Title IX Litigation & Resolutions Update

Cir. 2024

Introductions –

- Jacob Sapp, Esq. (Texas, Florida)
- ASA, FL 4th Cir.
- Former Staff Attorney, Education Law Practice
  - Bricker Graydon LLP
- Former Deputy Title IX Coordinator & Compliance Officer
- Double Hatter
  - Stetson Undergrad 16’ & Stetson Law 19’
  - Higher ED Center Employee

This presentation is not legal advice.

I am an attorney, but **not** Your attorney.

Goals

What's going on in Title IX Litigation & OCR Resolutions?

Takeaways for both Litigators & Title IX Admins

Overview of Presentation


Foundations
Litigation Overview & Update
Resolution Takeaways

Foundations

Original T9 Regulations

- NPRM – June 1974 = 39 Fed. Reg. 22228 (1974)
- Almost 10,000 formal responses
- June 4, 1975 = Final Title IX Regulations issued (40 Fed. Reg. 24128 (1975) Also sent to Congress for 45 day review (OG CRA)
- Resolutions of Disapproval filed in both chambers. Neither were passed.
- Regulations went into effect on July 21, 1975.
- Multiple bills introduced in congress to prohibit the application of Title IX to employees: S. 2146, § 2(1), 94th Cong., 1st Sess. (1975) & S. 2657, 94th Cong., 2d Sess. (1976)

FEDERAL REGISTER

The Daily Journal of the United States Government

Rule

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

A Rule by the Education Department on 05/19/2020

What about the 2020 Devos Regs?

Legal Challenges to 2020 Title IX Regulations

Original 4 Challenges

Cmlth. of Pennsylvania v. Devos, 1:20-CV-01468 (D.D.C. June 4, 2020)

-> Preliminary Inj. Denied, Aug. 12, 2020 / Held in Abeyance Until March 31, 2023

Know Your IX v. Devos, No. 1:20-cv-01224 (D. Md. May 14, 2020)

-> Dismissed Oct. 22, 2020 for lack of standing

State of New York v. Devos, 1:20-cv-04260 (S.D.N.Y. June 4, 2020)

-> Voluntarily dismissed Nov. 3, 2020

Victim Rights Law Center v. Cardona, 1:20-cv-11104 (D. Mass. June 10, 2020)

-> Cross Exam A&C update July 28, 2021, Appealed & Dismissed

VRLC - Cross Exam Update, OCR Enforcement

Dear Students, Educators, and other Stakeholders,

I write with an important update regarding the Department of Education's regulations implementing Title IX of the Education Amendments of 1972, as amended in 2020. On July 28, 2021, a federal district court in Massachusetts issued a decision in *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021). This case was brought by several organizations and individuals challenging the 2020 amendments to the Title IX regulations.

The court upheld most of the provisions of the 2020 amendments that the plaintiffs challenged, but it found one part of 34 C.F.R. § 106.45(b)(6)(i) (live hearing requirement for the Title IX grievance process at postsecondary institutions only) to be arbitrary and capricious, vacated that part of the provision, and remanded it to the Department for further consideration. In a subsequent order issued on August 10, 2021, the court clarified that its decision applied nationwide. The court vacated the part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits a decision-maker from relying on statements that are not subject to cross-examination during the hearing: "If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility…." Please note that all other

VRLC - Cross Exam Policy Update

"In practical terms, a decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process."

"For example, a decision-maker at a postsecondary institution may now consider statements made by the parties and witnesses during the investigation, emails or text exchanges between the parties leading up to the alleged sexual harassment, and statements about the alleged sexual harassment that satisfy the regulation's relevance rules, regardless of whether the parties or witnesses submit to cross-examination at the live hearing. A decision-maker at a postsecondary institution may also consider police reports, Sexual Assault Nurse Examiner documents, medical reports, and other documents even if those documents contain statements of a party or witness who is not cross examined at the live hearing."

CMLTH V. Devos Jan. 12, 2024 Update

3. The Office of Management and Budget periodically issues a Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda), which reports on administrative agencies' planned regulatory actions. The Unified Agenda represents the Department's statement of its expectations regarding the timeline for rulemaking. The Fall 2023 Unified Agenda states that the Department expects to publish the Final Rule in March 2024.[1]

4. In light of the Department's continuing consideration and review of public comments on the Proposed Rule, Plaintiffs and Defendants jointly request that the Court continue the present stay of all pending briefi[illegible]nce for an additional sixty-three (63) days, up to and [illegible]uding Friday, March 15, 2024. Beca[illegible]he Department is exploring administrative actions that m[illegible]—including the review of public comments and the release of a final rule—the interests of the parties and of judicial economy would be well served by continuing the present abeyance to permit the Department to evaluate potential regulatory changes. *See Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414,

Footnote leads to OIRA/OMB, shows 3/00/2024
Available Here

STETSON LAW

The United States Federal Courts

Supreme Court

United States Supreme Court

Appellate courts

U.S. Courts of Appeals (12 regional courts of appeals and the national jurisdiction Court of Appeals for the Federal Circuit)

Trial courts

U.S. District Courts (94 judicial districts and the U.S. bankruptcy courts)

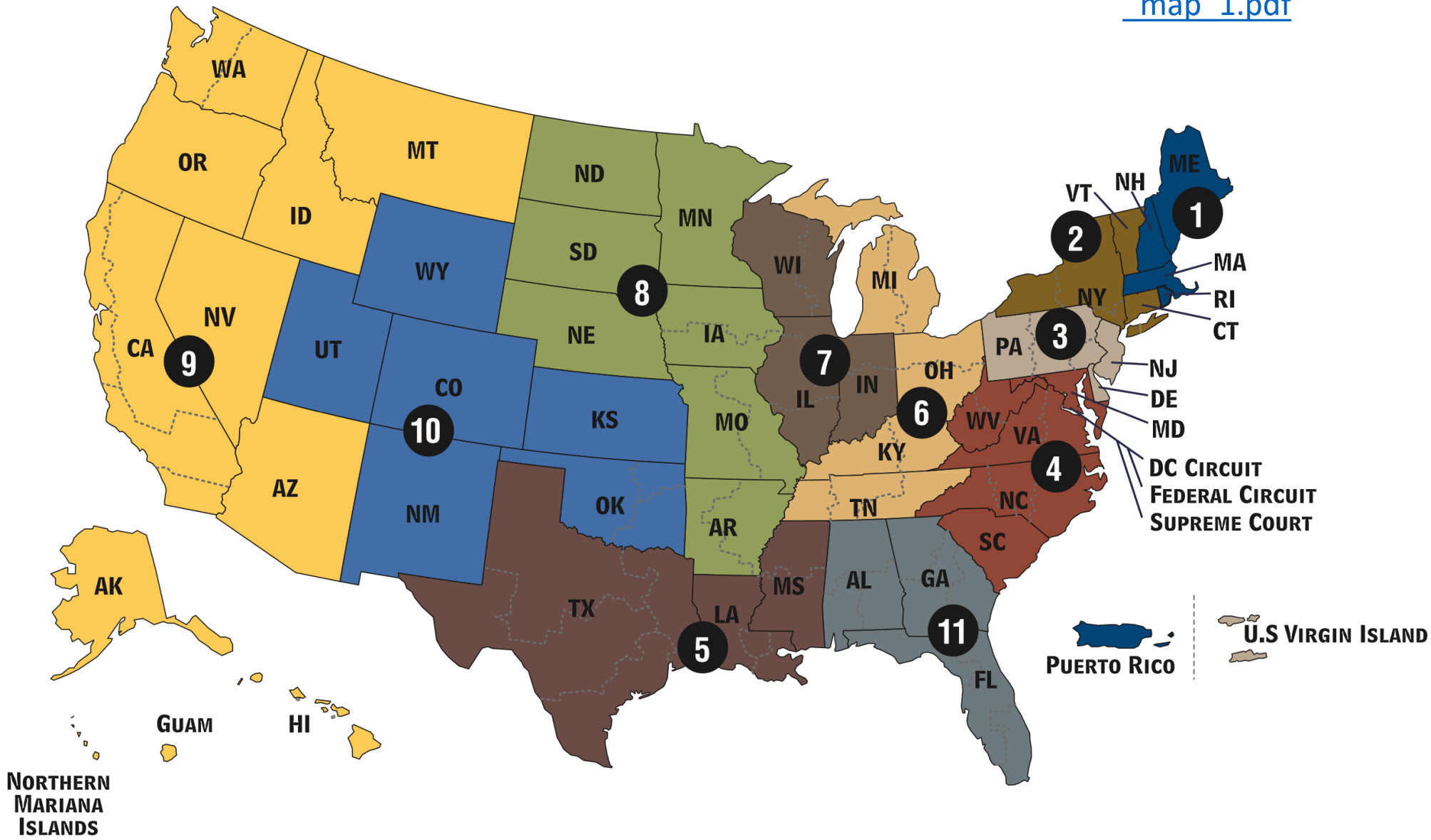
U.S. Court of International Trade

U.S. Court of Federal Claims

Geographic Boundaries

of United States Courts of Appeals and United States District Courts

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



Key Title IX SPCT Cases

Cannon v. Univ. of Chicago, 441 U.S. 677 – Implied Private Cause of Action

N. Haven Bd. Of Educ. v. Bell, 456 U.S. 512 – Authority to regulate Employees

Grove City College v. Bell, 456 U.S. 555 – Scope of program or activity receiving federal funds

Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 – Money Damages Available

Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 – Deliberate Indifference, Teacher on Student

Davis v. Monroe County Bd. Of Educ., 526 U.S. 629 – Deliberate Indifference, Student on Student

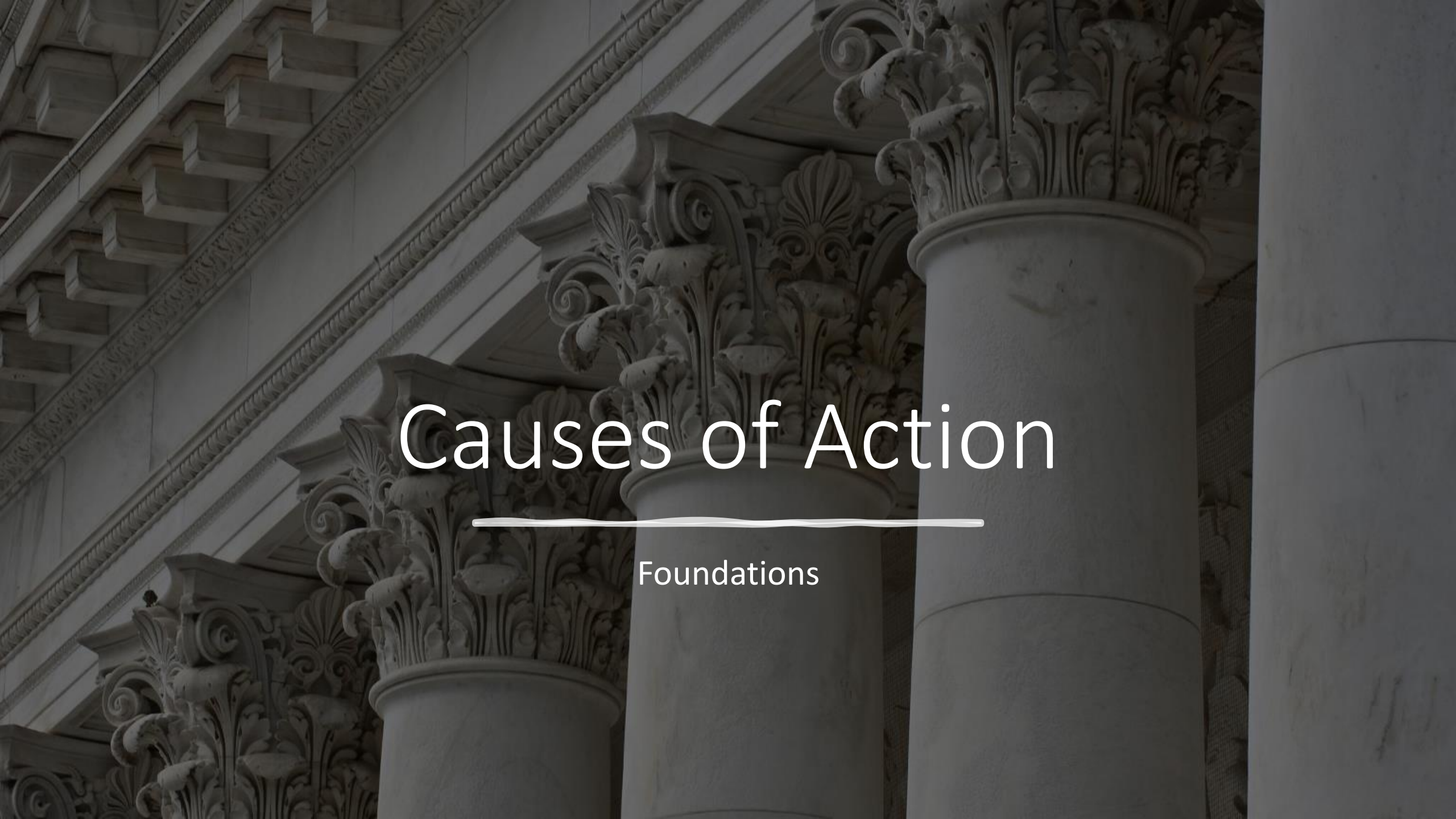
Jackson v. Birmingham Bd. Of Educ., 544 U.S. 167 – Retaliation Prohibited under Title IX, "Protected Activity"

Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 – Title IX does not Preclude 42 USC 1983 claims

*Bostock v. Clayton County, GA., 140 S.CT 1731 – Title VII protects employees from being fired for being Gay or Transgender

*Cummings v. Premier Rehab Keller, P.L.L.C, 596 US _ (2022) – 'Emotional Distress' Compensatory Damages Not avialable in TVI / TIX

STETSON LAW

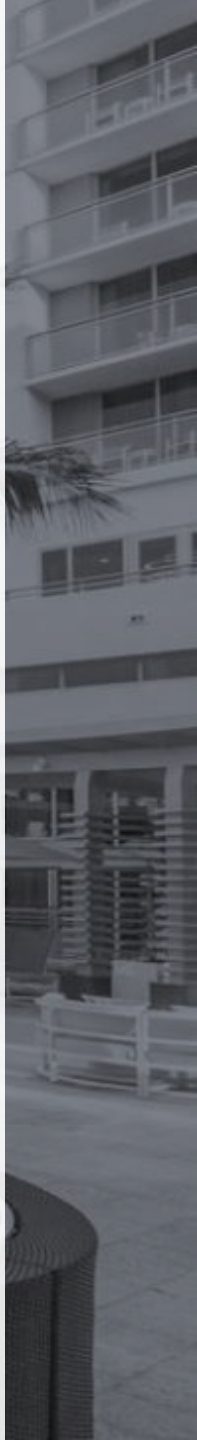


Causes of Action

Foundations

Recognized Title IX Sex Discrimination COAs

- Deliberate Indifference
- Pre-Assault / Heightened Risk
- Retaliation
- Erroneous Outcome
- Selective Enforcement
- Plausible Inference
- Pregnancy
- Religious Exemption
- Inequity in Athletics
- 42 U.S.C. 1983 – Due Process & Equal Protection
- Intentional Discrimination (Pregnancy, Transgender)
- Breach of Contract
- Additional State Law COAs



General Complainant T9 COAs

- Deliberate Indifference
- Pre-Assault / Heightened Risk
- Retaliation

Deliberate Indifference

STETSON LAW

Davis v. Monroe County Bd. Of Education, 526 U.S. 629 (1999)

STETSON LAW

Davis – Facts

- Complainant's grades fell
- Complainant left a Suicide note
- Complainant stated, "I Don't know how much longer I can keep him off me."
- Another student was assaulted and harassed by same student Respondent
- Teacher Reply to Mother: Principal will be informed
- Teacher Reply to Student: If the Principal wants you, he'll call you.
- Principal Reply to Mother: "I guess I'll just have to threaten him a little bit harder"
- Discipline // Interim Measures

Davis - Deliberate Indifference Test

1) Respondent is a Federal Funding Recipient
2) Appropriate Official has
3) Actual Knowledge of misconduct
4) Misconduct is so Severe, Pervasive, and Objectively Offensive
5) That it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school &,
6) Recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.
7) Damages liability is limited to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. **Only then can the recipient be said to "expose" its students to harassment or "cause" them to undergo it "under" the recipient's programs.**

STETSON LAW

DI - Circuit Split

Farmer v. Kansas St. Univ., 918 F.3d 1094 (10th Cir. 2019)

2 students reported assault to School by other student at off campus housing/location.

No disciplinary action taken by School.

Students reported fear of seeing Respondent's on campus, and experienced anxiety, depression, grades slipping, and seclusion.

Kollaritsch v. Mich. State Univ. Bd. Of Trs., 944 F.3d 613 (6th Cir. 2019)

4 students assaulted and reported to School, case focuses on 1 (Kollaritsch).

Respondent investigated and disciplined (NCO & Probation)

Kollaritsch claimed to encounter Respondent 9 times, none of which rose to the level of actionable harassment.

STETSON LAW

DI – Farmer Holding

“Plaintiffs can state a viable Title IX claim for student-on-student harassment by alleging that the funding recipient's deliberate indifference caused them to be "vulnerable to" further harassment without requiring an allegation of subsequent actual sexual harassment.”

DI – Kollaritsch Holding

Plaintiff must plead, and ultimately prove:
1) An incident of actionable sexual harassment,
2) School's actual knowledge of it,
3) Some further incident of actionable sexual harassment,
4) The further actionable harassment (3) would not have happened **but for** the objective unreasonableness (deliberate indifference) of the school's response,
5) The Title IX injury is attributable to the post-actual-knowledge further harassment.

Denied Cert. By Supreme Court

Heightened Risk Official Policy Claim

STETSON LAW

Pre-Assault / Heightened Risk Origins

Simpson v. University of Colorado Boulder, 500 F.3d 1170 (10th Cir. 2007)

Facts:

- Female students sexually assaulted by Highschool football recruits
- Recruits were to be shown a good time
- Recruits were paired with a female ambassador to show them around, and responsible for entertainment
- Some recruits had been promised opportunity to have sex
- School and Athletic program made aware of need for training on sexual assault prevention by District Attorney after similar incident previously.

PA Test Articulated by Simpson

Pre-Assault Test:
(1) a school maintained a policy of deliberate indifference to reports of sexual misconduct,
(2) which created a heightened risk of sexual harassment that was known or obvious
(3) in a context subject to the school's control, and
(4) as a result, the plaintiff suffered harassment that was so severe, pervasive, and objectively offensive that it can be said to have deprived the plaintiff of access to the educational opportunities or benefits provided by the school

Retaliation

STETSON LAW

Jackson v. Birmingham Bd. Of Educ., 544 U.S. 167 (2005)

Title IX's private right of action encompasses claims of retaliation against an individual because they have complained about sex discrimination.

- Jackson discovered unequal & access to equipment funding in boys & girls basketball programs.
- Complained to supervisors in Dec. 2000
- Removed as Coach in May 2001

Ensley High School basketball coach, Roderick Jackson, at press conference in front of Ensley High School after getting a favorable decision from the US Supreme Court on a discrimination case Tuesday March 29, 2005..... AP Photo/Joe Songer/The Birmingham News

STETSON LAW

General Respondent T9 COAs

- Traditional
  - Erroneous Outcome
  - Selective Enforcement
- Trending
  - Plausible Inference

Non-Title IX Claim by Respondent:
Dur Process Violations

Yusuf v. Vassar College, 35 F.3d 709 (2CA 9/15/1994)

"Title IX bars imposition of University discipline where gender is a motivating factor In the decision to discipline."

Erroneous Outcome = Innocent and wrongly found to have committed the offense.

Selective Enforcement = Regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by gender.

A) Statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender.

B) The allegation that males invariably lose when charged with sexual harassment at Vassar provides a verifiable causal connection similar to the use of statistical evidence in an employment case.

Due v. Purdue University, 928 F.3d 652 (7th Cir. 2019)

- **Do the alleged facts, if true, raise a plausible inference that the university discriminated against John "on the basis of sex"**

STETSON LAW

Due Process Claim

- 1) Deprived of a constitutional right (Liberty / Property)
- 2) by a state official acting under the color of law.
- 11th Amend – 1) Waived 2) Abrogated by statute 3) Ex Parte Young exception– Prospective Relief

  "Removal of Notation on Transcript"

- 3 Causes of Action

  1) Substantive Due Process Violation (bars certain arbitrary gov. actions "regardless of the fairness of the procedures used to to implement them.")

  2) Procedural Due Process Violation (guarantee of a "fair" procedure)

  3) Equal Protection Violation (Equal treatment under the laws)

42 USC 1983 → State Actors (Public Institutions)
Monroe v Pape, 365 US 167 (1961)
(Unlawful Police Search)
Monell v Dept. of social services, 436 U.S. 658 (1978)
(female employees forced to take
unpaid leave)

Mathews v Eldridge, 424 U.S. 319 (1976)

(1) the nature of the private interest affected—that is, the seriousness of the charge and potential sanctions,

(2) the danger of error and the benefit of additional or alternate procedures, and

(3) the public or governmental burden were additional procedures mandated.

Litigation Updates

Landscape

Boolean Search through Westlaw: “Title IX” & “College” or “University”

Court Rulings:

March 7, 2023 – March 7, 2024:

US Supreme Court = 2 (Denials of Cert)

Federal Appellate Courts = 58

Federal District Courts = 396

State Courts = 37

USED OCR Resolutions

2023 = 90 Post-Secondary Resolutions

17 Sex Discrimination

71 Disability Discrimination

1St Circuit Cases

John Joseph Moakley US Court House; Boston, MA

Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island

Czerwienski v. Harvard Univ., 666 F.Supp.3d 49 (Dct. Mass March 31, 2023)

Deliberate Indifference COA -

- Court finds that Professors actions were sufficiently severe and pervasive to "Undermine and detract from victims educational experience" such that victim is effectively denied equal access to an institution's resources and opportunities.
- Conduct that comes from person in authority may be more likely to meet requirement easier.
  - In this case, the Professor/Respondent is a leading specialist in has field with contacts and influence at academic institutions throughout the world.
  - Respondent had an extraordinary amount power and influence over over the educational environment in which the plaintiffs were pursuing their degrees.
  - Students dropped classes to not be around him given the threats he made against their careers, ended the professor as her mentor.

Czerwienski v. Harvard Univ.

- PreAssault analysis
  - Articles in Harvard Crimson and The Chron about these issues
  - Alleged policy issues:
    - "fails to investigate or act on credible reports of sexual harassment unless the victim files a formal ODR report. (Id. ¶ 204). They also maintain that Harvard fails to adequately train its faculty members to report sexual harassment by professors against students in the Anthropology Department, or to implement measures to protect students from retaliation by faculty members. (Id. ¶¶ 208-09). Furthermore, the plaintiffs allege that ODR will not credit women's complaints of sexual misconduct unless they are corroborated by independent evidence, while at the same time restricting the type of corroborating evidence it allows the victims to present."
- DI to Retaliation = Yes.
- Breach of contract = School's policy were specific statements that gave a reasonable expectation
- Title IX Claims borrow SOL from state law personal injury (generally) statutes. In this case, where the Mass Court passed a resolution that civil cases were tolled for 105 days, the plaintiffs title ix case SOL was also tolled by 105 days. Tolled for Covid.

Czerwienski v. Harvard Univ., State Privacy Law Violations

- Harvard's MSJ denied
- In the university's Title IX Investigation, it obtained one of the Complainant's therapy records and sent to the Respondent as part of the Investigative Report.
- Breach of Fiduciary Duty = Requested and received documents from the Complainants private therapist without specific authorization + interviewed the therapist about the complainant.
    - **Please Do Not do this**

Smith v. Brown Univ., No. 1:22-CV-329-JJM-PAS, 2023 WL 6314646 (D.R.I. Sept. 28, 2023)

- Plaintiff is a Respondent alleging Yusuf theories = Selective Enforcement & Erroneous Outcome
- Issue: Ruling on a Motion to Compel Discovery = Title IX Records from University, looking for "similarly situated in material respects."
- Brown Provided a Public Report, and a chart outlining prior cases: Gender, Charges, Sanctions, and Appeal Outcomes.
- Plaintiff serves renewed request, wants the actual investigation reports, adjudication decisions, and appeal decisions (genders disclosed, but names redacted)
- Brown objects, citing privacy and FERPA

What Court Looks At:

Privilege is not at issue in this case. *See* *Edmonds v. Detroit Pub. Sch. Sys.*, No. 12-CV-10023, 2012 WL 5844655, at *3 (E.D. Mich. Nov. 19, 2012) (FERPA does not provide an evidentiary privilege for discovery purposes but places a "higher burden on a party seeking access to student records to justify disclosure" ") (citation omitted). As such, the Court will evaluate relevance, proportionality, and the statutory requirements of disclosure under FERPA's "litigation exception." *See* Fed. R. Civ. P. 26(b)(1); 34 C.F.R. § 99.31(a)(9)(i)-(ii).

Smith v. Brown Univ.

The District Court, John J. McConnell, Jr., Chief Judge, held that:

1. Requested discovery was relevant to student's Title IX claim;
    - Discovering Pattern + Evaluate internal decision making, rational for findings, evaluating credibility contests, procedural history + would make plaintiff guess as to ways in which bias might manifest.

2. Requested discovery was proportional to student's Title IX claim;
    - 6 of a total 30 records that are essential

3. Notice to third parties would be required to include disclosure of FERPA requirements, guidance as to time in which to respond, and procedures for filing motion for protective order.
    - Court orders the party to figure out the terms amongst themselves, and if they can’t the Court will.

Doe v. Franklin Pierce Univ., No. 22-CV-00188-PB, 2023 WL 2573272 (D.N.H. Mar. 17, 2023)

- Assault occurred on October 27, 2021

Erroneous Outcome Claim:
- FPU's alleged missteps include:
    - failing to provide Doe with a sufficiently detailed notice of Smith's complaint prior to the start of the investigation;
    - failing to provide Doe with a timely notice of the charges against him;
    - failing to send the draft investigation report to Doe's advisor;
    - initially denying Doe's request to have a confidential support person attend the hearing;
    - initially denying Doe's appeal as untimely;
    - and improperly excluding impeachment evidence as to Smith and other witnesses.

What Happened?

The Respondent gave notice to the University of the deficiencies, and the University cured the issues. Court ruled no Erroneous Outcome found.

Selective Enforcement – Order Complaint Received

a. SE fails explanation:

1) A Complainant affirmatively reaches out to the University to make a report / complaint.
2) Respondent's complaint was filed mid process during investigation, arose defensively.

= These are not Similarly situated individuals to find bias in a SE COA.

JOHN DOE, Plaintiff, v. THE TRUSTEES OF BOSTON COLLEGE, Defendant.,
No. 23-CV-12737-ADB, 2024 WL 816507 (D. Mass. Feb. 27, 2024)
Breach of Contract Claim – Case to Watch

Facts:

1) Doe is a Complainant & a Respondent in a Title IX Case with a College employee.
2) No Contact order issued. Doe was able to complete work online and would be eligible to graduate.
3) The College & Doe entered a settlement to resolve complaints:

> [1] [BC would] dismiss all pending disciplinary charges against Doe and to expunge the charges from his student record, including any related records from its database[,]
>
> [2] Doe's disciplinary record would only reflect [an] incident described as Doe's failure to comply with a university directive[,] and
>
> [3] [BC would] not ... disclose the allegations related to the dismissed and expunged charges. If any third party requested information concerning Doe's conduct record, BC agreed that it would only say that Doe "was found responsible for failure to comply with a university directive, and completed one semester of university probation."

STETSON LAW

- John Doe Applied to Medical Schools
- John Doe Rejected from Medical Schools. When asked why, JD allegedly told the following:
  - the medical school admissions team was allegedly told that the incident described as Doe's "failure to comply with a university directive" was "the result of multiple instances of Doe breaking the rules despite multiple warnings," including relating to the violation of the stay away order.
  - The admissions team was also allegedly told that "Doe's disciplinary history at BC [was] ... more significant than previously described," [id. ¶ 115], and that he was suspended from BC, [id. ¶ 116]. Moreover, they were purportedly told by someone at BC that "there was legal action between Doe and BC."
  - when the medical school reached out to BC for more information, BC responded by email and "provided the agreed upon language, [and] ... also stated that it was unable to provide any further information regarding the incident," which Doe alleges "effectively informed [the medical school] of the existence of the contract." [Id. ¶¶ 133–135].

Thurgood Marshall US Courthouse; New York, NY.

2nd Circuit
Connecticut, New York, Vermont

Doe v. Yeshiva Univ., No. 22-CV-5405 (PKC), 2023 WL 8236316 (S.D.N.Y. Nov. 28, 2023)

a. Deliberate Indifference Claim
b. Respondent's apartment (where incident occurred) was located off campus.
c. Apartment is alleged to be:
    i. within the geographic limits of [Yeshiva's] security perimeter,
    ii. security guards hired by Yeshiva "regularly and routinely patrolled the area" where the apartment was located.
    iii. Yeshiva allegedly provided shuttle service to "areas within the community where the apartment is."
    iv. Yeshiva is also alleged to have "paid all or some" of Respondent's rent for his off-campus apartment, and Perry was only allowed to live off campus with the school's permission.
    v. Perry's landlord allegedly had a policy of not renting to noncitizens or persons under the age of 21 unless they were Yeshiva students.

Yeshiva Complaint Issues

a. School went straight to a Policy B (Non-Title IX Policy) without notifying the Complainant about the Title IX dismissal. Investigation Deficiencies Alleged:

- Investigators did not follow up on disclosed rape kit including photos,
- Complainant named her roommates as witnesses that she told about the assault right after it happened. They were not interviewed.
- Dismissal of Title IX Complaint without a reason and an opportunity to be heard

= Required by the policy and the current title ix regulations.

b. Complainant was required to sign an NDA before being able to review the Investigation report.

c. Few days later she lost access to report. Few days after, told the finding was that the respondent was not responsible.

d. Respondent was a member of varsity basketball team that had an amazing season and was getting the university public notoriety (allegedly during a major fundraising campaign)

a. School Argument = Assault took place off campus, which school did not control, therefore Title IX does not apply. + Def should have filed an Article 78 proceeding (state law process challenging determination)
b. Court’s Reply
    a. lawmakers did not condition a district court's power to adjudicate a dispute invoking **Title IX** on the situs, context, or degree of control that the institution exercised over the alleged violation, this Court has subject matter jurisdiction to adjudicate Doe's **Title IX** claims.
    b. Yeshiva's argument also fails because Doe's **Title IX** claims seek to impose liability on Yeshiva not only for the off-campus rape by Perry but also for the direct actions of Yeshiva, including deliberate indifference in the conduct and outcome of the investigation and alleged acts of retaliation.

New York Article 78 Proceeding
Doe 1 v SUNY at Buffalo (September 29, 2023)

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

592

TP 23-00496

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, OGDEN, AND DELCONTE, JJ.

IN THE MATTER OF DOE 1, PETITIONER,

V MEMORANDUM AND ORDER

STATE UNIVERSITY OF NEW YORK AT BUFFALO,
RESPONDENT.

STETSON LAW

- Respondent was no longer a student at the College, so College could have dismissed under Title IX Regs.
- However, the College instead applied it's Code of Student Conduct and disciplined Respondent
  = Arbitrary & Capricious
  - Code of conduct falls short of Title IX Due Process Protections
    - Prohibits live cross-examination
    - Parties may only submit written questions ahead of hearing

> It is hereby ORDERED that the determination so appealed from is unanimously annulled on the law without costs, the petition is granted, and respondent is directed to expunge all references to this matter from petitioner's school record.

Boucher v. Trustees of Canisius Coll., No. 1:22-CV-00381, 2023 WL 2544625 (W.D.N.Y. Mar. 17, 2023)

Title IX Retaliation Found where School failed to provide Supportive Measures.

1) Professor investigated for violations of Sexual Misconduct Policy.
2) Professor removed from campus pending investigation.
3) Students allegedly not provided supportive measures/academic accommodations:
    1) failing to provide Project Tiger footage until the summer of 2019;
    2) declining to fully apprise Plaintiffs of the College's Title IX investigatory and adjudicative process;
    3) failing to notify Plaintiffs of their rights;
    4) and neglecting to provide Plaintiffs with new advisors and other academic supports, resulting in their inability to obtain letters of recommendation for graduate school and other professional endeavors.

On June 11, 2019, some Plaintiffs received an email from Administrator notifying them that Professor Respondent had retired from the College effective June 1, 2019.
No additional information regarding the outcome of the investigation of his alleged misconduct was provided.

James A Byrne US Courthouse
Philadelphia, PA
3rd Circuit: Delaware, New Jersey, Pennsylvania

Doe v. Coll. of New Jersey, No. CV223283MASLHG, 2023 WL 2812362 (D.N.J. Apr. 6, 2023)

a. DCT agrees as a case of first impression that revising disciplinary records is prospective injunctive relief and is not barred by the Eleventh Amendment = Ex Parte Young Exception
b. Title IX Claim
    i. Plausible Inference Found with external pressure + these facts alleged:
        1. (1) TCNJ failed to provide Plaintiff with proper notice of the allegations against him and did not notify Plaintiff of Roe's initial complaint until three years later;
        2. (2) TCNJ failed to ask Roe any questions that would challenge her credibility, including questions regarding her evidence and motives;
        3. (3) TCNJ failed to question Roe about her inconsistent statements throughout the investigation;
        4. (4) TCNJ failed to take statements of innocence from Plaintiff's advisor into account in rendering a decision;
        5. (5) TCNJ failed to properly apply the preponderance of the evidence standard, and instead made a decision that went against the weight of evidence;
        6. (6) TCNJ refused to afford Plaintiff an opportunity to be heard once Plaintiff obtained an appropriate advisor, despite Plaintiff's requests in his appeal, before the sanction became final; and
        7. (7) TCNJ failed to consider that Roe did not bring forth a complaint until after she began dating her then-current boyfriend whom, on information and belief, she did not want to find out about her encounter with Plaintiff.

ABRAHAM *v.* THOMAS JEFFERSON UNIVERSITY, (2:20-cv-02967)
District Court, E.D. Pennsylvania

- Plaintiff was an employee of Thomas Jefferson who brought a Title IX: 1) Plausible Inference claim and 2) Retaliation claim.
- Case went to trial. On December 11, 2023, the Jury retuned the following verdict in favor of the Plaintiff.

CIVIL JUDGMENT

AND NOW, this 11th day of December, 2023, in accordance with the verdict of the jury,

IT IS ORDERED that Judgment is entered in favor of Plaintiff and against Defendants, Thomas Jefferson University and Thomas Jefferson University Hospitals, Inc. in the amount of $15,000,000.00.

The Clerk shall close this case.

STETSON LAW

Lewis F. Powell, Jr.
US Courthouse
Richmond, VA

4th Cir
Maryland, North Carolina, South Carolina, Virginia, West Virginia

Doe v. Univ. of Virginia, 668 F. Supp. 3d 448 (W.D. Va. 2023)

a. Title IX, Plausible inference of anti-male bias Sex discrimination by investigator and review panel by:
   i. Not interviewing his selected witnesses or Jacob Doe, the other party accused of sexual assault by Jane Roe;
   ii. Refusing to consider his polygraph results without reviewing the scientific literature on polygraphs; and
   iii. Not permitting Plaintiff to meaningfully challenge testimony during the review panel hearing.
   iv. The investigator during the review panel hearing stated that she, "could go on and on and on as to [her] opinions [about the parties] but that may not be fair to [Plaintiff]."
   v. Jane Roe, his accuser, made inconsistent statements during the investigation that were ignored by the investigator and that the investigator affirmed "findings that Jane Roe was incapacitated despite significant contradictory evidence."

Doe v. Univ. of Virginia

a. Breach of K
   i. Plaintiff also contends that his breach of contract claim should survive because it rests on the combination of his tuition payment and agreement to be bound by UVA's policies. Dkt. 32 at 49–50. This argument, however, is unpersuasive. Under Virginia law, university student conduct policies are "not binding, enforceable contracts." *Marymount Univ.*, 297 F. Supp. 3d at 587; *Wash. & Lee Univ.*, 439 F. Supp. 3d at 792 ("[T]his Court and numerous others have held that generally applicable university conduct policies, such as handbooks and sexual assault policies, do not establish a contract under Virginia law")

Doe v. Marshall Univ. Bd. of Governors, No. CV 3:22-0346, 2023 WL 4618689 (S.D.W. Va. July 19, 2023)

Interesting case where Plaintiff (Respondent) is suing the school after he and the Complainant voluntary resolved the complaint outside of the school process, but plaintiff is suing the school based on all the harm the school caused him during the investigation.

1) Standing:

a. Having to medically withdraw from the University and seek inpatient psychiatric treatment due to Defendants' alleged wrongful actions undoubtedly are sufficient for standing purpose.
b. Additionally, the Court finds Plaintiff's allegations that the no-contact order with Jane Roe was so onerous and one-sided that it made it difficult for him to schedule his classes and it prevented him from taking a required class in person are plausible allegations of "injuries in fact."
c. Moreover, Plaintiff's claims that Defendants' actions caused him to move away from campus in the fall and withdraw from college activities, which negatively impacted his social, educational, and career development opportunities, satisfies the "injury in fact" inquiry.
d. Plaintiff also asserts he has suffered reputational harm because others in the program learned of the false allegations.

2) Selective Enforcement - Alleged procedural irregularities:

i. Allowing the investigator to abandon the neutral fact-finding process and to usurp the role of the hearing panel by resolving disputed facts

ii. Investigator submitted a final report that concluded the Respondent was responsible before the hearing panel received any evidence.

iii. Denying a motion to continue the hearing b/c Jane Roe failed to provide the required witness list

iv. Allowing Jane Roe to testify remotely, w/o giving Respondent the option to object

v. Title IX Coordinator called as a witness and still allowed to preside over the complaint

vi. Investigator was a direct supervisor of Complainant's Title IX Advisor = conflict of interest

vii. Ignoring only eyewitness testimony as not credible b/c the witness was in a romantic relationship with the Respondent.

3) Title IX Retaliation:

Specifically, Plaintiff alleges that Defendant, acting as Marshall's **Title IX** Coordinator, personally solicited new **Title IX** complaints from female students against him because he participated in the **Title IX** process and successfully got other **Title IX** complaints dismissed. *Amended and Suppl. Compl.*. According to Plaintiff, Jane Roe admitted that she would not have filed her complaint, but for Defendant's solicitation and encouragement.

Roe v. Marshall Univ. Bd. of Governors, 668 F. Supp. 3d 461 (S.D.W. Va. 2023)

Title IX Jurisdiction Issue - Location

a. Marshall only contests the final element of this standard, arguing that there is no basis for imputing liability against it, due to the off-campus location where the alleged incident of sexual harassment occurred.

b. An educational institution's liability is limited to "to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs." *Davis*, 526 U.S. at 645, 119 S.Ct. 1661.

c. Further, *Davis* held that "recipients of federal funding may be liable for 'subjecting' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority." *Id.* at 646-47, 119 S.Ct. 1661.

Ruling: Plaintiff may bring a Title IX deliberate indifference claim alleging an institution's substantial control over the context of an incident premised upon the events or circumstances of that incident, regardless of the location at which the sexual harassment occurred.

Luskin v. Univ. of Maryland, Coll. Park, Maryland, No. 22-1910, 2023 WL 2985121, (4th Cir. Apr. 18, 2023) (Unpublished)

The University of Maryland's response was not clearly unreasonable because it:

(1) swiftly responded to each incident;
(2) contacted C.H.'s professors to determine if they had any concerns relative to C.H.'s behavior;
(3) attempted to relocate Appellant to a new student office away from C.H.;
(4) issued a no-contact order *within two days* of being notified of the text message incident;
(5) transitioned C.H. to online classes after he violated the no-contact order;
(6) placed C.H. on disciplinary probation until the end of the semester;
(7) encouraged C.H. to undergo a psychiatric evaluation; and
(8) barred C.H. from entering the building except through designated entrances and exits.

These actions are sufficient to establish that the University of Maryland took Appellant's complaints seriously and responded in a reasonable manner.

Ortegel v. Virginia Polytechnic Inst. & State Univ., No. 7:22-CV-00510, 2023 WL 8014237 (W.D. Va. Nov. 20, 2023)

Ortegel has not alleged any facts indicating that Virginia Tech deprived him of fair notice or an opportunity to be heard. Instead, Ortegel's claims center around the assertion that Dilworth was not an impartial or disinterested decision-maker. Ortegel alleges that Dilworth possessed biases "stemming from a source external" to Ortegel's hearing (namely, Dilworth's own personal beliefs on sex and race), rendering him an improper decision-maker. *See Morris*, 744 F.2d at 1045. Ortegel surmises that Dilworth likely "prejudged" Ortegel's guilt due to Dilworth's preexisting biases against men. *See Doe v. Fairfax Cnty. Sch. Bd.*, 403 F. Supp. 3d at 520. The court finds that Ortegel has alleged sufficient facts to plausibly show that Dilworth was not an impartial or disinterested decision-maker; in turn, Ortegel has plausibly stated a claim for deprivation of due process.

Bias based off Tweets, Sanctions, Prior Removal

One of Ortegel's sanctions was to read a book titled *Man Enough: Undefining My Masculinity*, which apparently "posits that masculinity itself, traditionally constructed, is a social evil."

Dilworth, the hearing panel chair, allegedly had tweeted that he is "doing [his] part to hold men other men [sic] accountable" and re-tweeted a message that read: "quite interesting how many college aged boys and men seem to understand consent when it comes to drinking their chocolate milk, but not when it comes to someone else's body and space".

Further still, an admin had previously removed Dilworth from another Title IX hearing panel after an accused student challenged Dilworth's objectivity given his "sexist" statements.

These foregoing allegations could plausibly lead to an inference that the defendants treated Ortegel differently because he was a man. Therefore, the defendants' motion to dismiss Count I and the gender-bias aspects of Counts V and VI will be denied.

F. Edward Herbert Building New Orleans, LA

5th Circuit
Louisiana, Mississippi, Texas

Van Overdam v. Texas A&M Univ., No. 4:18-CV-02011, 2024 WL 115229 (S.D. Tex. Jan. 10, 2024)

Confirms SPCT Cummings: Plaintiff does not cite to any authorities or make any other effort to establish that the specific damages he seeks (emotional, reputational, and punitive) are "traditionally, generally, or normally available for contract actions." *Cummings*, 596 U.S. at 223 (quoting *Barnes*, 536 U.S. at 187–88) (cleaned up). In fact, the Court finds that Plaintiff fails to make "any reasoned argument for making an exception to the spending clause statutory analysis for Title IX cases." *Loera*, 2023 WL 6130548, at *5. In sum, the Court holds that the emotional, reputational, and punitive damages sought by Plaintiff are not available post-*Cummings* and *Barnes*.

Doe v. Univ. of Mississippi, No. 3:18-CV-138-DPJ-FKB, 2023 WL 5729220 (S.D. Miss. Sept. 5, 2023)

1) Erroneous Outcome Summ Jud denied = claim survives

a. As noted, Roe said at times she was raped, but she also told one doctor that the decision to have intercourse was "mutual."
b. Also, Doe passed a lie-detector test indicating that the encounter was consensual (at least from his perspective). And he stated that Roe:
(1) removed her own underwear;
(2) helped Doe remove his;
(3) was on top of him when they began intercourse;
(4) patted his bottom in the bathroom when they finished;
(5) kissed him goodnight; and
(6) told him he could call her.

Doe also claimed that Roe was "coherent" and that she was not "stumbling around" at the fraternity house.

Testimony from Hearing Panel

A - One panel member who found Doe responsible for initiating non-consensual sex testified that he did not know whether or not Roe was capable of giving consent.

B - Another panelist testified that Roe did not exhibit the specific signs of incapacitation listed in the University's training materials.

In addition, the panel's conclusion that the encounter was non-consensual was influenced by the evidence about the bloody sheets, but the Title IX investigation failed to discover evidence that Roe was vaginally bleeding earlier in the day.

Tweets & Articles used to Allege Hearing Panel Bias

i. **Panel member B.T.'s alleged bias.** Doe says quotes from panelist B.T. in a student newspaper show her gender bias. That article, which focused on B.T.'s involvement in student government, quotes her as follows: “We decide on the punishment based on the crime .... We are really just here to make sure that all Ole Miss students feel safe. In a sexual assault case, we do everything that we can to make sure that the victim feels comfortable around campus.” Article [202-11] at 4.

ii. Court Replied: “This quote is a little troubling.”

“B.T. does not say the disciplinary panel exists to determine what happened, she says it's there to make “students feel safe,” and at least suggests a motive to protect complainants (whom B.T. describes as “victim[s]”). *Id.* According to Ussery, those have always been women in this context. Ussery Dep. [187] at 44.”

Panel member Presley's alleged bias. The issues with panelist Presley are more serious. Doe says Presley injected gender bias into the proceedings because he applies different standards for men and women.

i. Presley testified that "any consumption of alcohol impairs your judgment. Therefore, I can't say specifically she can give effective consent." Presley Dep. [202-3] at 80–81. When pressed, he agreed that "[a]ny alcohol consumption" could lead to impairment that would impact capacity to consent—"[w]hether it's 2 ounces of wine or 200 ounces of wine." *Id.* at 81–82. But when asked whether "a male complainant drinking alcohol [is] sufficient in and of itself in the context of a sexual allegation of a female ... for a finding of responsibility," Presley testified he "would have to review the entire case file to make that decision." *Id.* [202-3] at 127.

ii. Presley held Doe "responsible" even though he "did not know whether or not Bethany Roe was actually capable of giving consent to sexual intercourse." *Id.* at 81. In other words, he found that the University met its burden of proving Doe engaged in non-consensual sex without knowing whether Roe lacked capacity to consent.

Due Process Violation & Immediate Remedy

i. There is no objective evidence; Roe's account was filtered through Ussery; Roe gave conflicting statements about what happened; and her credibility was never tested by her live testimony, cross-examination, or even her own written statement. At a minimum, Doe should have been allowed to submit written questions, a procedure that would reduce some burdens on Roe. And because there are no factual disputes, the Court finds as a matter of law that Doe is entitled to judgment on his procedural-due-process claim.

ii. The Court grants Doe's request and orders "the University to immediately remove any indication of a disciplinary finding against Doe from his student records," to "wholly and permanently expunge[ ]" the "finding of responsibility and the record of the entire Title IX proceeding ... from his academic record," and to "permanent[ly] seal ... all such proceedings to protect against subsequent disclosure to any other person or academic institution."

Doe v. William Marsh Rice Univ., 67 F.4th 702, 712 (5th Cir. 2023)

i. Facts as Alleged:
   A – John Doe & Jane Roe had sex.
   B – Per the allegations, the parties discussed any STDs before hand, and John Doe disclosed that he had herpes a long time ago.
   C – Some time later, Jane Roe accused John Doe of giving her herpes.
   D – Jane Roe reported situation to the school, and that she did know that John Doe had herpes.
   E - Rice kicked Doe off campus on 24 hours' notice because he allegedly did not disclose his herpes diagnosis.

ii. Rice ultimately sanctioned Doe with what amounted to expulsion for failing to inform Roe of all of the risks of having sex with a herpes carrier, even though Rice's student code does not contain such a requirement and, again, even though the University would ultimately immunize Roe for doing the same thing.

iii. This is further evidenced by Dean Ostdiek's deposition testimony that the University would not require Roe to disclose to her sexual partners that she had herpes as the University was holding Doe liable for failing to do. Likewise, Garza's deposition testimony provided, and the record confirms, that Doe never made any misrepresentations or changed his story while Roe consistently misrepresented the facts and changed her story.

a. Err Outcome:

> "First, and most significantly, we note that contrary to Roe's allegations and the University's position at the time of Doe's interim suspension, the record supports Doe's contention that he did inform Roe about his history with herpes before the two had sex and that she may have had herpes already.
>
> Indeed, by her own admission, Roe knew that Doe had herpes in his sexual history, but she declined to inquire further about the disease or its transmissibility before having unprotected sex with him.
>
> Moreover, as Doe urged in the SJP proceedings, Roe could have contracted herpes from one of her other sexual partners prior to beginning her relationship with him, a theory which could have been corroborated by another male student had the University contacted him to confirm Doe's allegations.
>
> In other words, the record supports Doe's argument that Roe knew about Doe's herpes, had unprotected sex with him anyway, and may have already had herpes herself at that time."

Plaintiff's Archaic Assumption Claim

Archaic Assumptions claim:
A plaintiff must show that the University's actions were based on attitudes about gender roles that reflect gender bias. Decisions and statements that are predicated on "outdated" and "outmoded" assumptions demonstrate a university's intent to treat one differently because of their gender.

a. Doe on the other hand contends that "[c]ertainly, assuming that an adult female college junior is incapable of understanding the risks of sexual intercourse without the male educating her is part of" the archaic thinking our case law prohibits. According to Doe, "[r]efusing to acknowledge that Roe had an accountability for her own actions, her own choices[,] and her own conduct is 'remarkably outdated' " and "[s]ubsequently refusing to hold her accountable for the same conduct is outdated, archaic, and outmoded."

b. We agree with Doe that, to the extent a rational jury could find that the University's policy arose from the view that a more-knowledgeable male (Doe) had a duty to educate an unwitting female (Roe) about the precise risks of herpes transmission, its position rests on an archaic assumption.

Potter Stewart US Courthouse
Cincinnati, OH

6th Cir

Kentucky, Michigan, Ohio, Tennessee

Goldblum v. Univ. of Cincinnati, 62 F.4th 244, 251 (6th Cir. 2023)

1. Retaliation against Title IX Coordinator, case has been going on for a while.
    a. Under our precedent, we review Goldblum's Title IX claim under the analogous test for Title VII retaliation claims. *Bose*, 947 F.3d at 988–89. Because Goldblum relies on only indirect evidence, she may bring a prima facie retaliation claim under Title IX by showing that: "(1) she engaged in protected activity, (2) the funding recipient knew of the protected activity, (3) she suffered an adverse [employment]-related action, and (4) a causal connection exists between the protected activity and the adverse action."
    b. Fired for insubordination = sending letter to community & Failure to abide by College's standard of acceptable behavior.
    c. Letter was not protected activity, it was not a complaint of discrimination
    d. Affirmed grant of Summ J to College.

Niblock v. Univ. of Kentucky, No. CV 5:19-394-KKC, 2023 WL 4997678, (E.D. Ky. Aug. 4, 2023)

Title IX Athletics & 3 Part Test

a. Accordingly, the Court will defer to the 1979 Policy Interpretation and the three-part test as the applicable standard in this case.
b. College challenged the deference given to the 1979 Policy interpretation and three-part test guidance.
c. Court denied Challenge.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

GRACE CHEN and DANIELLE VILLARREAL, individually and on behalf and all others similarly situated,

Plaintiffs

v.

HILLSDALE COLLEGE

Defendants.

Case No. 1:23-cv-1129

CLASS ACTION COMPLAINT FOR INJUNCTIVE AND EQUITABLE RELIEF; MONETARY DAMAGES; AND JURY DEMAND

STETSON LAW

Plaintiffs are not alone. At Hillsdale, students are at an unusually high risk of sexual assault because Hillsdale fails to have or enforce policies that prevent sexual assault. This is no accident: Hillsdale does not accept government funding in a misguided and ineffective attempt to avoid its obligations under Title IX of the Education Amendments of 1972 ("Title IX").[2] Nevertheless, as a 501(c)(3) institution, Hillsdale receives federal financial assistance in the form of its tax-exempt status, which subjects it to Title IX's obligations.

DEFENDANT HILLSDALE COLLEGE'S MOTION TO DISMISS THE CLASS ACTION COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendant Hillsdale College, through its undersigned counsel, hereby moves to dismiss Plaintiffs' Class Action Complaint (ECF No. 1) with prejudice under Federal Rule of Civil Procedure 12(b)(6) on the following grounds: (1) Hillsdale's status as a tax-exempt institution does not alone render Title IX applicable to Hillsdale and, even if Title IX did apply, Plaintiffs fail to state a claim under Title IX; (2) Plaintiffs fail to state a claim of negligence; (3) Plaintiffs fail to state a claim

Cases to Watch

IN THE CUYAHOGA COUNTY COURT OF COMMON PLEAS

CIVIL DIVISION

c/o Eric Rosenberg, Esq
205 S. Prospect St.
Granville, OH 43023

JANE DOE,

Plaintiff,

v.

CASE WESTERN RESERVE UNIVERSITY and JANE ROE,→ address unkown

0900 Euclid Ave
Adelbert Hall
Room 311
Cleveland OH 44106

Defendants.

2023 OCT 19 A 10:21
CLERK OF COURTS
CUYAHOGA COUNTY

Case No.

JUDGE

Complaint
SHERRIE MIDAY
CV-23 987214

JURY DEMAND
ENDORSED HEREIN

CV23987214 162245380

VERIFIED COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF AND DAMAGES

Plaintiff Jane Doe ("Doe")[1] by her attorneys, Rosenberg & Ball Co. LPA, complain against Defendants Case Western Reserve University ("CWRU" or the University) and Jane Roe ("Roe") as follows:

COUNT 4
TORTIOUS INTERFERENCE WITH CONTRACT
[Against the University]

67. Doe realleges and incorporates all the allegations contained in preceding paragraphs as if fully set forth in this paragraph.

68. The actions of Lutner detailed above prove the University knew the Settlement Contract existed.

69. The actions of Lutner detailed above prove the University intentionally procured the breach of the Settlement Contract in part by falsely alleging the Title IX Policy gave Roe and/or the University the right to void Settlement Contract term(s).

Everett Mckinley Dirksen US Courthouse
Chicago, IL

7th Cir
Indiana,
Illinois,
Wisconsin

Shannon v. Bd. of Trustees of The Univ. of Illinois, No. 24-CV-2010, 2024 WL 218103 (C.D. Ill. Jan. 19, 2024)

Court found liklihood of success on merits on a Procedural Due Process claim given unfair proceedings after finding that there is a property (Student athlete reliance on funds) and liberty interest.

Basketball player interim measure expelled for an allegation of assault that took place off campus, out of state, with a non University student. Did not receive protections from Title IX policy, Court found that was okay because it did not fall under title ix Jurisdiction.

Just as in *Purdue*, Plaintiff was given notice and the opportunity to submit evidence but only in the form of a written statement and documents. He was unaware of the alleged victim's identity and there is no indication that he was given an opportunity to view the evidence against him. In reliance on the DIA policy, the conduct panel did not investigate the alleged offense, consider a written statement by the complainant, or have the ability to weigh the credibility of evidence in light of the nature of the allegation. Plaintiff was not allowed in the hearing and no recording or transcript of the proceeding was provided to him. The conduct panel is not required to submit a written decision or findings of fact for Plaintiff to ascertain the basis for the interim decision, and there is no avenue to appeal an interim decision.

Thomas F. Eagleton Courthouse
St. Louis, MO

8th Cir
Arkansas, Iowa, Minnesota, Missouri, Nebraska, South Dakota, North Dakota

James R. Browning
US Courthouse
San Francisco, CA

9th Cir
Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Norther Mariana Islands, Oregon, Washington

Grabowski v. Arizona Bd. of Regents, 69 F.4th 1110 (9th Cir. 2023)

a. As matter of first impression, discrimination on basis of sexual orientation is form of sex-based discrimination under Title IX;

b. As matter of first impression, discrimination on basis of perceived sexual orientation is actionable under Title IX;

c. Teammates alleged persistent harassment of student-athlete on basis of his perceived sexual orientation did not violate Title IX; (failed because plaintiff did not plea deprivation of school activities. Court just granted motion to amend complaint on Jan 12, 2024)

d. student-athlete stated plausible Title IX retaliation claim against university;

Brown v. Arizona, 82 F.4th 863, 875 (9th Cir. 2023)

Appeal case. A few years ago, the court dismissed the claim b/c the assault happened in a private apartment at an off-campus apartment. No substantial control over the respondent and context.

"We thus conclude that recipients of federal funding may be liable for 'subject[ing]' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and *the harasser is under the school's disciplinary authority*." *Id.* at 646–47, 119 S.Ct. 1661

These passages make clear that while the physical location of the harassment can be an important indicator of the school's control over the "context" of the alleged harassment, a key consideration is whether the school has some form of disciplinary authority over the harasser in the setting in which the harassment takes place.

Control Factors

CT: “There is undisputed evidence that the University had control over the off-campus housing in which Bradford was living while attending the University.”

“After he finished his freshman year, Bradford moved into another off-campus house with other members of the football team. The University and football program allowed Bradford and his teammates to live off campus only with the permission of their coaches. Head coach Rodriguez testified in his deposition that under Player Rule 15, permission to live off campus was conditioned on good behavior and could be revoked. The very existence of this off-campus players’ residence was therefore subject to the coaches’ control. Even behavior as innocuous as being late to appointments or receiving bad grades could result in players’ being forced to move back on campus.”

“As in *Simpson*, the University failed to impose its supervisory power and disciplinary authority over an off-campus context, despite having notice of the high risk of misconduct. *See* 500 F.3d at 1173. A reasonable factfinder could infer from Rodriguez's testimony that, had Rodriguez known of Bradford's assaults on Student A and DeGroote, Bradford's September 12 and 13 assaults on Brown at his off-campus house would never have occurred.”

Barlow v. State, 540 P.3d 783 (Wash. 2024)

Certified questions sent to the Supreme Court of Washington by the 9th Circuit.

1) Whether Washington law recognizes a special relationship between a university and its students, giving rise to a duty to use reasonable care to protect students from foreseeable injury at the hands of other students? **Yes.**

2) If yes to the first, what is the measure and scope of that duty? **Only when a student is on campus, similar to a business invitee, or involved in university sponsored activities.**

Facts of Case:
Complainant was raped by Respondent at Respondent's off-campus apartment.
Respondent was ultimately expelled and convicted of second-degree rape.
Prior to this, Respondent had been a student at a different same state school where he was disciplined and suspended for violation of the sexual misconduct policy.

dictate students' movements off campus and away from the oversight of campus security and administration. While a special relationship exists between a university and its students, that duty is to use reasonable care as recognized in *Restatement (Second)* § 344. Because no ability to control off-campus, non-school-sponsored interactions exists, the duty does not extend to the choices or activities under a student's control. A university's duty is limited to where a student is on campus for school related purposes or participating in a school activity.

Byron White US Courthouse
Denver, CO

10 Cir
Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming

Elbert P. Tuttle Courthouse
Atlanta, GA

11th Circuit

Alabama, Florida, Georgia

D.N. by Jessica N. v. DeSantis, No. 21-CV-61344, 2023 WL 7323078 (S.D. Fla. Nov. 6, 2023)

Background: Transgender high school student brought action alleging that Florida statute prohibiting transgender girls from participating in any public school-sponsored girls' sports violated Title IX and Fourteenth Amendment. State moved to dismiss.

Holdings: The District Court, Roy K. Altman, J., held that:

1 plaintiff's claim that statute violated Equal Protection Clause was subject to intermediate scrutiny;

2 statute did not violate Equal Protection Clause;

3 plaintiff's sex for purposes of Title IX was male;

4 statute did not violate Title IX;

5 plaintiff failed to establish injury-in-fact required for standing to assert substantive due process claim; and

6 statute did not violate plaintiff's substantive due process interest in nondisclosure of private information.

J.C. v. Bd. of Regents of Univ. Sys. of Georgia, No. 1:20-CV-4445-JPB, 2023 WL 4938054 (N.D. Ga. Aug. 1, 2023)

Damages case following the SPCT Cummings ruling.

i. The Court thus concludes that Cummings does not bar J.C.'s damages for educational expenses and lost earnings, and to the extent that the Board of Regents seeks summary judgment on this ground, the motion is **DENIED**

ii. Consequently, Cummings does not preclude J.C.'s claim for prepaid rent, and the Board of Regents' motion for summary judgment is **DENIED** on this basis

iii. Finally, J.C. requests damages related to counseling and psychiatric treatment…damages for counseling and psychiatric treatment relate directly to the emotional harms suffered by J.C.—in other words, to her emotional distress… While not binding on the Court, these cases provide a persuasive indication that expenses for counseling and psychiatric treatment are not recoverable under Title IX post-Cummings.

Accordingly, insofar as J.C. seeks compensatory damages for these expenses, the Court finds that such damages would redress emotional injuries and are therefore unavailable in a Title IX action. Insofar as the Board of Regents seeks summary judgment on the availability of J.C.'s damages for counseling and psychiatric treatment, the motion is **GRANTED**.

USED OCR Resolutions

STETSON LAW

Numbers Breakdown

2023: Post Secondary = 90

- Race/National Origin = 5
- Disability = 71
- Sex Discrimination = 17
  - Athletics = 2
  - Dissemination of Policy = 1
  - Gender Harassment = 2
  - Procedural Requirements = 2
  - Sexual Harassment = 4
  - Single Sex Campus Programs = 1

2024 (so far): Post Secondary = 1

Cuyahoga Community College OCR Docket Number 15-22-2065

Essentially follows last years Troy Title IX Pregnancy Resolution

STETSON LAW

OCR – Troy Univ. / Training

The University will provide training regarding the Title IX rights of pregnant students and the University's obligations regarding pregnant students to all faculty, as well as to all staff involved in providing Title IX resources or addressing requests for adjustments from pregnant students. This training must include: (i) how and to whom students may submit requests for adjustments to the regular program; (ii) the contact information for the University's Title IX Coordinator and any individual(s) tasked with coordinating the University's response to requests for adjustments from pregnant students; (iii) the process for identifying and providing adjustments; (iv) examples of pregnancy-related adjustments; and (v) the grievance procedure for students to file complaints of sex discrimination, including pregnancy-related complaints.

OCR / Survey

The University will assess the effectiveness of the training referenced in Item III above, by conducting a survey of the faculty and staff who attend the training. The survey will specifically inquire about their knowledge regarding: (a) how and to whom students may submit requests for adjustments to the regular program; (b) the contact information for the University's Title IX Coordinator and any individual(s) tasked with coordinating the University's response to requests for adjustments from pregnant students; and (c) the grievance procedure for students to file complaints of sex discrimination, including pregnancy-related complaints.

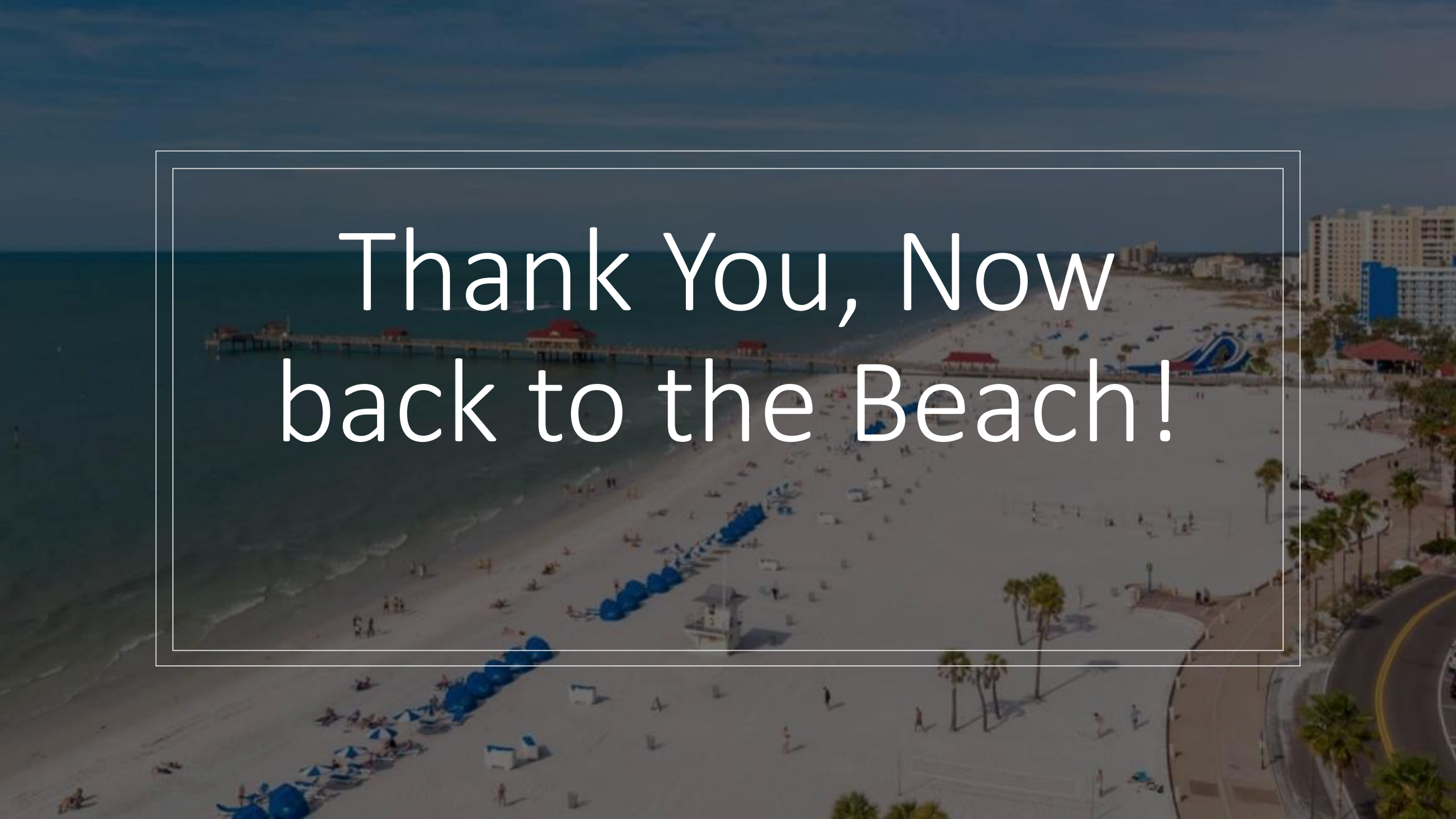
OCR / Tracking

By March 15, 2023, the University will develop a system for tracking (i) requests for pregnancy-related adjustments for students made to the Title IX Coordinator, faculty or other staff; (ii) the responses to the requests, including verification of adjustments provided by faculty, staff or others; and (iii) the reasons for the denial of any requests.

OCR – Troy Univ. / Training

The University will provide training regarding the Title IX rights of pregnant students and the University's obligations regarding pregnant students to all faculty, as well as to all staff involved in providing Title IX resources or addressing requests for adjustments from pregnant students. This training must include: (i) how and to whom students may submit requests for adjustments to the regular program; (ii) the contact information for the University's Title IX Coordinator and any individual(s) tasked with coordinating the University's response to requests for adjustments from pregnant students; (iii) the process for identifying and providing adjustments; (iv) examples of pregnancy-related adjustments; and (v) the grievance procedure for students to file complaints of sex discrimination, including pregnancy-related complaints.

Questions & Answers


Thank You, Now
back to the Beach!