

Association of
Title IX Administrators

June 2021

Title IX Coordinator and Administrator Level Three

Training and Certification Course

TNG

Strategic Risk
Management Solutions

ATIXA | TNG | NABITA

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.

AGENDA

1. Brief Legal Primer
2. Deliberate Indifference
3. Appeals
4. Retaliation
5. First Amendment & Title IX
6. Case Study

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AGENDA

7 Due Process

8 Erroneous Outcome & Selective Enforcement

9 LGBTQIAA+ Topics

10 Title IX Potpourri

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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."



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BRIEF LEGAL PRIMER

- Court System
- Laws, Courts, & Regulations

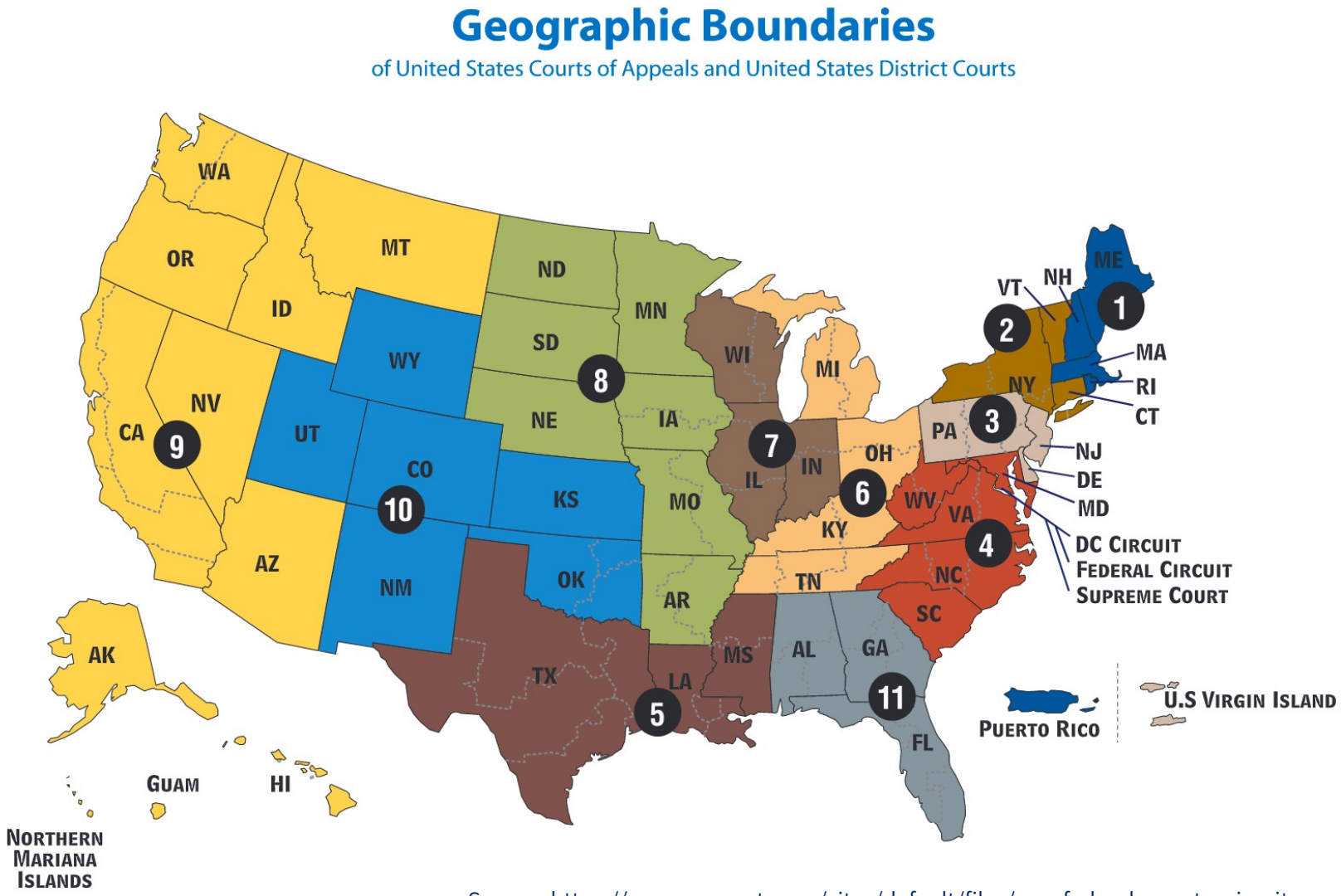
COURT SYSTEM IN A NUTSHELL

Federal Court

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

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U.S. COURTS OF APPEALS MAP



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

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LAWS, COURTS, & REGULATIONS

- **Laws** passed by Congress (e.g.: Title IX) – Enforceable by Courts and 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 DCL)
- Federal Case Law – **Force of law** based on jurisdiction
  - Supreme Court – binding on entire country
  - Circuit Courts of Appeal – binding on Circuit
  - District Court – binding on District
- State Case Law – **Force of law**; binding only in that state based on court jurisdiction

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CASE LAW CATEGORIES

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

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DELIBERATE DIFFERENCE STANDARD

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

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ENFORCEMENT PRE-2020 REGULATIONS

Lawsuit

- File in federal court
- Monetary damages, injunction
- Requires:
  - Actual notice
  - Employee with authority to take action
  - Deliberate Indifference

Administrative Action (OCR)

- Initiated by OCR
- Voluntary compliance or findings
- Requires:
  - Actual OR constructive notice ("knew or should have known")
  - Investigate
  - End harassment
  - Remedy impact
  - Prevent recurrence

This is no longer OCR's approach.

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NOTICE: COURT VS. 2020 REGULATIONS

Actual Notice (Lawsuit)

- Recipient receives notice of alleged incident reported to employee with authority to take corrective action.
- No formal complaint required.
- No formal distinction between Higher Ed and K-12.
- Requires a response that is not deliberately indifferent.

Actual Knowledge (OCR)

- Alleged incident reported to employee with authority to take corrective action.
  - K-12: All employees
  - Higher Ed: Only "Officials with Authority"
- Formal complaint required to investigate.
- Requires offering supportive measures to the parties
- Requires a response that is not deliberately indifferent

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FARMER V. KANSAS STATE UNIVERSITY

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

Facts

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

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FARMER V. KANSAS STATE UNIVERSITY

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

Facts (Cont.)

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

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FARMER V. KANSAS STATE UNIVERSITY

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

Decision

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

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FARMER V. KANSAS STATE UNIVERSITY

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

Status

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

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FARMER V. KANSAS STATE UNIVERSITY

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

Takeaways

- When responding to student-on-student sexual harassment, the institution can only be liable for its own deliberately indifferent response once the institution has actual notice
- K-State's potential liability arises from its own conduct, not from the underlying harm caused by the alleged assaults
- Even if an institution cannot address off-campus conduct under its polices, it still must remedy the effects of discrimination
- The U.S. Departments of Education and Justice submitted a statement of interest in this matter, arguing that K-State's fraternities are "education activities" covered by Title IX
- The 2020 Title IX regulations cite to *Farmer* re: "covered activity" & student organization residences

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KOLLARITSCH V. MICHIGAN STATE UNIVERSITY

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

Facts

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

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KOLLARITSCH V. MICHIGAN STATE UNIVERSITY

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

Facts (Cont.)

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

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KOLLARITSCH V. MICHIGAN STATE UNIVERSITY

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

Facts (Cont.)

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

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KOLLARITSCH V. MICHIGAN STATE UNIVERSITY

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

Decision

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

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KOLLARITSCH V. MICHIGAN STATE UNIVERSITY

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

Decision (Cont.)

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

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KOLLARITSCH V. MICHIGAN STATE UNIVERSITY

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

Takeaways

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

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KOLLARITSCH V. MICHIGAN STATE UNIVERSITY

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

Takeaways (Cont.)

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

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KARASEK v. REGENTS OF UNIV. OF CALIFORNIA

948 F.3D 1150 (9TH CIR. 2020)

Facts

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

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KARASEK v. REGENTS OF UNIV. OF CALIFORNIA

948 F.3D 1150 (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 on the majority of the claims
- The women appealed to the Ninth Circuit

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KARASEK v. REGENTS OF UNIV. OF CALIFORNIA

948 F.3D 1150 (9TH CIR. 2020)

Decision

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

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KARASEK v. REGENTS OF UNIV. OF CALIFORNIA

948 F.3D 1150 (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 educational institutions in the Ninth Circuit may be open to legal challenge regarding the effectiveness of their policies
- Implications for “special admits”

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KARASEK v. UNIV. OF CALIFORNIA

NO. 3:15-CV-03717-WHO (9TH CIR. APRIL 14, 2021).

Facts

- In January 2012, Nicoletta Commins was sexually assaulted by Doe 2, who had previously been sexually inappropriate and aggressive.
- Prior to the assault in January, Commins and Doe 2 encountered each other at a party at Doe 2's fraternity residence where Doe 2 was very aggressive with Commins in a "light sexual" way.
- Commins filed suit alleging 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.

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KARASEK v. UNIV. OF CALIFORNIA

NO. 3:15-CV-03717-WHO (9TH CIR. APRIL 14, 2021).

Facts (Cont.)

- Commins asserted, had the University provided sexual misconduct education, she would not have engaged in the January 2012 interaction with Doe 2 during which he assaulted her.

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KARASEK v. UNIV. OF CALIFORNIA

NO. 3:15-CV-03717-WHO (9TH CIR. APRIL 14, 2021).

Decision

- The court held that Commins 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.
- A **pre-assault claim** survives a motion to dismiss if the plaintiff plausibly alleges that:
  - A school maintained a policy of deliberate indifference to reports of sexual misconduct
  - Which created a heightened risk of sexual harassment
  - In a context subject to the school's control, and
  - The plaintiff was harassed as a result.

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KARASEK v. UNIV. OF CALIFORNIA,
NO. 3:15-CV-03717-WHO (9TH CIR. APRIL 14, 2021).

Takeaways

- Higher educational 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 VAWA 504 requirements of training and prevention programming.
- An annual assessment and detailed documentation is important for tracking your campuses training and prevention efforts and should be maintained by the Title IX Coordinator.

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CAVALIER V. CATHOLIC UNIV. OF AMERICA

NO. 16-2009 (RDM) (D.D.C. JAN. 8, 2021)

Facts

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

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CAVALIER V. CATHOLIC UNIV. OF AMERICA

NO. 16-2009 (RDM) (D.D.C. JAN. 8, 2021)

Facts (Cont.)

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

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CAVALIER V. CATHOLIC UNIV. OF AMERICA

NO. 16-2009 (RDM) (D.D.C. JAN. 8, 2021)

Facts (Cont.)

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

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CAVALIER V. CATHOLIC UNIV. OF AMERICA

NO. 16-2009 (RDM) (D.D.C. JAN. 8, 2021)

Decision

- The court found that the University was not clearly unreasonable in:
  - the training it provided to the Title IX team
  - the hearing it conducted
  - the enforcement of the no-contact order,
  - instituting an inequitable hearing process
- These allegations did not meet the five-part test used to determine institutional liability

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CAVALIER V. CATHOLIC UNIV. OF AMERICA

NO. 16-2009 (RDM) (D.D.C. JAN. 8, 2021)

Decision (Cont.)

- In determining whether the University's response to the alleged rape was deliberately indifferent, the court agreed with Cavalier that a reasonable jury could find that the initial investigation into Cavalier's complaint was clearly unreasonable on the ground that even though Cavalier consumed at least two shots of tequila, a glass of wine, and two to three shots of vodka the night of the alleged assault, and, more importantly, could not remember what had happened even immediately after the alleged assault occurred, investigators did not give serious consideration to the possibility that Cavalier was incapacitated.

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CAVALIER V. CATHOLIC UNIV. OF AMERICA

NO. 16-2009 (RDM) (D.D.C. JAN. 8, 2021)

Takeaways

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

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CAVALIER V. CATHOLIC UNIV. OF AMERICA

NO. 16-2009 (RDM) (D.D.C. JAN. 8, 2021)

Takeaways (Cont.)

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

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DOE v. RHODE ISLAND SCHOOL OF DESIGN

NO. 18-10-JJM-LDA (D.R.I. FEB. 2, 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 to the houses.

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DOE v. RHODE ISLAND SCHOOL OF DESIGN

NO. 18-10-JJM-LDA (D.R.I. FEB. 2, 2021)

Facts (Cont.)

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

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DOE v. RHODE ISLAND SCHOOL OF DESIGN

NO. 18-10-JJM-LDA (D.R.I. FEB. 2, 2021)

Facts (Cont.)

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

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DOE v. RHODE ISLAND SCHOOL OF DESIGN

NO. 18-10-JJM-LDA (D.R.I. FEB. 2, 2021)

Facts (Cont.)

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

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DOE v. RHODE ISLAND SCHOOL OF DESIGN

NO. 18-10-JJM-LDA (D.R.I. FEB. 2, 2021)

Decision

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

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DOE v. RHODE ISLAND SCHOOL OF DESIGN

NO. 18-10-JJM-LDA (D.R.I. FEB. 2, 2021)

Decision (Cont.)

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

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DOE v. RHODE ISLAND SCHOOL OF DESIGN

NO. 18-10-JJM-LDA (D.R.I. FEB. 2, 2021)

Decision (Cont.)

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

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DOE v. RHODE ISLAND SCHOOL OF DESIGN

NO. 18-10-JJM-LDA (D.R.I. FEB. 2, 2021)

Decision (Cont.)

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

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DOE v. RHODE ISLAND SCHOOL OF DESIGN

NO. 18-10-JJM-LDA (D.R.I. FEB. 2, 2021)

Takeaways

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

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DOE v. RHODE ISLAND SCHOOL OF DESIGN

NO. 18-10-JJM-LDA (D.R.I. FEB. 2, 2021)

Takeaways (Cont.)

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

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APPEALS

- 2020 Title IX Regulations
- *Doe v. George Mason University*

APPEALS – TITLE IX REGULATIONS

- Must offer equitable appeal based on determination or dismissal of any allegations
- All parties receive notification of any appeal
- Opportunity for all parties to support or oppose outcome
- Written decision with rationale delivered simultaneously to the parties
- Appeal decision-maker cannot have had any other role in the investigation or resolution process
- “Reasonably prompt” timeframe for producing appeal decision

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APPEAL GROUNDS – TITLE IX REGULATIONS

- A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

Source: 34 C.F.R. § 106.45(b)(8)

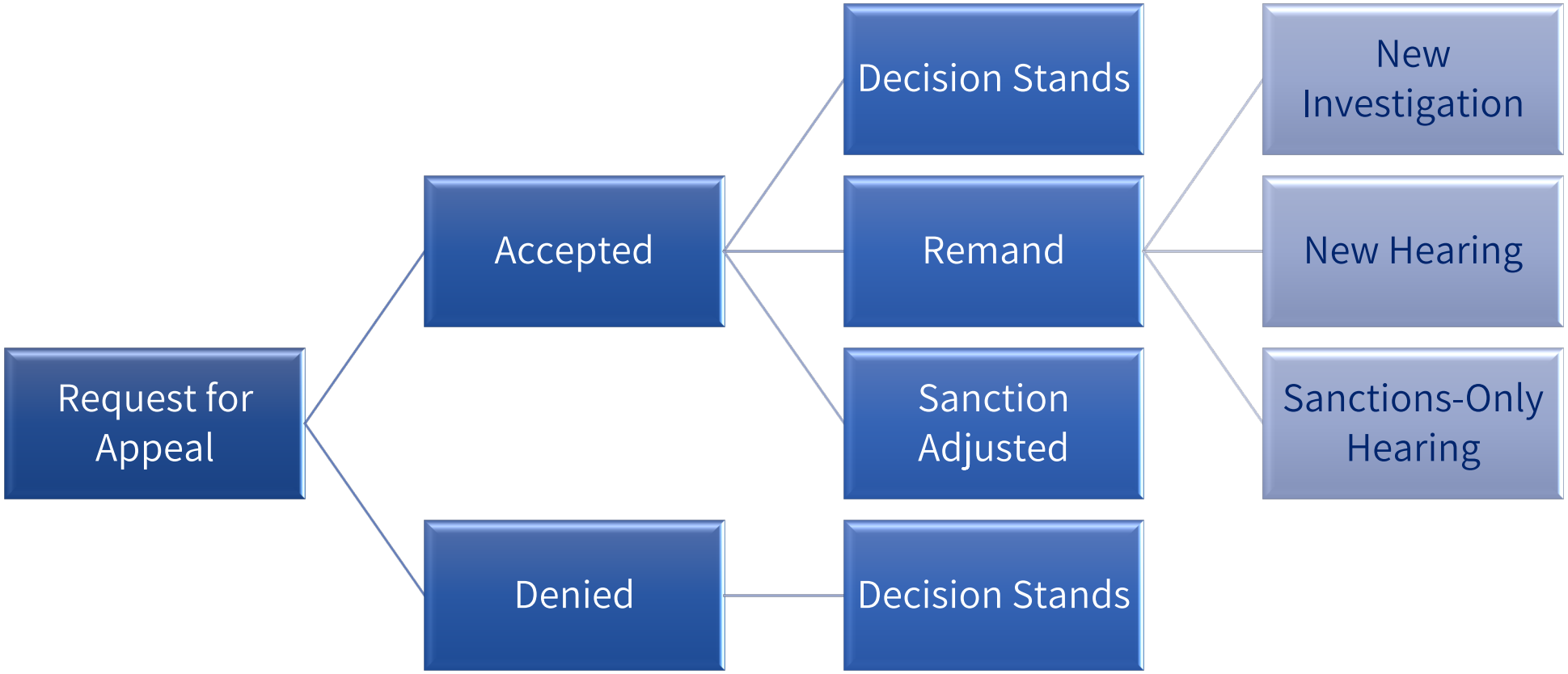
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APPEALS: KEY ELEMENTS

- Appeal heard by an impartial person/board
  - No conflict of interest
- No new allegations permitted
- Typically not a hearing
  - Document-based and recording review
- Limited exceptions to allowing new evidence for consideration on appeal
- Limited grounds for appeal
- Deference to original decision-making authority
  - But not rubber-stamp
- Written rationale for a decision
- Equitable and prompt

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APPEALS: THE PROCESS



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DOE V. GEORGE MASON UNIVERSITY

149 F. SUPP. 3D 602 (E.D. VA. 2016)

Facts

- John Doe (Doe), a GMU student, had a romantic and sexual BDSM relationship with Jane Roe (Roe), who was not a GMU student
- In October 2013, Roe and Doe had a sexual encounter in Doe's room, where Roe used her hand to push Doe away and said, "I don't know," in response to a request for a sexual act, but allegedly never used the agreed upon safe word ("Red")
- The relationship ended in January 2014
- In March 2014, Doe sent Roe a text message stating that he would "shoot himself" if she did not contact him by the following day

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DOE V. GEORGE MASON UNIVERSITY

149 F. SUPP. 3D 602 (E.D. VA. 2016)

Facts (Cont.)

- In April 2014, Roe reported the events of October 2013 to her college's police department, who contacted the GMU Dean of Students Office
- A GMU Asst. Dean had frequent contact with Roe over the summer regarding the report
- In August, a GMU Asst. Dean sent an email to Doe, indicating that he was accused of four violations of GMU's sexual misconduct policy
- A three-member, trained hearing panel found him "not responsible" for violating policy

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DOE V. GEORGE MASON UNIVERSITY

149 F. SUPP. 3D 602 (E.D. VA. 2016)

Facts (Cont.)

- Roe appealed, citing procedural irregularities
- The Appeal decision-maker was the Asst. Dean who did intake, interacted frequently with Roe, and provided Doe notice of the allegations
- During appeal, Asst. Dean met with Roe (not allowed)
  - Also met with Doe, but admitted his decision was already made at that point

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DOE V. GEORGE MASON UNIVERSITY

149 F. SUPP. 3D 602 (E.D. VA. 2016)

Facts (Cont.)

- Asst. Dean reversed the panel's decision and found Doe responsible for:
  - penetration of another person without consent; and
  - **communication that may cause injury, distress, or emotional and physical discomfort (new allegation)**
- The Asst. Dean provided no rationale for the decision
- Doe appealed to the Dean of Students, who affirmed, providing no rationale other than consistency of sanctions with past practice
- Doe filed a lawsuit and the court rejected GMU's Motion to Dismiss Doe's 14th Amendment and Free Speech claims

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DOE V. GEORGE MASON UNIVERSITY

149 F. SUPP. 3D 602 (E.D. VA. 2016)

Decision – Free Speech

- Court found that GMU infringed Doe's right to free speech regarding the "shoot myself" comment
- GMU's policy was overbroad
- The application of GMU's policy abridged Doe's right to free speech
- Doe's comments did not fall under the "true threat" exception

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DOE V. GEORGE MASON UNIVERSITY

149 F. SUPP. 3D 602 (E.D. VA. 2016)

Decision – Fourteenth Amendment

- Court found John Doe possessed a "liberty interest"
  - Expulsion, coupled with a permanent transcript notation, can do significant harm to his reputation, integrity, and his career and educational prospects
- GMU deprived him of that interest
  - He was expelled and a permanent notation was made on his transcript
- Deprivation occurred without constitutionally sufficient due process

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DOE V. GEORGE MASON UNIVERSITY

149 F. SUPP. 3D 602 (E.D. VA. 2016)

GMU Violated Doe's Due Process Rights By:

- Failing to provide **notice** of all allegations used to make a decision
- **Deviating substantially** from its appellate procedures by having off-the-record meetings with Roe
- **Re-hearing the case on appeal** without providing Doe adequate opportunity to "mount an effective defense"
- **Failing to provide a detailed rationale** for the appellate decisions
- **Pre-determining the outcome**
- Creating a significant **conflict of interest**
  - Citing the Asst. Dean/Appeal decision-maker's repeated contact with Roe prior to and while considering the appeal

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RETALIATION

- 2020 Title IX Regulations
- *Jackson v. Birmingham Board of Education*
- *Aslin v. University of Rochester*

RETALIATION – TITLE IX REGULATIONS

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

Source: 34 C.F.R. § 106.71

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RETALIATION – TITLE IX REGULATIONS (CONT.)

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

Source: 34 C.F.R. § 106.71

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RETALIATION – TITLE IX REGULATIONS (CONT.)

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

Source: 34 C.F.R. § 106.71

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ELEMENTS OF A RETALIATION OF CLAIM

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

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JACKSON V. BIRMINGHAM BD. OF ED.

544 U.S. 167 (2005)

Facts

- Teacher and girls' basketball coach Roderick Jackson brought suit against the Birmingham Board of Education (Board) alleging that the Board retaliated against him because he had complained about sex discrimination (funding and facilitates and equipment access inequity based on gender) in the high school's athletic program
- In December 2000, Jackson began complaining to his supervisors about the unequal treatment of the girls' basketball team. Jackson's complaints went unanswered, and the school failed to remedy the situation.

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JACKSON V. BIRMINGHAM BD. OF ED.

544 U.S. 167 (2005)

Facts (Cont.)

- Jackson began to receive negative work evaluations and ultimately was removed as the girls' coach in May 2001.
- He sued for retaliation under Title IX's private right of action.
- The Board moved to dismiss on the ground that Title IX's private cause of action does not include claims of retaliation. The district court granted the motion to dismiss.
- The Eleventh Circuit Court affirmed the district court's ruling.
- The Supreme Court remanded the case back to the lower court

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JACKSON V. BIRMINGHAM BD. OF ED.

544 U.S. 167 (2005)

Decision

- The Supreme Court reversed the decision by the Eleventh Circuit Court and remanded the case back to the lower court for further proceedings consistent with the Supreme Court's opinion
  - "Funding recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979"
  - "A reasonable school board would realize that institutions covered by Title IX cannot cover up violations of that law by means of discriminatory retaliation"

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Does the private right of action for discrimination only apply to the direct victim of the discrimination, or does it also apply to a party who advocated on behalf of the victim?

JACKSON V. BIRMINGHAM BD. OF ED.

544 U.S. 167 (2005)

Decision (Cont.)

- "[R]etaliation presents an even easier case than deliberate indifference. It is easily attributable to the funding recipient, and it is always — by definition— intentional. **We therefore conclude that retaliation against individuals because they complain of sex discrimination is 'intentional conduct that violates the clear terms of the statute**'"

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ASLIN V. UNIVERSITY OF ROCHESTER

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

Facts

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

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ASLIN V. UNIVERSITY OF ROCHESTER

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

Facts (Cont.)

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

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ASLIN V. UNIVERSITY OF ROCHESTER

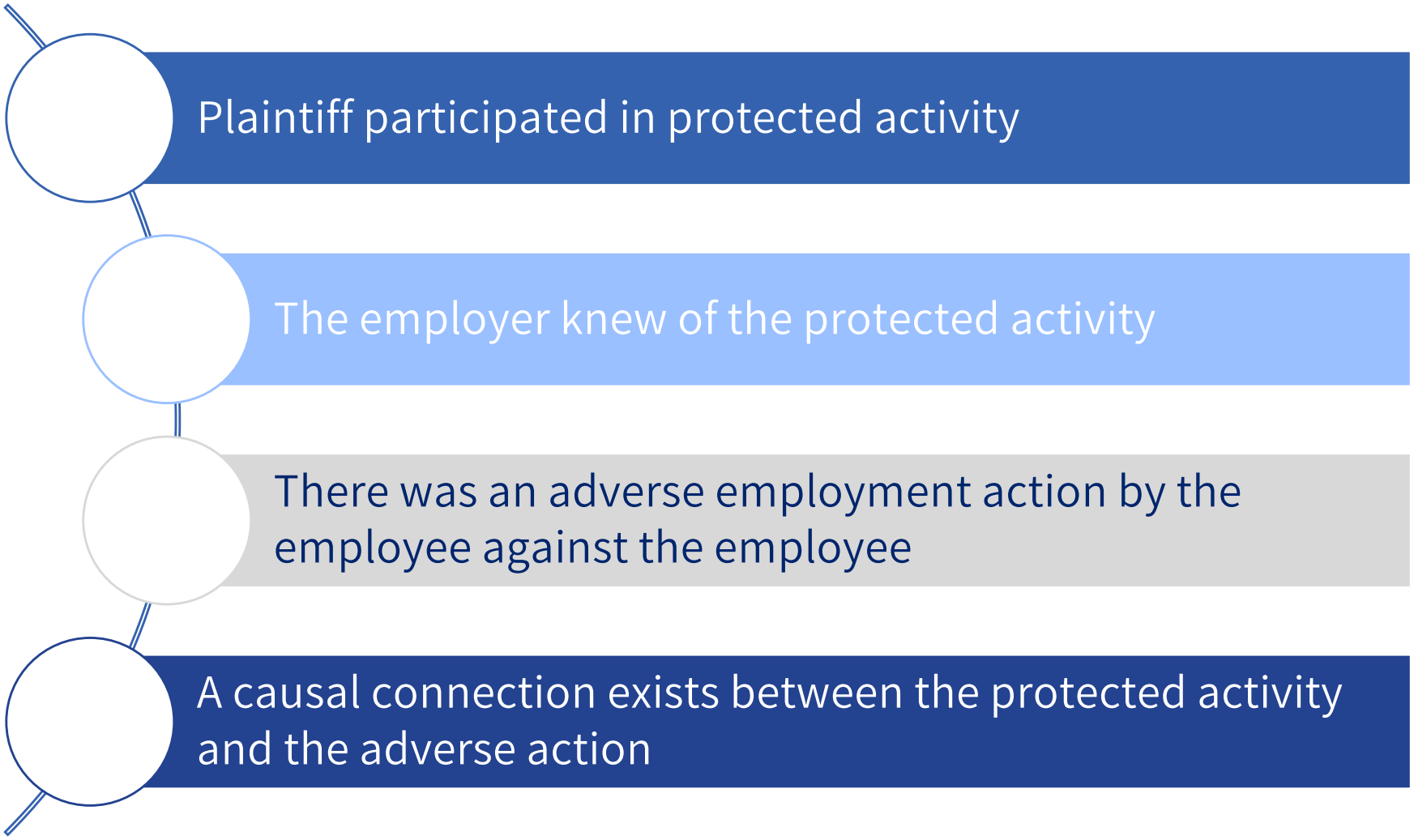
NO. 6:17-CV-06847 (W.D.N.Y. AUG. 28, 2019)

Facts (Cont.)

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

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RETALIATION ANALYSIS UNDER TITLE VII



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ASLIN V. UNIVERSITY OF ROCHESTER

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

Decision on University's Motion to Dismiss:

- The District Court found that a pattern of possible retaliatory behavior exists, the impact of which cannot fairly be construed as trivial, e.g.:
  - Various forms of criticism about the Plaintiffs
  - Breach of confidentiality in how the University handled the two investigations
  - Searches of Plaintiffs' email accounts
  - Allowing the respondent to participate in the complainants' performance evaluations
  - Failure to retain a tenured faculty member who was recruited by a competing university
  - Sabotaging a Plaintiff's planned move to a neighboring university
  - Exclusion from meetings

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ASLIN V. UNIVERSITY OF ROCHESTER

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

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

- Although some of the reported incidents occurred outside of the 300-day filing deadline set by the EEOC, the generic allegations of a hostile environment, which were not necessarily tied to any specific alleged incident, were sufficient to constitute a "continuing claim" of hostile work environment
- The University's motion to dismiss was mostly denied; one set of retaliation allegations from a former employee was dismissed because that individual's protected activity occurred more than four years after they had left the University (i.e., after the employment relationship had ended

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ASLIN V. UNIVERSITY OF ROCHESTER

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

Resolution

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

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ASLIN V. UNIVERSITY OF ROCHESTER

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

Takeaways

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

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TITLE IX & THE FIRST AMENDMENT

- *Feminist Majority Foundation et al. v. Hurley, Paino, and University of Mary Washington*
- *Speech first, Inc. v. Schlissel*
- *Business Leaders In Christ v. University of Iowa et al.*
- *Intervarsity Christian Fellowship v. University of Iowa*

TITLE IX & THE FIRST AMENDMENT

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

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TYPES OF FORUMS

Traditional Public Forum

- campus mall
- public streets through campus
- public sidewalks

Designated Public Forum

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

Limited Public Forum

- auditoriums
- meeting rooms
- athletic facilities

Nonpublic Forum

- classrooms
- residence halls
- offices

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TITLE IX & THE FIRST AMENDMENT (CONT.)

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

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FEMINIST MAJORITY FOUND. V. HURLEY

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 (the now-defunct social media app)
  - FMF members were called "femicunts," "feminazis," "cunts," and "bitches," and there were threats to "euthanize," "kill," and "gang rape" FMF members
  - Specific FMF members were referenced by name on Yik Yak
  - Some Yaks articulated threats (with details) to specific FMF members

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FEMINIST MAJORITY FOUND. V. HURLEY

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

Facts (Cont.)

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

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FEMINIST MAJORITY FOUND. V. HURLEY

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

Facts (Cont.)

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

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FEMINIST MAJORITY FOUND. V. HURLEY

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

Decision

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

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FEMINIST MAJORITY FOUND. V. HURLEY

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

Decision (Cont.)

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

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FEMINIST MAJORITY FOUND. V. HURLEY

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

Decision (Cont.)

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

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FEMINIST MAJORITY FOUND. V. HURLEY

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

Takeaways

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

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FEMINIST MAJORITY FOUND. V. HURLEY

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

Takeaways (Cont.)

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

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SPEECH FIRST, INC. V. SCHLISSEL

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

Facts

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

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SPEECH FIRST, INC. V. SCHLISSEL

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

Facts (Cont.)

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

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SPEECH FIRST, INC. V. SCHLISSEL

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

Facts (Cont.)

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

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SPEECH FIRST, INC. V. SCHLISSEL

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

Decision

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

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SPEECH FIRST, INC. V. SCHLISSEL

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

Decision (Cont.)

- Even though the University voluntarily removed the definitions from its website after Speech First sued, its actions were akin to ad hoc regulatory action and can be easily and/or discretionarily reversed. Thus, the issue is still subject to a court's review.

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SPEECH FIRST, INC. V. SCHLISSEL

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

Takeaways

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

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BUSINESS LEADERS IN CHRIST V. UNIV. OF IOWA

360 F. SUPP. 3D 885 (S.D. IOWA 2019)

Facts

- Business Leaders in Christ (BLIC) was a religious student organization. All Registered Student Organizations (RSOs) must comply with Iowa's policies and procedures, including the Human Rights (HR) Policy, which prohibits discrimination.
- BLIC was a "Bible-based group that believes the Bible is the unerring Word of God," believed that "homosexual relationships are outside of God's design" and that "every person should embrace, not reject, their God-given sex."
- BLIC required student leaders sign a statement of faith denouncing homosexuality.

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BUSINESS LEADERS IN CHRIST V. UNIV. OF IOWA

360 F. SUPP. 3D 885 (S.D. IOWA 2019)

Facts (Cont.)

- A BLIC member reported that he was denied a leadership position when BLIC leaders learned that he is gay.
- Iowa deregistered BLIC because the statement of faith violated the HR Policy.
- Plaintiffs sued based on First Amendment rights to free speech, free association, and religious exercise.

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BUSINESS LEADERS IN CHRIST V. UNIV. OF IOWA

360 F. SUPP. 3D 885 (S.D. IOWA 2019)

Decision on Cross Motions for Summary Judgement

- The HR Policy was not neutrally applied to all RSOs/was selectively enforced against religious student groups
- Iowa violated Plaintiff's First Amendment rights
- Iowa's actions failed "strict scrutiny," in that revoking BLIC's RSO status was not narrowly tailored
- Injunction awarded; Iowa required to reinstate BLIC
- School officials entitled to qualified immunity
- BLIC awarded nominal damages in the amount of $1

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BUSINESS LEADERS IN CHRIST V. UNIV. OF IOWA

360 F. SUPP. 3D 885 (S.D. IOWA 2019)

Takeaways

- Allowing some secular groups exemptions from a neutral non-discrimination policy, while not allowing exemptions for religious groups, violates the First Amendment
- Institutions should ensure that neutral non-discrimination policies are applied consistently

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INTERVARSITY CHRISTIAN FELLOWSHIP V. UNIV. OF IOWA

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

Facts

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

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INTERVARSITY CHRISTIAN FELLOWSHIP V. UNIV. OF IOWA

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

Facts (Cont.)

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

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INTERVARSITY CHRISTIAN FELLOWSHIP V. UNIV. OF IOWA

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

Facts (Cont.)

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

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INTERVARSITY CHRISTIAN FELLOWSHIP V. UNIV. OF IOWA

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

Decision

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

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INTERVARSITY CHRISTIAN FELLOWSHIP V. UNIV. OF IOWA

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

Decision (Cont.)

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

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INTERVARSITY CHRISTIAN FELLOWSHIP V. UNIV. OF IOWA

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

Takeaways

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

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INTERVARSITY CHRISTIAN FELLOWSHIP V. UNIV. OF IOWA

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

Takeaways (Cont.)

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

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CASE STUDY

The iPhone

CASE STUDY: THE IPHONE

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

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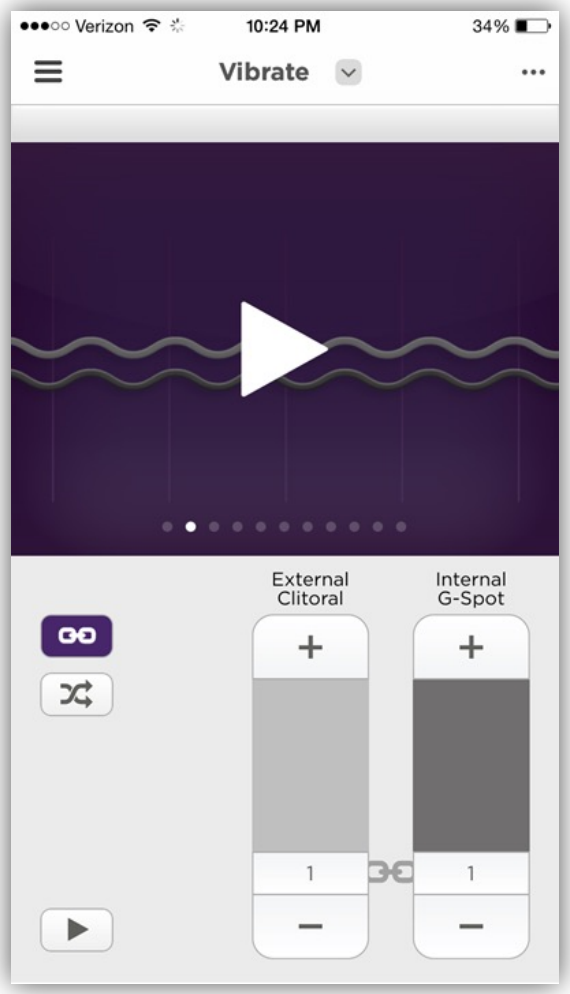
CASE STUDY: THE IPHONE

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

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CASE STUDY: IPHONE

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



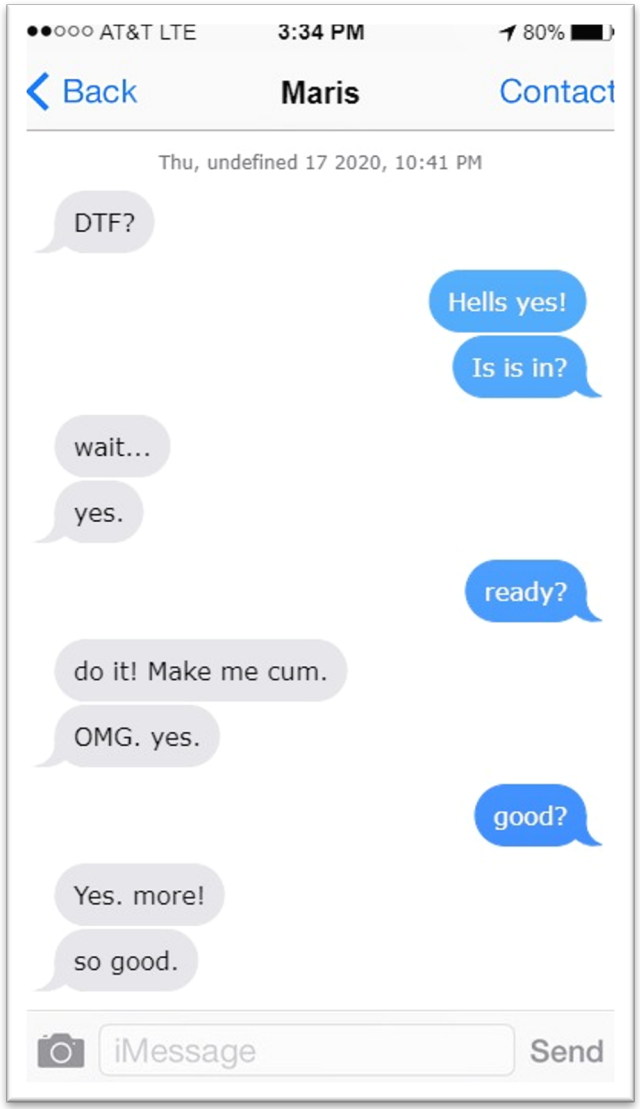
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CASE STUDY: IPHONE

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

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CASE STUDY: IPHONE





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CASE STUDY: IPHONE

- Four other teammates saw Jeff and Greg talking and came over to investigate. The phone was passed around the team, and everyone took a turn adjusting the controls and reading the texts from Maris. She wrote, “I love this!” and “You are going to make me cum!”
- The group of six laughed at this and Greg pulled up some naked pictures of Maris for them to view. They talked about how hot she was and soon all six of them were sharing pictures of their girlfriends and people they had slept with in a competition to see who had the “dirtiest” and “hottest” images.

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CASE STUDY: IPHONE

- Maris and Greg signed off the app and agreed to see each other after the party. Greg was pretty intoxicated and made a joke about how his teammates helped out with the app.
- Maris became very upset, and they had a big argument before she broke up with him and told him to get out of her room.
- In the morning, Maris shared this story with her resident assistant and asked to make a complaint.

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CASE STUDY DISCUSSION: IPHONE

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

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CASE STUDY DISCUSSION: IPHONE

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

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DUE PROCESS

- *Dixon v. Alabama State Board of Education*
- *Esteban v. Central Missouri State College*
- *Goss v. Lopez*
- *Doe v. Baum*
- *Haidak v. University of Massachusetts Amherst*
- *Doe v. Purdue University*
- *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

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DUE PROCESS – TITLE IX REGULATIONS

- Due process contained in 34 C.F.R. § 106.45
- Some key components:
  - 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
  - Robust investigation

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DUE PROCESS – TITLE IX REGULATIONS

- Due process contained in 34 C.F.R. § 106.45 (Cont.)
  - Prompt timeframes
  - Report writing
  - Report and evidence review – provide evidence
  - Hearing
  - Questioning & Cross examination
  - Use of technology
  - Appeals required; equitable
  - Informal resolution
  - Differences between Higher Ed and K-12

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DIXON V. ALABAMA STATE BD. OF ED.

294 F. 2D 150 (5TH CIR. 1961)

- In February of 1960, six black students sat in at a public (all white) lunch counter and were arrested
- Alabama State summarily expelled all of them without any notice of the charges or of a hearing, and no opportunity to provide evidence or defend themselves
- 5th Cir. Court decision established minimum due process (reiterated by U.S. Supreme Court in *Goss v. Lopez* (1975))
  - Students facing expulsion at public institutions must be provided with at least **notice of the charges** and an **opportunity to be heard**
  - Ushered in most campus disciplinary and hearing-based processes

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DIXON V. ALABAMA STATE BD. OF ED.

294 F. 2D 150 (5TH CIR. 1961)

- Specifically, the court set forth a number of due process-based guidelines, including:
  - Notice, with an outline of specific charges
  - A fair and impartial hearing
  - Providing names of witnesses to Respondent
  - Providing the content of witnesses' statements
  - Providing the Respondent an opportunity to speak in own defense
  - The results and findings of the hearing presented in a report open to the student's inspection

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ESTEBAN V. CENTRAL MISSOURI STATE COLLEGE

415 F.2D 1077 (8TH CIR. 1969)

- Students were suspended from school following participation in campus riots. They sued MSC and won. The court asserted the school must provide the following elements to satisfy due process:
  - Written charge statement, made available 10 days prior to hearing
  - Hearing before a panel with authority to suspend or expel
  - Respondent given opportunity to review information to be presented prior to hearing
  - Right of Respondent to bring counsel to furnish advice, but not to question witnesses
  - Right of Respondent to present a version of the facts through personal and written statements, including statements of witnesses

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ESTEBAN V. CENTRAL MISSOURI STATE COLLEGE

415 F.2D 1077 (8TH CIR. 1969)

- An opportunity for the Respondent to hear all information presented against them and to question adverse witnesses personally
- A determination of the facts of the case based solely on what is presented at the hearing by the authority that conducts the hearing
- A written statement of the finding of facts
- Right of the Respondent to make a record of the hearing

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GOSS V. LOPEZ

419 U.S. 565 (1975)

- Nine high school students were suspended for 10 days for non-academic misconduct from various public high schools. None were provided a hearing.
- The court held that since PreK–12 education is a fundamental right, students were entitled to at least a modicum of "due process."
- Reiterating the 5th Circuit, it noted that the minimum due process is notice and an opportunity for a hearing and to present the Respondent's version of events.

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GOSS V. LOPEZ

419 U.S. 565 (1975)

- The court further stated that the hearing could be informal and need not provide students with an opportunity to obtain private counsel, cross-examine witnesses, or present witnesses on their behalf
- Potential suspensions beyond 10 days or expulsions, however, require a more formal procedure to protect against unfair deprivations of liberty and property interests

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DOE V. BAUM

903 F.3D 575 (6TH CIR. 2018)

Facts

- Jane Roe accused John Doe of sexual misconduct, claiming she was incapacitated during the interaction.
- The University of Michigan investigated over the course of three months, interviewing 25 people.
  - "The investigator was unable to say that Roe exhibited outward signs of incapacitation that Doe would have noticed before initiating sexual activity. Accordingly, the investigator recommended that the administration rule in Doe's favor and close the case."
- The administration followed the investigator's recommendation, found for Doe, and closed the case.
- Roe appealed.

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DOE V. BAUM

903 F.3D 575 (6TH CIR. 2018)

Facts (Cont.)

- The three-member Appellate Board reviewed the evidence and reversed the investigator's decision. The Board did not meet with anyone or consider any new evidence. The Board felt Roe was more credible.
- Before sanctioning, Doe withdrew, one semester shy of graduation.
- Doe sued, alleging Title IX and due process violations.
- On a Motion to Dismiss by Michigan, the District Court dismissed the case, but Sixth Circuit reversed.
- Doe's due process and Title IX erroneous outcome claims survived.

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DOE V. BAUM

903 F.3D 575 (6TH CIR. 2018)

Decision Regarding Due Process:

- "Our circuit has made two things clear:
  1. If a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension, and
  2. When the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination."
- "If a public university has to choose between competing narratives to resolve a case, the university must give the accused student or [their] agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."
  - "Either directly by the accused or by the accused's agent."

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DOE V. BAUM

903 F.3D 575 (6TH CIR. 2018)

Decision Regarding Title IX Erroneous Outcome:

- The due process issues informed their finding.
- The court cited significant public scrutiny and fear of losing federal funding due to an OCR investigation that began two years prior into whether UM's policy and procedure discriminated against female reporting parties.
- Although the court recognized that external pressure alone is not enough to state a claim that the university acted with bias, the court found that it could be possible here when:
  - The Appellate Board dismissed all evidence provided by male witnesses.

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DOE V. BAUM

903 F.3D 575 (6TH CIR. 2018)

Decision Regarding Title IX Erroneous Outcome (Cont.):

- All the male witnesses were on Doe's side, and the female witnesses were on Roe's side.
- The Appellate Board found Doe's witnesses were biased because they were his fraternity brothers but found Roe's sorority sisters credible.

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DOE V. BAUM

903 F.3D 575 (6TH CIR. 2018)

Takeaways

- In the Sixth Circuit, decision-makers must hold a live hearing with cross-examination when credibility is a central issue, providing the parties with an opportunity to submit written statements is not sufficient.
- Additional due process may be required when the student is facing suspension or expulsion.
- Courts in the Sixth Circuit may balance the rights of the Respondent with the burden on the institution to provide more due process and rule in favor of the rights of the Respondent as a consequence.
- This will likely continue to be an area that will evolve in the legislatures and courts.

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HAIDAK V. UNIV. OF MASSACHUSETTS AMHERST

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

Facts

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

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HAIDAK V. UNIV. OF MASSACHUSETTS AMHERST

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

Facts (Cont.)

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

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HAIDAK V. UNIV. OF MASSACHUSETTS AMHERST

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

Facts (Cont.)

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

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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 "calming" questions and the administrator paring down questions that never got to the Board.

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HAIDAK V. UNIV. OF MASSACHUSETTS AMHERST

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

Decision (Cont.)

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

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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 Hearing Board's thorough and extended questioning of the parties and evaluation of credibility is instructive
- Probing of credibility issues should occur in the hearing in the presence of the parties

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HAIDAK V. UNIV. OF MASSACHUSETTS AMHERST

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

Takeaways (Cont.)

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

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DOE V. PURDUE UNIVERSITY

928 F.3D 652 (7TH CIR. 2019)

Facts

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

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DOE V. PURDUE UNIVERSITY

928 F.3D 652 (7TH CIR. 2019)

Facts (Cont.)

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

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DOE V. PURDUE UNIVERSITY

928 F.3D 652 (7TH CIR. 2019)

Facts (Cont.)

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

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DOE V. PURDUE UNIVERSITY

928 F.3D 652 (7TH CIR. 2019)

Decision

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

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DOE V. PURDUE UNIVERSITY

928 F.3D 652 (7TH CIR. 2019)

Decision (Cont.)

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

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DOE V. PURDUE UNIVERSITY

928 F.3D 652 (7TH CIR. 2019)

Decision (Cont.)

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

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DOE V. PURDUE UNIVERSITY

928 F.3D 652 (7TH CIR. 2019)

Decision (Cont.)

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

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DOE V. PURDUE UNIVERSITY

928 F.3D 652 (7TH CIR. 2019)

Takeaways

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

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DOE V. PURDUE UNIVERSITY

928 F.3D 652 (7TH CIR. 2019)

Takeaways (Cont.)

- Institutions in the Seventh Circuit should take heed of the "stigma-plus" test.
- The theory of Title IX liability applied here is a novel one, which could have the effect of fewer institutions in this circuit winning at the motion to dismiss stage of Title IX litigation.

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DOE V. SYRACUSE UNIVERSITY

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

Facts

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

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DOE V. SYRACUSE UNIVERSITY

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

Facts (Cont.)

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

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DOE V. SYRACUSE UNIVERSITY

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

Doe's Allegations Regarding the Investigation

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

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DOE V. SYRACUSE UNIVERSITY

5:18-CV-377 (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 as to Roe's credibility
- The investigator did not provide Doe with all of Roe's evidence
  - A letter from a nurse that relayed Roe's own report of the incident and reports of vaginal bleeding
  - However, in the investigation Roe reported anal bleeding

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DOE V. SYRACUSE UNIVERSITY

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

Doe's Allegations Regarding the Investigation (Cont.)

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

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DOE V. SYRACUSE UNIVERSITY

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

Doe's Allegations Regarding the Hearing and Decision

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

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DOE V. SYRACUSE UNIVERSITY

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

Doe's Allegations Regarding the Appeal Process

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

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DOE V. SYRACUSE UNIVERSITY

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

Decision

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

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DOE V. SYRACUSE UNIVERSITY

341 F.SUPP.3D 125 (2018)

Takeaways

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

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ERRONEOUS OUTCOME & SELECTIVE ENFORCEMENT

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

DOE V. NEW YORK UNIVERSITY

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

Facts

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

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DOE V. NEW YORK UNIVERSITY

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

Facts (Cont.)

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

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DOE V. NEW YORK UNIVERSITY

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

Facts (Cont.)

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

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DOE V. NEW YORK UNIVERSITY

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

Decision

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

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DOE V. NEW YORK UNIVERSITY

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

Decision (Cont.)

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

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DOE V. NEW YORK UNIVERSITY

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

Takeaways

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

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DOE V. COASTAL CAROLINA UNIVERSITY

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

Facts

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

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DOE V. COASTAL CAROLINA UNIVERSITY

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

Facts (Cont.)

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

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DOE V. COASTAL CAROLINA UNIVERSITY

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

Facts (Cont.)

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

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DOE V. COASTAL CAROLINA UNIVERSITY

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

Decision

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

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DOE V. COASTAL CAROLINA UNIVERSITY

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

Takeaways

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

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LGBTQIAA+ TOPICS

- *Bostock v. Clayton County, Georgia*
- *Grimm v. Gloucester City School Board*

BOSTOCK V. CLAYTON COUNTY, GEORGIA

590 U.S. ___ (2020)

Facts

- "Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status."
  - **Bostock**, a child welfare advocate, was terminated by Clayton County for "unbecoming" conduct after he began participating in a gay softball rec. league
  - **Zarda**, a skydiving instructor, was terminated from his job days after mentioning he was gay
  - **Stephens**, who worked for a funeral home, presented as a male when hired, but was terminated after she told her employer she planned to "live and work as a woman"

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BOSTOCK V. CLAYTON COUNTY, GEORGIA

590 U.S. ___ (2020)

Facts (Cont.)

- **Bostock: Eleventh Circuit** – Found that law does not prohibit firing on the basis of being gay
- **Zarda: Second Circuit** – Sexual orientation discrimination does violate Title VII
- **Stephens: Sixth Circuit** – Title VII bars employers from firing employees because of transgender status

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BOSTOCK V. CLAYTON COUNTY, GEORGIA

590 U.S. ___ (2020)

Analysis

- "We must determine the ordinary public meaning of Title VII's command that it is 'unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'"
- The parties agreed that when Title VII was written, it referred to biological sex.

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BOSTOCK V. CLAYTON COUNTY, GEORGIA

590 U.S. ___ (2020)

Analysis (Cont.)

- "The question isn't just what 'sex' meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions 'because of' sex. And, as this Court has previously explained, 'the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'"
- Discrimination then and now means, **treating that individual worse than others who are similarly situated**.
- Discrimination under Title VII requires intent.
- Title VII focused on discrimination against individuals, not an entire class of people.

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BOSTOCK V. CLAYTON COUNTY, GEORGIA

590 U.S. ___ (2020)

Decision

- "An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff 's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."
- Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees."

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BOSTOCK V. CLAYTON COUNTY, GEORGIA

590 U.S. ___ (2020)

Decision (Cont.)

- For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that "should be the end of the analysis."
- We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.

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BOSTOCK V. CLAYTON COUNTY, GEORGIA

590 U.S. ___ (2020)

Decision (Cont.)

- The court rejected the argument that a person's sex must be the sole reason for being fired.
- "Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context."

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BOSTOCK V. CLAYTON COUNTY, GEORGIA

590 U.S. ___ (2020)

Decision (Cont.)

- "If we applied Title VII's plain text only to applications some (yet-to-be-determined) group expected in 1964, we'd have more than a little law to overturn. Start with Oncale. How many people in 1964 could have expected that the law would turnout to protect male employees? Let alone to protect them from harassment by other male employees? As we acknowledged at the time, 'male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII.'"

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BOSTOCK V. CLAYTON COUNTY, GEORGIA

590 U.S. ___ (2020)

Decision (Cont.)

- In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: **An employer who fires an individual merely for being gay or transgender defies the law.**

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GRIMM V. GLOUCESTER CTY. SCH. BD.

400 F.SUPP.3D 44 (E.D. VA. 2019)

Facts

- Gavin Grimm was assigned the sex “female” at birth. Gavin enrolled at Gloucester High School in Virginia as a girl.
- During his freshman year, Grimm came out to his parents as transgender. He began to see a therapist and was diagnosed with gender dysphoria. Grimm’s therapist provided medical documentation that he should present as male in his daily life and be permitted to use restrooms consistent with his gender identity.
- Grimm legally changed his first name and began using male restrooms in public.

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GRIMM V. GLOUCESTER CTY. SCH. BD.

400 F.SUPP.3D 44 (E.D. VA. 2019)

Facts (Cont.)

- Grimm and his guidance counselor initially agreed he would use the restroom in the nurse's office. Over time, this situation proved unworkable, and he felt anxious, stigmatized, and embarrassed.
- Grimm was permitted to use the male restrooms and did so without incident for seven weeks.

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GRIMM V. GLOUCESTER CTY. SCH. BD.

400 F.SUPP.3D 44 (E.D. VA. 2019)

Facts (Cont.)

- Grimm began hormone therapy and began to present as predominately male before the unisex restrooms were complete. Grimm encountered times when he could not access a suitable restroom for various reasons. Grimm also had chest reconstruction surgery.
- Grimm changed his license and birth certificate to reflect his male identity. The school refused to change his sex/gender designation on his transcript. Grimm was also admitted to the hospital with suicidal thoughts.

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GRIMM V. GLOUCESTER CTY. SCH. BD.

400 F.SUPP.3D 44 (E.D. VA. 2019)

Decision

- Grimm's litigation has been underway for years. It was bound for the U.S Supreme Court when the Trump administration rescinded the Department of Education's 2016 transgender guidance that had previously provided the legal basis for his case.
- The Fourth Circuit Court of Appeals, in deciding in an earlier decision in Grimm's case, said "a plaintiff must demonstrate exclusion from an educational program… because of sex…." And, that the school's discrimination harmed the plaintiff.

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GRIMM V. GLOUCESTER CTY. SCH. BD.

400 F.SUPP.3D 44 (E.D. VA. 2019)

Decision (Cont.)

- In this 2019 decision, therefore, the district court was forced to confront the legal question of whether "on the basis of sex" in Title IX applies to the allegations that the school discriminated against him on the basis of his gender identity and gender expression.
- The court reasoned that Title IX does protect a student in Grimm's circumstances.

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GRIMM V. GLOUCESTER CTY. SCH. BD.

400 F.SUPP.3D 44 (E.D. VA. 2019)

Decision (Cont.)

- The court stated:
  - "[T]here is no question that the Board's policy discriminates against transgender students on the basis of their gender nonconformity. Under the policy, all students except for transgender students may use restrooms corresponding with their gender identity. Transgender students are singled out, subjected to discriminatory treatment, and excluded from spaces where similarly situated students are permitted to go."
- Not updating Grimm's student records was also discrimination under Title IX.
- The Board tried to advance an argument based on concept of physical privacy, but the court was not persuaded.

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GRIMM V. GLOUCESTER CTY. SCH. BD.

400 F.SUPP.3D 44 (E.D. VA. 2019)

Updates and Subsequent Decisions

- The school board appealed the District Court's 2019 decision in favor of Grimm.
- In the interim, the U.S. Supreme Court ruled in favor of LGBTQ plaintiffs in *Bostock*.
- After *Bostock*, the court had "little difficulty holding that a bathroom policy precluding Grimm from using the boys' restrooms discriminated against him 'on the basis of sex.'"

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TITLE IX POTPOURRI

- *Gruver v. Louisiana State University*
- *Doe v. Rensselaer Polytechnic Institute*

GRUVER V. LOUISIANA STATE UNIVERSITY

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

Facts

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

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GRUVER V. LOUISIANA STATE UNIVERSITY

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

Facts (Cont.)

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

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GRUVER V. LOUISIANA STATE UNIVERSITY

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

The District Court Grappled with Four Threshold Questions:

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

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

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GRUVER V. LOUISIANA STATE UNIVERSITY

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

Decision

- The court looked to the *Baylor*[1] 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.

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

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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, etc.).
- This bolsters the argument that school's may be held responsible for policies and practices that discriminate against one gender or the other when the discrimination puts those students at a heightened risk of harm.

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GRUVER V. LOUISIANA STATE UNIVERSITY

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

Takeaways (Cont.)

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

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GRUVER V. LOUISIANA STATE UNIVERSITY

959 F. 3D 178 (5TH CIR. 2020)

Updates and Subsequent Decisions

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

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DOE V. RENSSELAER POLYTECHNIC INSTITUTE

NO. 1:20-CV-1185 (N.D.N.Y. SEPT. 28, 2020)

Facts

- Doe and the Complainant (Roe) met on the online dating site, Tinder in late fall 2019.
- Upon returning to school in Spring 2020, they met in person and engaged in consensual sex on multiple occasions.
- Roe invited Doe to her residence hall, Doe consumed multiple drinks of vodka, and they subsequently engaged in consensual sex.
- Doe alleged that Roe, who remained sober, plied Doe with alcohol and pressured him to have intercourse a second time. Doe refused because he had only brought one condom, but eventually did have vaginal intercourse with Roe as well as anal intercourse (briefly).

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DOE V. RENSSELAER POLYTECHNIC INSTITUTE

NO. 1:20-CV-1185 (N.D.N.Y. SEPT. 28, 2020)

Facts (Cont.)

- Doe claimed he was too drunk to clearly assess the situation or even get out of bed following intercourse.
- Roe's resident assistant reported a sexual assault between Doe and Roe to the Title IX Office on 1/23/2020 and Doe was notified of the investigation on 1/31/2020.
- Doe filed an allegation against Roe on 6/9/2020 alleging he was too intoxicated to consent to sexual activity during their January encounter.
- RPI rendered a finding of responsibility against Doe on 8/4/2020 based on the school's 2018 Sexual Misconduct Policy.

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DOE V. RENSSELAER POLYTECHNIC INSTITUTE

NO. 1:20-CV-1185 (N.D.N.Y. SEPT. 28, 2020)

Facts (Cont.)

- Doe requested a hearing to challenge this finding. The same day, RPI dismissed Doe's complaint against Roe.
- On 8/11/2020 Doe requested a hearing on this dismissal.
- On August 14 the 2020 Title IX regulations went into effect.
- Doe sought to have the new regulations applied to the remainder of RPI's investigation, including a hearing conducted pursuant to the new regulations.
- RPI declined to apply the new regulatory hearing standards.

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DOE V. RENSSELAER POLYTECHNIC INSTITUTE

NO. 1:20-CV-1185 (N.D.N.Y. SEPT. 28, 2020)

Facts (Cont.)

- Doe filed a lawsuit alleging that the refusal of RPI to apply the new regulatory standards violated Title IX. Doe also filed a temporary restraining order to prevent RPI from moving forward with its 2018 process.
- Doe claimed that RPI violated Title IX by selectively enforcing its misconduct policies to his detriment by dismissing his complaint against Roe but allowing her claim to proceed.

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DOE V. RENSSELAER POLYTECHNIC INSTITUTE

NO. 1:20-CV-1185 (N.D.N.Y. SEPT. 28, 2020)

Decision

- The court stated that while ED would not have punished RPI for failing to apply the 2020 procedures, RPI had new procedures in place but maintained two parallel procedures, one for pre-August 14th cases and one for post-August 14th cases.
- RPI created an "irregular adjudicative process" and applied a process with lesser standards of due process protection when it could have provided one with greater protections as requested by Doe.

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DOE V. RENSSELAER POLYTECHNIC INSTITUTE

NO. 1:20-CV-1185 (N.D.N.Y. SEPT. 28, 2020)

Decision (Cont.)

- The court, relying on the *Menaker*[1] case, stated that "when combined with clear procedural irregularities in a university's response to allegations of sexual misconduct, even minimal evidence of pressure on the university to act based on invidious stereotypes will permit a plausible inference of sex discrimination."
- The court granted Doe's requested injunction, stating that he had met all requisite elements for a temporary restraining order: a likelihood of irreparable harm; a likelihood of success on the merits; the balance of hardships; and a finding for Doe is in the public interest.

[1] *Menaker v. Hofstra Univ.*, 935 F.3d 20, 33 (2d Cir. 2019).

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NO. 1:20-CV-1185 (N.D.N.Y. SEPT. 28, 2020)

Decision (Cont.)

- Although this decision was not made on the merits of the claim itself, rather on the foundation for a temporary restraining order, the court was clearly swayed by the importance of "rights" conferred by the new regulations and took a very negative view of RPI's operation of parallel grievance processes.

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DOE V. RENSSELAER POLYTECHNIC INSTITUTE

NO. 1:20-CV-1185 (N.D.N.Y. SEPT. 28, 2020)

Takeaways

- The court disregarded language in the preamble to the regulations, stating that the *Auer*[1] deference would not apply in this set of circumstances. Be cautious not to read the preamble as law itself.
- Establish and publish a sunset provision for implementation of pre-regulation grievance processes (or reconsider application of prior procedures at all).
- Commonly, when a new regulatory regime is enacted, institutions apply policy definitions that were in place at the time of the incident, but the procedures that were in place at the time of the resolution. This becomes complex in cases like Doe's, which straddle an implementation deadline.

[1] *Auer v. Robbins,* 519 U.S. 452 (1997).

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