
ATIXA
Association of
Title IX Administrators
Title IX Coordinator Three:
Key Topics and Lessons from
Recent Court Decisions
Training and Certification Course

TNG Strategic Risk Management Solutions

Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

CONTENT ADVISORY

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

AGENDA

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

AGENDA

7 Erroneous Outcome and Selective Enforcement

8 LGBTQIAA+ Topics & Activity

9 Title IX Potpourri

TITLE IX NOTICE OF PROPOSED RULEMAKING 2022

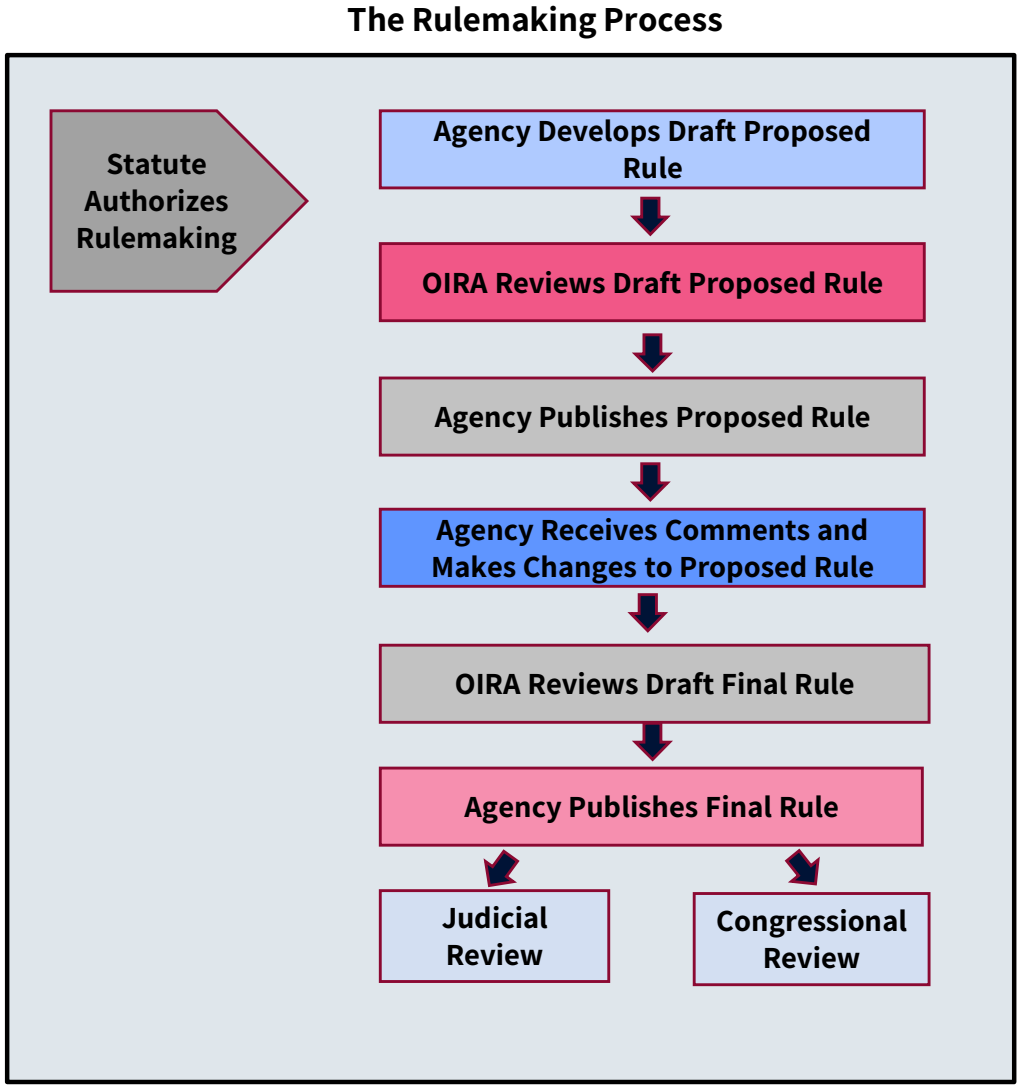
TITLE IX REGULATIONS

- Congress passed Title IX of the Education Amendments in 1972
- Since 1980, the Department of Education's Office for Civil Rights (OCR) has had primary responsibility for enforcing Title IX
- November 2018: OCR proposed the most detailed and comprehensive Title IX regulations to date[1]
- August 2020: Significantly amended, due-process oriented Regulations took effect
- June 2022: OCR published the Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations
- On July 12, 2022, the NPRM was published in the Federal Register and the 60-day comment period began

[1] U.S. Office of the Federal Register, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,* https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal

CODE OF FEDERAL REGULATIONS PROCESS

- Draft proposed rule
- Review for Budget
- Publish Fed. Reg.
- Receive Comments
- Make Changes
- Publish Final Rule
- Effective Date



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

NPRM PROCESS TIMELINE

- Official publication in the Federal Register July 12, 2022
- Review and comment period
  - 60-day comment period ended September 12, 2022
  - Submit comments to the Department of Education's Office for Civil Rights (OCR)
- Final Rule expected to be issued in Spring 2023
- Effective Date approximately Summer/Fall 2023
- Watch for ATIXA webinars and other opportunities ☺
- There will be a separate NPRM for Athletics

PREPARING FOR IMPLEMENTATION

- Must continue to fulfill obligations under the current regulations for the 2022-2023 academic year.
- Anticipate OCR will expect schools to implement the new Title IX regulations before the start of the 2023-2024 academic year.

Steps to Take Now:

- Prepare to educate your community on the changes
- Identify stakeholders that will need to be involved in making policy decisions (e.g., whether to have hearings)
- Determine how you will manage policy changes
- Plan for the training needs for your community
- Consider state laws, court decisions, and other regulations that may affect your institutional approach

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."

BRIEF LEGAL PRIMER

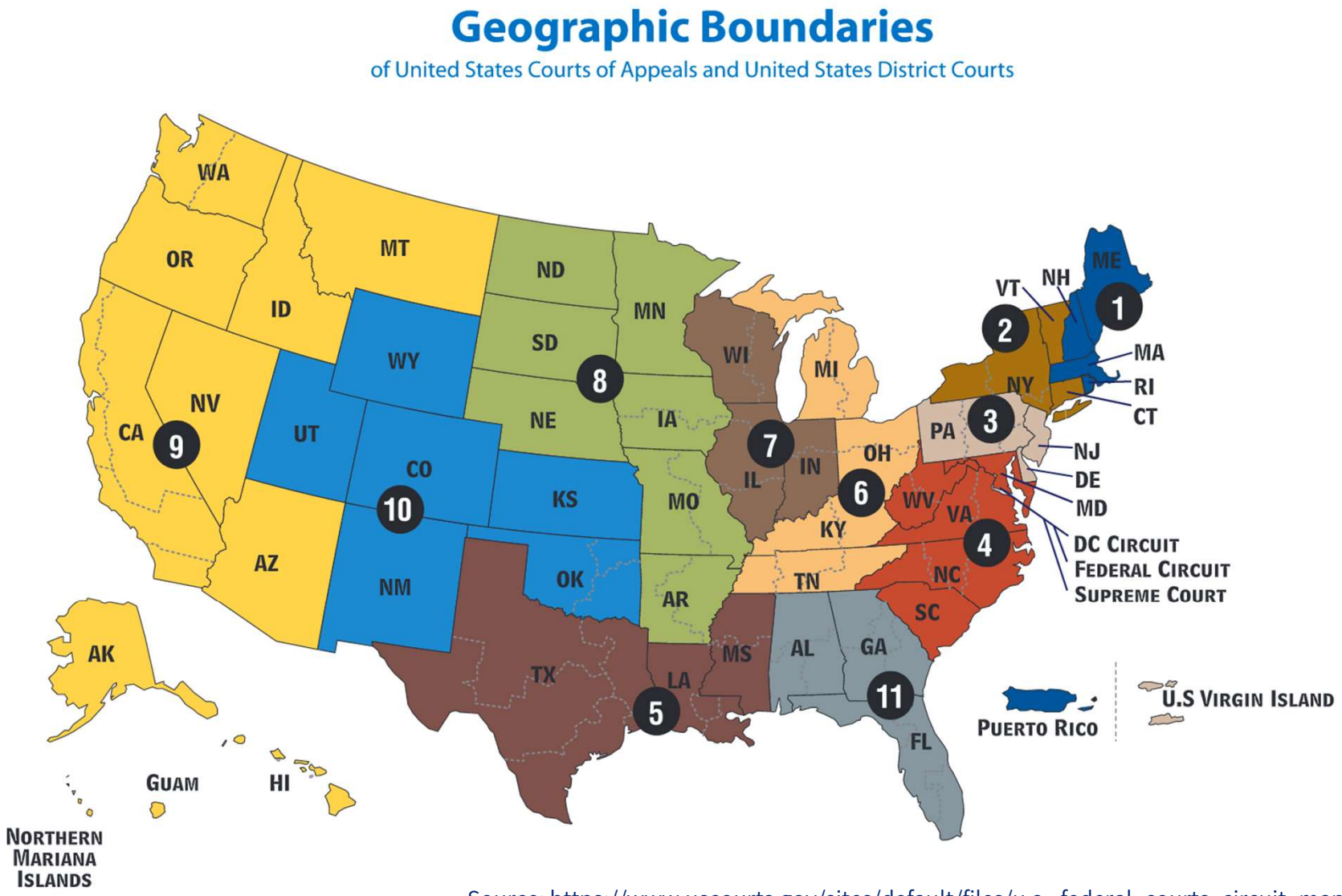
- Court System
- Laws, Courts, & Regulations
- Motions
- How to Read Case Law

COURT SYSTEM IN A NUTSHELL

Federal Court

- **U.S. District Court**
  - Trial Court; Single judge or magistrate judge; Decisions binding only on single District (94 Districts)
- **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

U.S. COURTS OF APPEALS MAP



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

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, Preamble)
- Federal Case Law – **Force of law** based on jurisdiction
  - Supreme Court – binding on entire country
  - Circuit Courts of Appeal – binding on Circuit, persuasive on others
  - District Court – binding on District, persuasive on others
- State Case Law – **Force of law**; binding only in that state based on court jurisdiction

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.

MOTIONS IN A NUTSHELL

- **Motion to Dismiss (MTD)**
  - After pleadings
  - Usually because one party believes the other failed to plead all the facts needed to state a claim
  - The court interprets all facts in favor of the "nonmovant," only looking for a plausible claim
- **Motion for Summary Judgement (MSJ)**
  - After discovery
  - Movant must show there is no genuine dispute as to any material facts, and the lack of dispute means there is no question for the jury to decide

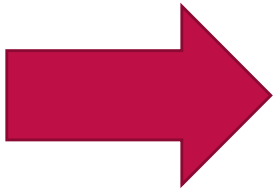
MOTIONS IN A NUTSHELL

- **Motion for Preliminary Injunction/Temporary Restraining Order (TRO)**
  - Asks the court to prevent one party from performing an action, such as:
    - Enforcing a law or regulation
    - Suspending or expelling a student
    - Eliminating a sports team
  - The court usually examines:
    - The likelihood of success on the merits of the claim
    - The likelihood of irreparable injury
    - Balance of harms between parties
    - Any public interest

HOW TO READ CASE LAW

- Primary Sections:
  - Case Name
  - Introduction/Summary
  - Facts
  - Legal Dispute/Procedural History
  - Applicable Law
  - Reasoning & Holding

READING CASE LAW: CASE NAME



119 S.Ct. 1661
Supreme Court of the United States

Aurelia DAVIS, as Next Friend
of LaSHONDA D., Petitioner,
v.
MONROE COUNTY BOARD OF EDUCATION, et al.

No. 97–843.
|
Argued Jan. 12, 1999.
|
Decided May 24, 1999.

Synopsis
Parent, on behalf of fifth-grade student, sued school board and officials under Title IX for failure to remedy classmate's sexual harassment of student. The United States District Court for the Middle District of Georgia, 862 F.Supp. 363, dismissed for failure to state claim. Parent appealed. The Court of Appeals for the Eleventh Circuit, 120 F.3d 1390,affirmed, and certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) a private damages action may lie against a school board under Title IX in cases of student-on-student harassment, but only where the funding recipient acts with deliberate indifference and the harassment is so severe that it effectively bars the victim's access to an educational opportunity or benefit; (2) damages liability is not imposed on fund recipient under Title IX based on agency principles; (3) Title IX proscribes harassment with

West Headnotes (22)

[1] **Civil Rights** Sexual harassment; sexually hostile environment

Civil Rights Education

A private damages action may lie against a school board under Title IX in cases of student-on-student harassment, but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities, and only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit. Education Amendments of 1972, § 901(a), as amended, 20 U.S.C.A. § 1681(a).

981 Cases that cite this headnote

[2] **Federal Courts** Scope and Extent of Review

In reviewing the legal sufficiency of a cause of action, following dismissal for failure to state a claim, Supreme Court must assume the truth of the material facts as alleged in the complaint. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

READING CASE LAW: INTRODUCTION

IX, but a plaintiff must show harassment that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities. Cf. *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49. Whether gender-oriented conduct is harassment depends on a constellation of surrounding circumstances, expectations, and relationships, *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 82, 118 S.Ct. 998, 140 L.Ed.2d 201, including, but not limited to, the harasser's and victim's ages and the number of persons involved. Courts must also bear in mind that schoolchildren may regularly interact in ways that would be unacceptable among adults. Moreover, that the discrimination must occur "under any education program or activity" suggests that the behavior must be serious enough to have the systemic effect of denying the victim equal access to an education **1666 program or activity. A single instance of severe one-on-one peer harassment could, in theory, be said to have such a systemic effect, but it is unlikely that Congress would have thought so. The fact that it was a teacher who engaged in harassment in *Franklin* and *Gebser* is relevant. Peer harassment is less likely to satisfy the requirements that the misconduct breach Title IX's guarantee of equal access to educational benefits and have a systemic effect on a program or activity. Pp. 1674–1676.

2. Applying this standard to the facts at issue, the Eleventh Circuit erred in dismissing petitioner's complaint. This Court cannot say beyond doubt that she can prove no set of facts that would entitle her to relief. She alleges that LaShonda was the victim of repeated acts of harassment by G.F. over a 5–month period, and allegations support the conclusion that his misconduct was severe, pervasive, and objectively offensive. Moreover, the complaint alleges that multiple victims of G.

which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined, *post,* p. 1676.

Attorneys and Law Firms

Verna L. Williams, Washington, DC, for petitioner.

Barbara D. Underwood, Washington, DC, for the United States as amicus curiae, by special leave of the Court.

W. Warren Plowden, Jr., Macon, GA, for the respondents.

Opinion

Justice O'CONNOR delivered the opinion of the Court.

[1] Petitioner brought suit against the Monroe County Board of Education and other defendants, alleging that her fifth-grade daughter had been the victim of sexual harassment by another student in her class. Among petitioner's claims was a claim for monetary and injunctive relief under Title IX of **633 the Education Amendments of 1972 (Title IX), 86 Stat. 373, as amended, 20 U.S.C. § 1681 *et seq.* The District Court dismissed petitioner's Title IX claim on the ground that "student-on-student," or peer, harassment provides no ground for a private cause of action under the statute. The Court of Appeals for the Eleventh Circuit, sitting en banc, affirmed. We consider here whether a private damages action may lie against the school board in cases of student-on-student harassment. We conclude that it may, but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, we conclude that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.

READING CASE LAW: FACTS

I

[2] Petitioner's Title IX claim was dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. Accordingly, in reviewing the legal sufficiency of petitioner's cause of action, "we must assume the truth of the material facts as alleged in the complaint." *Summit Health, Ltd.* v. *Pinhas,* 500 U.S. 322, 325, 111 S.Ct. 1842, 114 L.Ed.2d 366 (1991).

A

Petitioner's minor daughter, LaShonda, was allegedly the victim of a prolonged pattern of sexual harassment by one of her fifth-grade classmates at Hubbard Elementary School, a public school in Monroe County, ****1667** Georgia. According to petitioner's complaint, the harassment began in December 1992, when the classmate, G.F., attempted to touch LaShonda's breasts and genital area and made vulgar statements such as " 'I want to get in bed with you' " and " 'I want to feel your boobs.' " Complaint ¶ 7. Similar conduct allegedly occurred on or about January 4 and January 20, 1993. *Ibid.* LaShonda reported each of these incidents to her ***634** mother and to her classroom teacher, Diane Fort. *Ibid.* Petitioner, in turn, also contacted Fort, who allegedly assured petitioner that the school principal, Bill Querry, had been informed of the incidents. *Ibid.* Petitioner contends that, notwithstanding these reports, no disciplinary action was taken against G.F. *Id.,* ¶ 16.

G.F.'s conduct allegedly continued for many months. In early February, G.F. purportedly placed a door stop in his pants and proceeded to act in a sexually suggestive manner toward LaShonda during physical education class. *Id.,* ¶ 8. LaShonda reported G.F.'s behavior to her physical education teacher, to both Maples and Pippen. *Id.,* ¶ 10. In mid-April 1993, G.F. allegedly rubbed his body against LaShonda in the school hallway in what LaShonda considered a sexually suggestive manner, and LaShonda again reported the matter to Fort. *Id.,* ¶ 11.

The string of incidents finally ended in mid-May, when G.F. was charged with, and pleaded guilty to, sexual battery for his misconduct. *Id.,* ¶ 14. The complaint alleges that LaShonda had suffered during the months of harassment, however; specifically, her previously high grades allegedly dropped as she became unable to concentrate on her studies, *id.,* ¶ 15, and, in April 1993, her father discovered that she had written a suicide note, *ibid.* The complaint further alleges that, at one point, LaShonda told petitioner that she " 'didn't know how much longer she could keep [G.F.] off her.' " *Id.,* ¶ 12.

***635** Nor was LaShonda G.F.'s only victim; it is alleged that other girls in the class fell prey to G.F.'s conduct. *Id.,* ¶ 16. At one point, in fact, a group composed of LaShonda and other female students tried to speak with Principal Querry about G.F.'s behavior. *Id.,* ¶ 10. According to the complaint, however, a teacher denied the students' request with the statement, " 'If [Querry] wants you, he'll call you.' " *Ibid.*

Petitioner alleges that no disciplinary action was taken in response to G.F.'s behavior toward LaShonda. *Id.,* ¶ 16. In addition to her conversations with Fort and Pippen, petitioner alleges that she spoke with Principal Querry in mid-May 1993. When petitioner inquired as to what action the school intended to take against G.F., Querry simply stated, " 'I guess I'll have to threaten him a little bit harder.' " *Id.,* ¶ 12. Yet, petitioner alleges, at no point during the many months of his reported misconduct was G.F. disciplined for harassment. *Id.,* ¶ 16. Indeed, Querry allegedly asked petitioner why LaShonda " 'was the only one complaining.' " *Id.,* ¶ 12.

Nor, according to the complaint, was any effort made to

READING CASE LAW: PROCEDURAL HISTORY

B

On May 4, 1994, petitioner filed suit in the United States District Court for the Middle District of Georgia against the Board, Charles Dumas, the school district's superintendent, **1668 and Principal Querry. The complaint alleged that the Board *636 is a recipient of federal funding for purposes of Title IX, that "[t]he persistent sexual advances and harassment by the student G.F. upon [LaShonda] interfered with her ability to attend school and perform her studies and activities," and that "[t]he deliberate indifference by Defendants to the unwelcome sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abus[ive] school environment in violation of Title IX." *Id.*, ¶¶ 27, 28. The complaint sought compensatory and punitive damages, attorney's fees, and injunctive relief. *Id.*, ¶ 32.

The defendants (all respondents here) moved to dismiss petitioner's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted, and the District Court granted respondents' motion. See *D. v. Monroe Cty. Bd. of Educ.*, 862 F.Supp. 363, 368 (M.D.Ga.1994). With regard to petitioner's claims under Title IX, the court dismissed the claims against individual defendants on the ground that only federally funded educational institutions are subject to liability in private causes of action under Title IX. *Id.*, at 367. As for the Board, the court concluded that Title IX provided no basis for liability absent an allegation "that the Board or an employee of the Board had any role in the harassment." *Ibid.*

Petitioner appealed the District Court's decision dismissing

panel recognized that petitioner sought to state a claim based on school "officials' failure to take action to stop the offensive acts of those over whom the officials exercised control," *ibid.*, and the court concluded that petitioner had alleged facts sufficient to support a claim for hostile environment sexual harassment on this theory, *id.*, at 1195.

The Eleventh Circuit granted the Board's motion for rehearing en banc, *Davis v. Monroe Cty. Bd. of Educ.*, 91 F.3d 1418 (1996), and affirmed the District Court's decision to dismiss petitioner's Title IX claim against the Board, 120 F.3d 1390 (1997). The en banc court relied, primarily, on the theory that Title IX was passed pursuant to Congress' legislative authority under the Constitution's Spending Clause, U.S. Const., Art. I, § 8, cl. 1, and that the statute therefore must provide potential recipients of federal education funding with "unambiguous notice of the conditions they are assuming when they accept" it. 120 F.3d, at 1399. Title IX, the court reasoned, provides recipients with notice that they must stop their employees from engaging in discriminatory conduct, but the statute fails to provide a recipient with sufficient notice of a duty to prevent student-on-student harassment. *Id.*, at 1401.

Writing in dissent, four judges urged that the statute, by declining to identify the perpetrator of discrimination, encompasses misconduct by third parties: "The identity of the perpetrator is simply irrelevant under the language" of the statute. *Id.*, at 1412 (Barkett, J., dissenting). The plain language, the dissenters reasoned, also provides recipients with sufficient notice that a failure to respond to student-on-student harassment could trigger liability for the district.

READING CASE LAW: LAW & APPLICATION

response to known student-on-student harassment), vacated and remanded, 526 U.S. 1142, 119 S.Ct. 2016, 143 L.Ed.2d 1028 (1999), *Brzonkala v. Virginia Polytechnic Institute and State University,* 132 F.3d 949, 960–961 (C.A.4 1997) (same), vacated and District Court decision affirmed en banc, 169 F.3d 820 (C.A.4 1999) (not addressing merits of Title IX hostile environment sexual harassment claim and directing District Court to hold this claim in abeyance pending this Court's decision in the instant case), and *Oona R.S. v. McCaffrey,* 143 F.3d 473, 478 (C.A.9 1998) (rejecting qualified immunity claim and concluding that Title IX duty to respond to student-on-student harassment was clearly established by 1992–1993), cert. denied, 526 U.S. 1154, 119 S.Ct. 2039, 143 L.Ed.2d 1047 (1999). We now reverse.

II

Title IX provides, with certain exceptions not at issue here, that

> "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

Congress authorized an administrative enforcement scheme for Title IX. Federal departments or agencies with the authority to provide financial assistance are entrusted to promulgate rules, regulations, and orders to enforce the objectives of § 1681, see § 1682, and these departments or agencies may rely on "any ... means authorized by law," including ***639** the termination of funding, *ibid.,* to give effect to the statute's restrictions.

There is no dispute here that the Board is a recipient of federal education funding for Title IX purposes. 74 F.3d, at 1189. Nor do respondents support an argument that student-on-

A

Petitioner urges that Title IX's plain language compels the conclusion that the statute is intended to bar recipients of federal funding from permitting this form of discrimination in their programs or activities. She emphasizes that the statute prohibits a student from being "*subjected to discrimination* under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). It is Title IX's "unmistakable focus on the benefited class," *Cannon v. University of Chicago,* 441 U.S. 677, 691, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), rather than the perpetrator, that, in petitioner's view, compels the conclusion that the statute works to protect students from the discriminatory misconduct of their peers.

[3] **[4]** **[5]** **[6]** Here, however, we are asked to do more than define the scope of the behavior that Title IX proscribes. We must determine whether a district's failure to respond to student-on-student harassment in its schools can support a private suit for money damages. See *Gebser v. Lago Vista Independent School Dist.,* 524 U.S. 274, 283, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998) ("In this case, ... petitioners seek not just to establish a Title IX violation but to recover *damages* ..."). This Court has indeed recognized an implied private right of action under Title IX, see *Cannon v. University of Chicago, supra,* and we have held that money damages are available in such suits, *Franklin v.* ***640** *Gwinnett County Public Schools,* 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). Because we have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause, however, see, *e.g., Gebser v. Lago Vista Independent School Dist., supra,* at 287, 118 S.Ct. 1989 (Title IX); ****1670** *Franklin v. Gwinnett County Public Schools, supra,* at 74–75, and n. 8, 112 S.Ct. 1028 (Title IX); see also *Guardians Assn. v. Civil Serv. Comm'n of New York City,* 463 U.S. 582, 598–599, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983) (opinion of White, J.) (Title VI), private

READING CASE LAW: REASONING & HOLDING

provide, that a student has been "teased," *post,* at 1688, or "called ... offensive names," *post,* at 1689. Comparisons to an "overweight child who skips gym class because the other children tease her about her size," the student who "refuses to wear glasses to avoid the taunts of 'four-eyes,' " and "the child who refuses to go to school because the school bully calls him a 'scaredy-cat' at recess," *post,* at 1688, are inapposite and misleading. ****1676** Nor do we contemplate, much less hold, that a mere "decline in grades is enough to survive" a motion to dismiss. *Ibid.* The dropoff in LaShonda's grades provides necessary evidence of a potential link between her education and G.F.'s misconduct, but petitioner's ability to state a cognizable claim here depends equally on the alleged persistence and severity of G.F.'s actions, not to mention the Board's alleged knowledge and deliberate indifference. We trust that the dissent's characterization of our opinion will not mislead courts to impose more sweeping liability than we read Title IX to require.

Moreover, the provision that the discrimination occur "under any education program or activity" suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would ***653** have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment. By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored. Even the dissent suggests that Title IX liability may arise when a funding recipient remains indifferent to severe, gender-based mistreatment played out on a "widespread level" among students. *Post,* at 1690.

C

[22] Applying this standard to the facts at issue here, we conclude that the Eleventh Circuit erred in dismissing petitioner's complaint. Petitioner alleges that her daughter was the victim of repeated acts of sexual harassment by G.F. over a 5–month period, and there are allegations in support of the conclusion that G.F.'s misconduct was severe, pervasive, and objectively offensive. The harassment was not only verbal; it included numerous acts of objectively offensive touching, and, indeed, G.F. ultimately pleaded guilty to criminal sexual misconduct. Moreover, the complaint alleges that there were multiple victims who were sufficiently disturbed by G.F.'s misconduct to seek an audience with the school principal. ***654** Further, petitioner contends that the harassment had a concrete, negative effect on her daughter's ability to receive an education. The complaint also suggests that petitioner may be able to show both actual knowledge and deliberate indifference on the part of the Board, which made no effort whatsoever either to investigate or to put an end to the harassment.

On this complaint, we cannot say "beyond doubt that [petitioner] can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). See also *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) ("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims"). Accordingly, the judgment of the United States Court of Appeals for the Eleventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SYNTHESIZING TAKEAWAYS

- A holding is generally fact specific
- Courts like to limit their holdings, as well as the MH0 applicability of other courts' holdings
- Takeaways, or recommendations, are a mix of holdings, facts, and critical thinking
- More of an art than science

Slide 26

MH0 Something isn't grammatically correct with the "others' courts" piece

Mandy Hambleton, 2022-10-10T21:40:47.528

SYNTHESIZING TAKEAWAYS (CONT.)

Examples MH0

1. Schools and districts with dress codes should consider making changes to any gender- or sex-based distinctions, or at least examine the rationale behind such distinctions.
2. 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.
3. An institution's obligations to respond to harassment do not end with its response to the initial harassment. Failing to address and remedy additional harassment, including retaliation or violations of NCDs, may result in liability.

Slide 27

MH0 Replaced the second example with something shorter to allow everything to fit on the slide.
Mandy Hambleton, 2022-10-10T21:54:56.249

TITLE IX 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

DELIBERATE INDIFFERENCE

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

DELIBERATE INDIFFERENCE STANDARD

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

FARMER V. KANSAS STATE UNIVERSITY

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

Facts

- Two female students, Farmer and Weckhorst, sued KSU alleging deliberate indifference in response to reported off-campus rapes
  - One incident occurred at a fraternity house. T.R. had consensual sex with Farmer, then C.M. emerged from the closet and sexually assaulted Farmer
  - In the second case, the assaults occurred at an off-campus fraternity event and at the fraternity house. At the fraternity house, J.F. raped Weckhorst multiple times and left her naked and passed out; Weckhorst was then raped by J.G.
- Both Farmer and Weckhorst reported to KSU & the police

FARMER V. KANSAS STATE UNIVERSITY

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

Facts (Cont.)

- KSU told Farmer and Weckhorst 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 Weckhorst's to the Interfraternity Council.
- Farmer and Weckhorst stated they lived in fear of encountering their assailants on campus, they withdrew from campus activities, their grades suffered, and they suffered significant anxiety.
- KSU filed motions to dismiss, which were denied by the District Court.

FARMER V. KANSAS STATE UNIVERSITY

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

Decision

- KSU appealed to the Tenth Circuit regarding the proper interpretation of "deliberate indifference." The Tenth Circuit affirmed the decision:
  - Rejected KSU's claim that Farmer and Weckhorst must allege that KSU's deliberate indifference caused actual further harassment; rather, it was sufficient for Complainants to allege that KSU'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

FARMER V. KANSAS STATE UNIVERSITY

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

Status

- Farmer and Weckhorst permanently dropped all claims in November 2019
- KSU claims it provided no monetary payment or other form of compensation

FARMER V. KANSAS STATE UNIVERSITY

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

Takeaways

- KSU's potential liability arose 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

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 KSU's fraternities are "education activities" covered by Title IX
- The 2020 Title IX regulations cite to *Farmer* re: "covered activity" & student organization residences

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
  - Afterwards, 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

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, and 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 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

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

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 Sixth Circuit reached an arguably different conclusion than the Tenth Circuit in *Farmer*

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"

KOLLARITSCH V. MICHIGAN STATE UNIVERSITY

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

Takeaways

- 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

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

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

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

DOE V. FAIRFAX COUNTY SCHOOL BOARD

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

Facts (Cont.)

- 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
- The jury received an instruction that the actual knowledge standard was subjective, as opposed to objective
- The plaintiff appealed the verdict on the basis on an improper jury instruction

DOE V. FAIRFAX COUNTY SCHOOL BOARD

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

Decision Regarding Actual Notice

- On appeal, the circuit court determined "**actual notice**" is an objective test, not subjective. If a report includes allegations that could rise to the level of harassment, actual notice is met
- This is true regardless of whether 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 Title IX misconduct

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**
- Appealed to the Supreme Court

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**

WAMER V. UNIVERSITY OF TOLEDO

27 F.4TH 461 (6TH CIR. 2022)

Facts

- Wamer experienced sexually harassing behavior from her faculty member, Tyger
  - Touching her chest, thigh, and hair
  - Telling her she smelled good
  - Sharing stories about sex
  - Making derogatory comments about the #MeToo movement and women "asking for it"

WAMER V. UNIVERSITY OF TOLEDO (CONT.)

27 F.4TH 461 (6TH CIR. 2022)

Facts (Cont.)

- Wamer contacted another faculty member, O'Korn, about submitting a complaint, which they both did
- The Title IX office asked Wamer to come onto campus for an interview
  - Wamer declined because she did not feel comfortable doing so, for fear of running into Tyger
  - The Title IX office indicated it would continue pursuing the complaint
  - Wamer asserted she never indicated that she did not want to pursue the complaint

WAMER V. UNIVERSITY OF TOLEDO (CONT.)

27 F.4TH 461 (6TH CIR. 2022)

Facts (Cont.)

- Three weeks later, the University notified Wamer that it was closing the investigation and would be taking no action
  - Wamer asserted she would have attended an interview if she had known the University would otherwise end the investigation
- After the investigation closed, Wamer reported having difficulty with her studies and coming to campus
- Eventually, she changed her major and enrolled in online classes

WAMER V. UNIVERSITY OF TOLEDO (CONT.)

27 F.4TH 461 (6TH CIR. 2022)

Facts (Cont.)

- Five months after the University closed its investigation, O'Korn arranged a meeting between Wamer and a senior faculty member to discuss Wamer's allegations
  - The meeting resulted in a third Title IX complaint
  - As a result, the University placed the Tyger on administrative leave and ultimately ended up terminating him
- Tyger allegedly tried to smear Wamer's reputation by naming her as a Complainant, publicizing her grades, and accusing her of lying

WAMER V. UNIVERSITY OF TOLEDO (CONT.)

27 F.4TH 461 (6TH CIR. 2022)

Decision

- The primary issue is whether *Kollaritsch* and it's "post-notice" harassment rule applies
- Here, the court said *Kollaritsch* does not apply because this case involves teacher-student harassment, rather than peer harassment
  - The relationship between the harasser and victim is critical
  - When a teacher sexually harasses a student, it can be "more easily presumed" that the harassment would undermine and detract from the student's education

WAMER V. UNIVERSITY OF TOLEDO (CONT.)

27 F.4TH 461 (6TH CIR. 2022)

Takeaways

- The *Kollaritsch* decision is limited by other Sixth Circuit decisions and this case creates persuasive authority for other circuits deciding similar cases
- The law governing this aspect of "deliberate indifference" may be unsettled, but the facts of each case provide examples of the choices and behaviors Recipients should avoid
- Peer harassment may give rise to different levels of liability than teacher-student harassment
- Discuss and clarify Complainant wishes; be flexible

HALL V. MILLERSVILLE UNIVERSITY

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

Facts

- Hall, a student, was murdered on campus by her non-student boyfriend. Her family brought action against the University 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 her boyfriend had a history of staying together in the residence hall on campus.

HALL V. MILLERSVILLE UNIVERSITY

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

Facts (Cont.)

- A Resident Assistant (RA) had previously submitted a Title IX report after hearing a struggle in Hall's room. Hall's boyfriend answered the door and indicated that it had "got a little physical"
  - Police responded and drove Hall's boyfriend off campus and no police report was filed
- Hall's roommate called her own mother to tell her Hall's boyfriend gave Hall a black eye. The roommate's mother called University Police, the Millersville's counseling department, and the Area Coordinator.

HALL V. MILLERSVILLE UNIVERSITY

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

Facts (Cont.)

- A Deputy TIX Coordinator and an Area Coordinator reviewed and filed away the report, but the report was not forwarded to anyone else, and no investigation was conducted
- Several months later, residents and the RA heard noises coming 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, Hall's boyfriend killed Hall by "strangulation and multiple traumatic injuries"

HALL V. MILLERSVILLE UNIVERSITY

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

Decision

- The district court ruled in favor of Millersville since a non-student guest was the source of harassment.
- The Third Circuit reversed, finding that "Millersville knew, and intended, for its Title IX policies to apply to non-students."
- The appellate court relied on *Davis,* finding the notice requirement does not apply for **intentional** violations.
- 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."

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 Recipient can be liable for deliberate indifference to sexual harassment perpetrated by a **non-student guest** on campus under Title IX.
- 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 Recipient had "[substantial] control over the harasser and the context of harassment."

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.

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

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.

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.

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"

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.

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."

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.

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

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 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
- She told him he could kiss her cheek, and he asked for another, she said no and escorted him out of her bedroom
- Doe closed her door, could not lock it, and went to sleep

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

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

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"

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
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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
- Testimony from RISD officials confirmed that no institutional officials did any due diligence about the locks
- The plaintiff's expert witness, a security consultant, further testified that RISD failed to meet the standard of care
- Although persuaded by the plaintiff's expert, the court held that "the breach of duty by RISD was obvious to anyone"
- The court concluded 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.

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

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

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 and they must 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
- Earlier incident impacted the view of RISD's negligence
- "Continuous improvement" matters
  - Institution leaders must learn from past incidents to improve safety measures and prevent recurrence

RETALIATION

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

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

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

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

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?

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

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
- The False Statement Rule established that "a good faith report of discrimination or harassment that is not later substantiated" is not considered to be a false report

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).

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

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
- A Recipient can pursue a TIX investigation to conclusion while also exploring institutional code of conduct violations for knowingly making materially false statements in bad faith

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

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

Update

- A jury found Purdue retaliated against Nancy Roe and violated due process
  - As part of the judgment, Purdue will pay Roe $10,000
  - Purdue reportedly plans to appeal
- Doe settled with Purdue prior to trial

ISSUE SPOTTING

- *Doe v. Ohio University (S.D. Ohio, 2022)*

DOE V. OHIO UNIVERSITY ISSUE SPOTTING

Instructions

- Skim through the first 3 ½ pages (just the facts)
  - Stop at Procedural History
- What facts stand out to you? Why?
- How do you envision the court ruling, based on these facts? Why?

DOE V. OHIO UNIVERSITY ISSUE SPOTTING

Decisions

- Doe made repeated efforts to report the ongoing harassment, regardless of OU's contention that Doe did not give notice because she did not provide the names of her harassers
- OU was deliberately indifferent because the institution refused to step in and address peer harassment and violations of the protective order

DOE V. OHIO UNIVERSITY ISSUE SPOTTING

Takeaways

- An institution's obligation to respond to harassment does not end with its response to initial harassment
- Institutions must raise aware of their retaliation provisions, including how to report incidents

FIRST AMENDMENT

- *Feminist Majority Foundation et al. v. Hurley, Paino, and University of Mary Washington*
- *Mahanoy Area School District v. B.L.*
- *Honeyfund v. DeSantis*

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

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

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

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.

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

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

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

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"

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 investigat
  - UMW could have disabled Yik Yak campus-wide
- UMW could also have more "vigorously denounced" the harassment, offered counseling services to impacted students

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

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

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

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"

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

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**

HONEYFUND V. DESANTIS

4:22-CV-227, 2022 WL 3486962 (N.D. FLA., 2022)

Facts

- Two Florida employers and a diversity consultant sued for an injunction to halt enforcement of the Individual Freedom Act (IFA), also known as the "STOP WOKE" Act
- The IFA expanded the definition of unlawful employment practice in the Florida Civil Rights Act of 1992. The Law prohibits requiring employees to attend training promoting a variety of concepts, including several related to race, sex, and national origin
- Plaintiffs argued the IFA violated the First Amendment

HONEYFUND V. DESANTIS

4:22-CV-227, 2022 WL 3486962 (N.D. FLA., 2022)

Facts (Cont.)

- Employers may not:
  - "[Subject] any individual, as a condition of employment, membership, certification, licensing, credentialing, or passing an examination, to training, instruction, or any other required activity that **espouses, promotes, advances, inculcates, or compels such individual to believe** any of the following concepts constitutes discrimination based on race, color, sex, or national origin under this section…"

HONEYFUND V. DESANTIS

4:22-CV-227, 2022 WL 3486962 (N.D. FLA., 2022)

Decision

- The State argued that the IFA restricts conduct only, not speech – or, if it does restrict speech, it does so only as an unintentional consequence of regulating conduct
- And – if the court disagreed with the State's first two arguments, the State argued the IFA is constitutional because it is narrowly tailored to serve a compelling state interest
- The court disagreed, arguing the IFA does not ban all mandatory trainings, nor does it ban all mandatory trainings on the prohibited topics – just those mandatory trainings that *endorse* the prohibited topics
  - This is classic viewpoint discrimination

HONEYFUND V. DESANTIS

4:22-CV-227, 2022 WL 3486962 (N.D. FLA., 2022)

Decision (Cont.)

- Next, the State argued that the IFA echoed Title VII's incidental regulation of speech, so striking down the IFA would threaten Title VII
  - Title VII only regulates speech when it is objectively and subjectively offensive *and* when it is sufficiently severe or pervasive
  - The Title VII standard provides a shelter for "core protected speech," the court held, whereas the IFA does not

HONEYFUND V. DESANTIS

4:22-CV-227, 2022 WL 3486962 (N.D. FLA., 2022)

Decision (Cont.)

- Finally, the State argued that it has a compelling interest in preventing employers from forcing repugnant speech on a captive audience.
- The court pointed out that the captive audience concept does not apply in this context and, either way, the IFA is not narrowly tailored because it bans a significant amount of protected speech in order to quash "a sliver of offensive conduct"
- The court granted the injunction

HONEYFUND V. DESANTIS

4:22-CV-227, 2022 WL 3486962 (N.D. FLA., 2022)

Takeaways

- Recipients will likely continue to encounter these kinds of state laws that are more political than constitutional
- There is often room for recipients to adopt policies and creative practices geared towards prevention and support for targeted populations
- Be mindful of your policies, such as campus speaker policies, discrimination and harassment policies, or protest policies, that could implicate free speech
- The Title VII standard reflects the NPRM's Title IX standard, which means recipients will need to consider how their Title IX policies may implicate "core protected speech"

DUE PROCESS

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

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

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

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

VICTIM RIGHTS LAW CENTER V. CARDONA

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

Facts

- Four organizations and three individuals challenged the Title IX regulations as a violation of the Administrative Procedures Act (APA) and the Equal Protection Clause
- The organizational and individual Plaintiffs (collectively, the "Advocates") challenged the Final Rule and argued that it violates the APA because:
  - depart from established practice and procedure regulating educational institutions;
  - arbitrary and capricious decision making;
  - in excess of the Dept of Education's (ED) authority;
  - violates the Equal Protection Clause

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

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

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

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

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 hearin
- A hearing board conducted the hearing

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

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
- Haidak appealed to the First Circuit

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

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

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

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

Other cases

- *Overdam v. Texas A&M* (5th Cir., 2022)
  - "due process in the university disciplinary setting requires some opportunity for real-time cross-examination, even if only through a hearing panel"
- *Doe v. Baum* (6th Cir., 2018)

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

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

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

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

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

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.

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

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"

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

ERRONEOUS OUTCOME AND SELECTIVE ENFORCEMENT

- *Doe v. Coastal Carolina University*
- *Doe v. Texas Christian University*

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

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

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.'"

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
- **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

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

DOE V. TEXAS CHRISTIAN UNIVERSITY

4:22-CV-00297-O, 2022 WL 1573074 (N.D. TX, 2022)

Facts

- Roe, another student, had accused Doe of sexual assault on two different instances
  - The first instance was in Roe's on-campus room
    - Alleged digital penetration
    - Exchanged text messages where Doe appeared to take responsibility
  - The second was in Austin, Texas, after a football game
    - Roe called Doe, who picked her up from a hotel and brought her back to an apartment
    - Disagreement about what happened next

DOE V. TEXAS CHRISTIAN UNIVERSITY

4:22-CV-00297-O, 2022 WL 1573074 (N.D. TX, 2022)

Facts (Cont.)

- Doe and Roe continued to see each other over the following few months
- Doe began seeing someone else and stopped seeing Roe
- About a year later, Roe filed a formal complaint
- Investigators noted that Roe "refused to provide detailed answers to questions" in her interview
- Both parties submitted responses and addenda to the report, including texts, photos, and emails from Roe

DOE V. TEXAS CHRISTIAN UNIVERSITY

4:22-CV-00297-O, 2022 WL 1573074 (N.D. TX, 2022)

Facts (Cont.)

- Panel chair excluded several large batches of evidence, including text messages and photos exchanged by the parties after the incidents, including some potentially exculpatory texts
  - Chair asserted the evidence was submitted late and not shown to be unavailable at the time of the investigation
  - And the evidence was more prejudicial than probative of a material fact
- Panel concluded that Doe violated TCU's policy regarding the first allegation but not the second

DOE V. TEXAS CHRISTIAN UNIVERSITY

4:22-CV-00297-O, 2022 WL 1573074 (N.D. TX, 2022)

Decisions

- The court stated that the panel's decision to find Doe in violation of only one allegation was illogical, asserting that the panel arbitrarily applied evidence to one allegation although the evidence was clearly applicable to both
- The panel cited two reasons for finding Doe responsible pertaining to the first allegation
  - Doe admitted to being a rapist in text messages to Roe
  - Doe admitted to being a bad person in messages to Roe's friend
- Both of these facts are true for the second incident as well

DOE V. TEXAS CHRISTIAN UNIVERSITY

4:22-CV-00297-O, 2022 WL 1573074 (N.D. TX, 2022)

Decisions (Cont.)

- The panel cited two reasons for acquitting Doe of the second allegation
  - After the incident in Austin, Roe neither told her friend about the encounter nor asked for help
  - Roe and Doe continued to have sex
- Both of these facts were true for the first allegation too
- "Concluding that a thing is both true and not true is, by definition, erroneous"

DOE V. TEXAS CHRISTIAN UNIVERSITY

4:22-CV-00297-O, 2022 WL 1573074 (N.D. TX, 2022)

Decisions (Cont.)

- Additionally, the panel ignored evidence of Roe's motive to lie out of jealousy of Doe's new girlfriend
- Roe's response to the investigation report was also full of contradictions and false statements
- The panel Chair excluded a significant amount of exculpatory evidence
- Multiple procedural irregularities also supported Doe's contention that gender bias caused the erroneous decision, particularly because the irregularities consistently favored Roe

DOE V. TEXAS CHRISTIAN UNIVERSITY

4:22-CV-00297-O, 2022 WL 1573074 (N.D. TX, 2022)

Takeaways

- Procedural irregularities open the door for courts to take a closer look at the process and result
- Recipients should avoid deviation from their published policies and procedures
- Decision-makers must follow the facts – it seems the panel did not have the evidence to find Doe responsible for violating policy, but nonetheless went looking for an excuse to sanction Doe in some way
- Erroneous outcome and selective enforcement suits are often a “totality of the circumstances” determination

LGBTQIAA+ TOPICS

- *Meriwether v. Hartop*
- *Tennessee v. U.S. Department of Education*
- *AM by EM v. Indianapolis Public Schools*

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'" or be 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"

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 complying with the student’s demands

MERIWETHER V. HARTOP

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

Facts (Cont.)

- The student became hostile and threatening
- Meriwether reported incident and 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

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

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

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"

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).

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

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?

TENNESSEE V DEPT OF ED

3:21-CV-308, 2022 WL 2791450 (E.D. TENN, 2022)

Facts

- Twenty states filed an injunction to halt the Department of Education (ED) from using Title IX to combat discrimination on the basis of sexual orientation and gender identity

Decisions

- The court found that ED likely violated the Administrative Procedure Act because ED did not undergo the notice and comment process
- The court also found that irreparable harm would befall the states if they were unable to enforce their laws

TENNESSEE V DEPT OF ED

3:21-CV-308, 2022 WL 2791450 (E.D. TENN, 2022)

Takeaways

- The injunction only applies to the states in the lawsuit:
  - AL, AK, AZ, AR, GA, ID, IN, KS, KY, LA, MS, MO, MT, NE, OH, OK, SC, SD, TN, WV
- When ED implements its new Title IX regulations, it will cure the concerns the court cited, though more lawsuits are likely
  - Until ED completes the rulemaking process, OCR will be unable to enforce LGBTQIA+ equality in schools
- For recipients in the 20 states, this decision does not mandate changes to your policy – it only means OCR cannot enforce protections

A.M. BY E.M. V. INDIANAPOLIS PUB. SCHOOLS

1:22-CV-01075, 2022 WL 2951430 (S.D. IND. 2022)

Your turn

A.M. BY E.M. V. INDIANAPOLIS PUB. SCHOOLS

1:22-CV-01075, 2022 WL 2951430 (S.D. IND. 2022)

- Read through the opinion, either alone or with partner(s)
- Identify the different sections of the opinion
- Identify key facts
- Identify the holding
- Draft one or two takeaways

A.M. BY E.M. V. INDIANAPOLIS PUB. SCHOOLS

1:22-CV-01075, 2022 WL 2951430 (S.D. IND. 2022)

Facts

- A 10-year-old transgender girl played on the girls' softball team the previous school year
- Indiana Code Section 20-33-13-4 went into effect on July 1, 2022
  - The state law prohibits a male (based on the individual's sex assigned at birth) from participating on an athletic team designated as being a female, women's or girls' athletic team
- A.M.'s mother filed suit on behalf of her daughter to obtain an injunction against the state law so her daughter could play softball this year

A.M. BY E.M. V. INDIANAPOLIS PUB. SCHOOLS

1:22-CV-01075, 2022 WL 2951430 (S.D. IND. 2022)

Facts (Cont.)

- A.M. has been living as a girl and her classmates know her only as a girl
- A.M. uses the girls' restrooms at school
- A.M.'s gender marker on her birth certificate was changed, as was her first name
- A.M. was diagnosed with gender dysphoria at the age of six, causing A.M. to be suicidal, depressed, anxious, angry, and afraid
- A.M. has taken puberty blockers

A.M. BY E.M. V. INDIANAPOLIS PUB. SCHOOLS

1:22-CV-01075, 2022 WL 2951430 (S.D. IND. 2022)

Facts (Cont.)

- A.M. has enjoyed playing softball and the experience has lessened the distressing symptoms of gender dysphoria
- A.M.'s mother believes forcing her daughter to play on the boys' team would undermine her core identity as a girl
  - It would also "out" her, which would be traumatic and irreversible

A.M. BY E.M. V. INDIANAPOLIS PUB. SCHOOLS

1:22-CV-01075, 2022 WL 2951430 (S.D. IND. 2022)

Decisions

- A.M. asserted she is being treated differently than her cisgender classmates because they can play on the girls' softball team
- A.M. argued it was insulting that the State would suggest that persons will casually choose or switch gender identities
  - The State presented no evidence in support of this claim
- A.M. pointed out that numerous athletic organizations, including the Indiana High School Athletics Association, have found ways to accommodate trans athletes

AM BY EM V. INDIANAPOLIS PUB. SCHOOLS

1:22-CV-01075, 2022 WL 2951430 (S.D. IND. 2022)

Decisions (Cont.)

- The court held that the Supreme Court did not foreclose the application of *Bostock* to Title IX, they just did not extend their ruling to Title IX explicitly
- The court also relied upon a higher court decision holding that discriminating against an individual on the basis of their transgender status violated Title IX
- As a result, the court held that A.M. was likely to succeed on the merits of her claim

AM BY EM V. INDIANAPOLIS PUB. SCHOOLS

1:22-CV-01075, 2022 WL 2951430 (S.D. IND. 2022)

Decisions (Cont.)

- The court turned to the comparison of harms, once again holding in favor of A.M.
  - The court cited the irreparable harm of having her social transition disrupted and being outed
  - The court stated "it was difficult to theorize" the possible harm that could come from maintaining the status quo – especially when A.M.'s past participation did not create any harm
- The State argued the injunction would "inflict harm to the governance process" and force girls to compete against biological boys - the court was unimpressed

A.M. BY E.M. V. INDIANAPOLIS PUB. SCHOOLS

1:22-CV-01075, 2022 WL 2951430 (S.D. IND. 2022)

Takeaways

- Federal courts, increasingly, interpret Title IX to prohibit discrimination based on gender identity
  - ED proposed doing so in the NPRM
- Federal laws and regulations take precedence over state laws, so Title IX is likely to be in a constant state of conflict with the numerous state laws targeting trans students
- Speculative harm may work for political arguments, but courts require evidence to support laws that restrict or discriminate
- IPS was a defendant in name only

TITLE IX POTPOURRI

- *Gruver v. Louisiana State University*
- *Snyder-Hill v. Ohio State University*
- *Peltier v. Charter Day School*
- *E.H. v. Valley Christian Academy*

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, dying 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

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

GRUVER V. LOUISIANA STATE UNIVERSITY

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

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.

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).

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

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)

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

SNYDER-HILL, ET AL. V. OHIO STATE UNIVERSITY

21-3981/3991, 2022 WL 4233750, (6TH CIR. 2022)

Facts

- Dr. Richard Strauss, in his role as university physician and athletic team doctor, allegedly abused hundreds of young men under the guise of performing medical examinations
- The abuse occurred between 1978 and 1998, but did not become public until 2018
- In 1996, Ohio State placed Strauss on administrative leave, investigated his conduct, and declined to terminate his employment, though he remained a tenured faculty member, receiving emeritus status upon retirement

SNYDER-HILL, ET AL. V. OHIO STATE UNIVERSITY

21-3981/3991, 2022 WL 4233750, (6TH CIR. 2022)

Facts (Cont.)

- Strauss regularly abused male students during medical examinations, committing at least 1,429 sexual assaults and 47 rapes
- An independent investigation in 2018 substantiated the allegations of abuse
- The students allege that OSU knew about the abuse but took no action, except to mislead students and staff about prior complaints about Strauss
  - The independent investigation confirmed OSU's knowledge

SNYDER-HILL, ET AL. V. OHIO STATE UNIVERSITY

21-3981/3991, 2022 WL 4233750, (6TH CIR. 2022)

Facts (Cont.)

- OSU hid the reasons it investigated and removed Strauss
  - Concealed the abuse by not investigating or attempting to identify the students Dr. Strauss harmed
  - Destroyed medical records and shredded files
- District court held that statute of limitations barred the students' claims because the conduct occurred over 20 years ago, even though most students did not know they were abused until 2018
  - Did not know what was medically appropriate
  - Widely known around campus, trusted OSU
  - **Did not know about OSU's complicity/responsibility**

SNYDER-HILL, ET AL V. OHIO STATE UNIVERSITY

21-3981/3991, 2022 WL 4233750, (6TH CIR. 2022)

Facts (Cont.)

- Both the Director of Student Health Services and Dr. Strauss's direct supervisor stated they did not know how any students could have known that OSU knew about the abuse and failed to act
  - Even if the students had investigated, further inquiry would have been "futile" because OSU controlled access to the relevant information
- In sum, although the students alleged OSU knew of the abuse at the time, the students did not know until 2018 that OSU enabled and perpetuated the abuse

SNYDER-HILL, ET AL V. OHIO STATE UNIVERSITY

21-3981/3991, 2022 WL 4233750, (6TH CIR. 2022)

Decisions

- The district court held the claims barred by the statute of limitations since conduct occurred over 20 years ago
- The appeals court applied the "discovery rule," which protects the students who, through no fault of their own, lacked the information to bring a claim
  - The lack of knowable information leaves the students at the mercy of the University and unable to file suit
  - To disallow claims would make "a mockery of the law"
- The clock begins to run when the reasonable person knows, or should have known, both their injury and the cause of the injury
- The appeals court permitted the claims to move forward

SNYDER-HILL, ET AL V. OHIO STATE UNIVERSITY

21-3981/3991, 2022 WL 4233750, (6TH CIR. 2022)

Takeaways

- The ruling in this case could dramatically expand Title IX liability by extending the statute of limitations based on a plaintiff's knowledge of abuse or institutional responsibility
  - This could look differently in K-12 than higher education because K-12 students may be less likely to understand whether they are victims of abuse
- Recipients cannot cover up abuse allegations and wait out the statute of limitations

PELTIER V. CHARTER DAY SCHOOL

37 F.4TH 104 (4TH CIR. 2022)

Facts

- Three parents filed a lawsuit against Charter Day School, a charter school managed by a for-profit corporation, alleging the school dress code violated the Equal Protection Clause and Title IX because the dress code established different standards for students based on sex
- The school's founder asserted the code was to preserve chivalry, respect, and traditional values, but asserted that women are "fragile vessels" men should honor

PELTIER V. CHARTER DAY SCHOOL

37 F.4TH 104 (4TH CIR. 2022)

Facts (Cont.)

- The district court found the dress code violated the Equal Protection Clause, but not Title IX
  - Prior to this case, ED had rescinded its regulatory guidance about dress codes, leading the district court to assert that Title IX did not apply to dress codes
- CDS disputed that the Equal Protection Clause applied to them because CDS is a charter school
  - In order for the Equal Protection Clause to apply, the school must be a "state actor"
- The for-profit management company disputed any Title IX obligations

PELTIER V. CHARTER DAY SCHOOL

37 F.4TH 104 (4TH CIR. 2022)

Decision

- The appellate court determined CDS qualifies as a state actor because it adheres to state performance standards, receives state funding, and has open enrollment
  - NC state law defining charter schools as public schools, too
- Under the Equal Protection clause, any gender or sex-based restriction must serve an important government objective
  - CDS's argued that the dress code imposed "comparable burdens" on students of different genders and sexes
    - "Comparable burdens" is not an Equal Protection defense
  - Citing the founders' comments about the fragility of women, the court asserted "it is difficult to find a clearer example of a rationale based on impermissible gender stereotypes"

PELTIER V. CHARTER DAY SCHOOL

37 F.4TH 104 (4TH CIR. 2022)

Decision (Cont.)

- Next, the court determined that the for-profit corporation managing the charter school is subject to Title IX
  - Title IX regulations make clear that Title IX applies to recipients of federal funding as well as those receiving federal financial assistance directly or through an intermediary
  - The corporation received 90% of its funding from schools operated by CDS, and CDS receives nearly all its funding from public sources, including federal funding

PELTIER V. CHARTER DAY SCHOOL

37 F.4TH 104 (4TH CIR. 2022)

Decision (Cont.)

- The court also held that the ED decision to rescind dress code guidance did not mean Title IX did not apply to dress codes
  - Language of Title IX unambiguously applies to dress codes
  - There is a list of exceptions to Title IX, and dress codes and not on the list

PELTIER V. CHARTER DAY SCHOOL

37 F.4TH 104 (4TH CIR. 2022)

Takeaways

- Charter schools may be considered state actors, as well as any corporations contracted to manage day-to-day operations
- Gender- or sex-based dress codes are more and more likely to draw the ire of federal courts, whether under Equal Protection, Title IX, or both
- Revisit any dress codes or policies that treat individuals differently based on their sex or gender

E.H. V. VALLEY CHRISTIAN ACADEMY

2:21-CV-07574, 2022 WL 2953681 (C.D. CA, 2022)

Facts

- E.H., a female student at Cuyama Valley High School, played in a varsity football game against Valley Christian Academy (VCA)
- When VCA discovered a girl had played a game against them, they banned E.H. from competing on VCA premises
  - VCA also refused to play at Cuyama if E.H. was still on the team
  - VCA communicated its decision to "uproot their entire football schedule" to avoid paying Cuyama to "respect the guiding principles of the Bible regarding care of a woman"

E.H. V. VALLEY CHRISTIAN ACADEMY

2:21-CV-07574, 2022 WL 2953681 (C.D. CA, 2022)

Decisions

- The court determined Title IX applied to VCA because VCA took Paycheck Protection Program (PPP) loans and enjoyed tax-exempt status
  - Even though E.H. was not a student at VCA, she could sue under Title IX because Title IX applies to "any person" excluded from an education program/activity based on sex
  - E.H. was attempting to participate in VCA's education program/activity
  - E.H. could sue VCA for violating her Title IX rights

E.H. V. VALLEY CHRISTIAN ACADEMY

2:21-CV-07574, 2022 WL 2953681 (C.D. CA, 2022)

Decisions (Cont.)

- VCA claimed a religious organization exception
  - "Physical contact" policy
  - The court disputed VCA's claim of a religious organization exception, asserting that VCA did not directly connect its physical contact policy to its religious beliefs
  - No indication that physical contact between different sexes was inconsistent with biblical teachings, whereas other cases involved codes of conduct explicitly referencing scripture
  - Does not apply at this stage of the lawsuit

E.H. V. VALLEY CHRISTIAN ACADEMY

2:21-CV-07574, 2022 WL 2953681 (C.D. CA, 2022)

Takeaways

- Courts increasingly finding that Recipients are subject to Title IX for the duration of PPP loans, which can create liability for many schools unused to Title IX compliance
- A few courts have found tax-exempt status is a federal financial benefit requiring Title IX compliance
  - ATIXA asked ED to clarify ED's position, will monitor
- Recipients need to make a direct correlation between religious exceptions and policy at issue
- Title IX is broad – "any person"

Association of
Title IX Administrators

Questions?

Thanks for joining us today.

Association of
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