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175

MERIWETHER V. HARTOP
992 F.3D 492 (6TH CIR. 2021)

Decision (Cont.)

- Citing to the *Tinker*[3] case the court said, "Government officials violate the First Amendment whenever they try to prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion."
- Citing to *Keyishian v. Bd of Regents*[4] the court said the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."

[3] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
[4] *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

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176

MERIWETHER V. HARTOP
992 F.3D 492 (6TH CIR. 2021)

Takeaways

- There may be a balancing test to applying the First Amendment rights of the professor vs. the rights of the institution to maintain a non-disruptive learning environment.
- The professor may not create a hostile environment, but what constitutes a hostile environment may be guard-railed by free speech rights, religious freedom, and/or academic freedom.

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177

MERIWETHER V. HARTOP
992 F.3D 492 (6TH CIR. 2021)

Takeaways (Cont.)
- What are the rights of the student?
- What are the obligations of the institution?
- Would the use of a racial epithet be treated differently? Should it? How are misgendering and racism different?

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178

TITLE IX POTPOURRI
- *Gruver v. Louisiana State University*
- *Doe v. Univ. of Denver*

179

179

GRUVER V. LOUISIANA STATE UNIVERSITY
401 F. SUPP. 3D 742 (M.D. LA. 2019)

Facts
- Maxwell Gruver was a freshman at LSU and a Phi Delta Theta fraternity pledge. In 2017, Gruver died from alcohol poisoning in a hazing incident.
- Ten days before Gruver died, a concerned parent anonymously reported to LSU's Greek Life office that dangerous levels of alcohol were being consumed at a different fraternity's pledge events.
- The report described specific activities, at a specific fraternity on Bid Night, and significant abuse of alcohol by new members.
- LSU's Greek office claimed there was insufficient information to investigate the reported activity.

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180

GRUVER V. LOUISIANA STATE UNIVERSITY

401 F. SUPP. 3D 742 (M.D. LA. 2019)

Facts (Cont.)

- Gruver's family sued LSU under Title IX under a theory that the University failed to enforce its anti-hazing policies against male fraternities in the same (strict) manner it applied to female sororities.
- The Gruvers alleged LSU has a clear pattern of failing to meaningfully address fraternity hazing, including examples of more than a dozen significant injuries or deaths of male students in recent years.
- LSU took a "boys will be boys" approach to fraternity oversight that relied on gender stereotypes about male fraternity members and masculine rights of passage.
- LSU filed a motion to dismiss the case.

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181

GRUVER V. LOUISIANA STATE UNIVERSITY

401 F. SUPP. 3D 742 (M.D. LA. 2019)

The District Court Grappled with Four Threshold Questions:

1. What types of facts must the Gruvers allege to raise a claim of intentional discrimination on the basis of sex?
2. Did Gruver need to be a member of a protected class?
3. Did the Gruvers need to allege their son was treated less favorably than similarly situated students?
4. Must LSU's alleged discrimination have **caused** Gruver's death?

- The court categorized this case as a "heightened risk claim" and evaluated whether LSU's practices created a heightened risk of harm.

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182

GRUVER V. LOUISIANA STATE UNIVERSITY

401 F. SUPP. 3D 742 (M.D. LA. 2019)

Decision

- The court looked to the *Baylor*[5] case because it was conceptually analogous, and the reasoning was persuasive.
- The court determined that the Gruvers met the burden of alleging sufficient facts to plead a case for intentional discrimination. They had clearly alleged that LSU had misinformed male students about the risks of fraternity hazing, LSU had actual notice of multiple hazing violations, and LSU failed to stop or correct dangerous hazing.
- The court denied LSU's motion to dismiss the lawsuit.

[5] *Doe 1 v. Baylor University*, 240 F. Supp. 3d 646 (W.D. Tex. 2017).

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183

GRUVER V. LOUISIANA STATE UNIVERSITY

401 F. SUPP. 3D 742 (M.D. LA. 2019)

Takeaways

- This is the first time a federal court has applied this Title IX theory of discrimination to a fact pattern involving male students.
- The case creates a different avenue for liability for fraternity hazing deaths other than the traditional tort claims (e.g., wrongful death, negligence).
- This bolsters the argument that schools may be held responsible for policies and practices that discriminate against one gender or the other when the discrimination puts those students at a heightened risk of harm.

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184

GRUVER V. LOUISIANA STATE UNIVERSITY

401 F. SUPP. 3D 742 (M.D. LA. 2019)

Takeaways (Cont.)

- Institutions should evaluate whether gender stereotypes and related attitudes are affecting their enforcement of hazing and other student safety policies.
- TIX Coordinators should add fraternity and sorority life to their audit schedule and review policies/practices across the institution for equitable construction and enforcement.
- This legal theory would only be applicable in cases involving gender-segregated organizations (e.g., fraternities and sororities, athletics).

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185

GRUVER V. LOUISIANA STATE UNIVERSITY

401 F. SUPP. 3D 742 (M.D. LA. 2019)

Updates and Subsequent Decisions

- This case is ongoing, and LSU appealed the district court's decision, attempting to invoke immunity under the Eleventh Amendment
- The circuit court affirmed the lower court's decision to deny LSU's motion to dismiss, citing LSU has waived immunity from lawsuits that allege discrimination on the basis of sex by accepting federal funds

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186

DOE V. UNIV. OF DENVER

1 F.4TH 822 (10TH CIR. 2021)

Facts

- Doe, a student at the University of Denver (DU), was expelled after a classmate, Roe, accused him of sexual assault.
- Investigators interviewed Doe, Roe, and 11 other people with whom Roe discussed the alleged assault. Although the University took the statement of Doe's resident adviser, it did not interview the **five people** Doe spoke with.
- DU's investigators did not mention the numerous inconsistencies in Roe's story. Notably, Roe only began telling witnesses the sexual encounter was non-consensual after she saw Doe talking to another woman at a party.

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187

DOE V. UNIV. OF DENVER

1 F.4TH 822 (10TH CIR. 2021)

Facts (Cont.)

- Only after DU issued its preliminary report did investigators talk to Doe's witness, his therapist. The therapist, in turn, complained that the interviewer had "made up her mind already." Doe also raised concerns that Roe withheld part of the Sexual Assault Nurse Examiner (SANE) report pertaining to Roe's injuries.
- The investigators' final report in August 2016 found Doe more likely than not committed sexual assault, and a committee expelled him.

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188

DOE V. UNIV. OF DENVER

1 F.4TH 822 (10TH CIR. 2021)

Decision

- At the trial level, Doe sued the University and various school administrators alleging, among other things, that the University violated the sex discrimination prohibition of Title IX, because anti-male bias pervaded the sexual misconduct investigation, resulting in a disciplinary decision against the weight of the evidence.
- The district court concluded that Doe failed to present sufficient evidence that the University's actions were motivated by bias against him because of his sex, and it therefore granted summary judgment to the University on Doe's Title IX claim.

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189

DOE V. UNIV. OF DENVER

1 F.4TH 822 (10TH CIR. 2021)

Decision (Cont.)

- Doe appealed to the Court of Appeals for the Tenth Circuit.
- The Tenth Circuit concluded Doe provided sufficient evidence for a jury to decide whether the investigation into the allegations and subsequent disciplinary action discriminated against him because of his sex.
- The Tenth Circuit noted that the Final Report that the disciplinary committee reviewed before expelling Doe, when viewed in the light most favorable to Doe, can be construed as ignoring, downplaying, and misrepresenting inconsistencies in Roe's account of the alleged assault.

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190

DOE V. UNIV. OF DENVER

1 F.4TH 822 (10TH CIR. 2021)

Takeaways

- Previously a Judge in the Tenth Circuit warned, "[S]tereotypes and prejudices against a class protected by Title IX (males) are beginning to infect the enforcement of sexual-misconduct policies."
- Title IX Coordinators need to ensure investigations are thorough and impartial. It is better to re-open an investigation rather than face a gender bias claim.

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191

TITLE IX AND ATHLETICS

- *Balow v. Mich. State Univ.*
- *Berndsen v. North Dakota Univ. System*

192

192

BALOW V. MICH. STATE UNIV.
NO. 21-1183, 2022 WL 292426 (6TH CIR. FEB. 1, 2022)

Facts

- Michigan State University (MSU) eliminated both its men's and women's swimming and diving teams. Members of the women's swimming and diving team sued, arguing that MSU fails to provide women athletes with equal participation opportunities as required by Title IX.
- The district court denied the student-athletes' motion for a preliminary injunction, finding that they were not likely to succeed on the merits of their Title IX claim.
- The women appealed the district court's decision to the Court of Appeals for the Sixth Circuit.

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193

BALOW V. MICH. STATE UNIV.
NO. 21-1183, 2022 WL 292426 (6TH CIR. FEB. 1, 2022)

Decision

- The Sixth Circuit remanded the case back to the district court on appeal.
- The two-judge majority said at the Preliminary Injunction stage the district court should have focused on the number of available athletic opportunities at MSU for both sexes to determine whether a participation gap existed, instead of defining the participation gap as a percentage of the overall athletic program.
- Found that a court may disregard OCR's definition of "participant" and may instead use the *Equity in Athletics Disclosure Act* (EADA) broader definition to find non-compliance.

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194

BALOW V. MICH. STATE UNIV.
NO. 21-1183, 2022 WL 292426 (6TH CIR. FEB. 1, 2022)

Decision (Cont.)

- While the percentage gap may be relevant, determining substantial proportionality should have focused on the number of available athletic opportunities at MSU for both sexes to determine whether a participation gap existed.
- "At the preliminary injunction stage, the appropriate remedy when a school seeks to eliminate a women's team in violation of Title IX is typically an injunction that prevents them from doing so."

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195

BALOW V. MICH. STATE UNIV.
NO. 21-1183, 2022 WL 292426 (6TH CIR. FEB. 1, 2022)

Takeaways

- Understanding the *Equity in Athletics Disclosure Act* (EADA) broader definition of equity may be useful in preventing a participation gap argument.
- OCR's analysis under the three-part test may not be the best approach for assessing compliance.
- In this case, whether a preliminary injunction is appropriate depends on both the district court's finding of the size of the participation gap and its weighing of the preliminary injunction factors.

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196

BERNDSEN V. NORTH DAKOTA UNIV. SYSTEM
7 F.4TH 782 (8TH CIR. 2021)

Facts

- Berndsen, et al. filed suit against the North Dakota University System (NDU), alleging the NDU violated Title IX when it eliminated the women's ice hockey program but not the men's.
- NDU established the women's ice hockey team seventy-three years after the men's hockey team.
- The team ranked sixth nationally and was the most "prominent and popular" sport on campus for women.
- Women's ice hockey athletes competed against seven other teams in the "strongest and most competitive women's ice hockey league in the country" at the "most competitive" collegiate level (NCAA Division I).

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197

BERNDSEN V. NORTH DAKOTA UNIV. SYSTEM
7 F.4TH 782 (8TH CIR. 2021)

Facts (Cont.)

- The district court granted NDU's motion to dismiss for failure to state a claim.
- Berndsen appealed to the U.S. Court of Appeals for the Eighth Circuit which reversed and remanded the case to the District Court for further consideration.

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198

BERNDSEN V. NORTH DAKOTA UNIV. SYSTEM
7 F.4TH 782 (8TH CIR. 2021)

Decision

- The Eighth Circuit Court found that (1) the appellants' legal theory clashed with the district court's understanding of how a Title IX claim should be pled, and (2) the district court's analysis was flawed because it only focused on the Three-Part Test and not the **entire** 1979 Interpretation [emphasis added].
- OCR provided different ways to meet institutional compliance obligations, and the Court gave controlling deference to the entire 1979 Interpretation, not just the Three-Part Test.

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199

BERNDSEN V. NORTH DAKOTA UNIV. SYSTEM
7 F.4TH 782 (8TH CIR. 2021)

Decision (Cont.)

- The plain text of the 1979 Interpretation requires institutions to operate single-sex contact sports equally and provide equal opportunities for members of both sexes.
- The district court erred by improperly relying on the Three-Part Test as the ***only*** way to analyze a claim. The district court erred by disregarding the plain text of the 1979 Interpretation.
- The Court held that (1) none of OCR's subsequent clarifications (1996, 2003, or 2010) have addressed any part of the 1979 Interpretation beyond the Three-Part Test and (2) this appeal argued compliance issues of single-sex contact sports (or separate teams), which is covered by a different section from the one that governs the Three-Part Test.

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200

BERNDSEN V. NORTH DAKOTA UNIV. SYSTEM
7 F.4TH 782 (8TH CIR. 2021)

Takeaways

- If the Plaintiffs prevail, schools would be required to comply with the 1979 Interpretation, not just the Three-Part Test, which has become industry standard for Title IX athletics.
- Institutions should always conduct a risk analysis to review any potential harm the elimination of an athletic team may cause.

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201

BERNDSEN V. NORTH DAKOTA UNIV. SYSTEM

7 F.4TH 782 (8TH CIR. 2021)

Takeaways (Cont.)

- When eliminating single-sex teams, schools may need to comply with the Selection of Sports section of the 1979 Interpretation, which provides:
  - "[I]f an institution sponsors a team for members of one sex in a **contact** sport, it must do so for members of the other sex if: (1) opportunities for members of the excluded sex have historically been limited and (2) there is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team."

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202

203

204