Higher Ed – Title IX Litigation Update

Melissa Carleton & Jessica Galanos

Bricker Graydon

Disclaimers

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We can't help ourselves. We're lawyers.

- We are not giving you legal advice
- Many of these cases may still be in appeals – stay tuned
- The impact of the 2020 Regulations on Title IX litigation is developing
- Consult with your legal counsel regarding how best to address a specific situation
- Use the chat function to ask general questions and hypotheticals
- There are a variety of stakeholders listening, so please keep that in mind as you submit your questions

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Agenda

Complainants, Respondents, Employees, and Other Title IX Issues

- Cases brought by Complainants
- Cases brought by Respondents
- Cases brought by Employees
- Title IX Athletics
- Title IX and Religious Institutions

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Quick Reminder

Some Decisions Matter To You More Than Others.

- Pay the closest attention to the Supreme Court, your Circuit Court, and your District Court, as this is "precedential," which means future courts are supposed to follow the same logic.
- All other decisions are "persuasive." The persuasiveness depends on how thoughtful the case is, and how similar the facts are to your own.
  - Your District Court might prefer to look first at case law from other District Courts in your Circuit.

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Another Quick Reminder

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Consider the Procedural Posture of the Case

- The information considered by the Court will depend on how far along the case is at the time of the decision
  - Motion to Dismiss
  - Motion for Summary Judgment
  - Jury Verdict
  - Appeal

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Cases Brought by Student Complainants

Theme: Defining the confines of deliberate indifference

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Shared elements with different interpretations

Generally, from *Gebser*, a plaintiff must allege the following in a deliberate indifference Title IX private action:

1. sexual harassment over which institution had **substantial control**,
2. an official with authority to take corrective action had **actual notice** of the harassment,
3. The institution's response was clearly unreasonable, and
4. Institution's deliberate indifference caused plaintiff to suffer discrimination or exclusion from an **educational activity or program**

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Roe v. Marshall Univ. Bd. of Governors, 2023 WL 2799733 (S.D. WV, April 5 2023) (slide 1 of 3)

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Deliberate indifference – failure to investigate assault

- Complainant was reportedly sexually assaulted at off-campus apartment by a fellow student
  - **Post-2020 regs conduct**
- Complainant alleged she was lured into meetings with admin. under guise of providing witness information concerning assault
- Complainant charged with underage drinking and placed on probation; alleged Title IX office declined to open investigation into Respondent
- Complainant filed suit under Title IX, alleging deliberate indifference for failing to investigate
  - University filed a **Motion to Dismiss**

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Roe v. Marshall Univ. Bd. of Governors, 2023 WL 2799733 (S.D. WV, April 5 2023) (slide 2 of 3)

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Deliberate indifference – failure to investigate assault

- University argued there was no basis for imputing liability against it because the alleged incident occurred off-campus
  - "In contesting that it exercised substantial control over the context of the sexual harassment, Marshall exhibits a myopic focus on the location of the incident. Marshall repeatedly emphasizes that the assault took place in 'a random off-campus apartment.'… Apparently, Marshall fails to grasp Ms. Roe's argument: that the University exhibited substantial control over the *events or circumstances* of the incident, rather than the locale at which it occurred."

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Roe v. Marshall Univ. Bd. of Governors, 2023 WL 2799733 (S.D. WV, April 5 2023) (slide 3 of 3)

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- Language of 34 C.F.R. § 106.44(a) does not limit "context" over which institution exercises control to physical locations
- Univ. investigated and imposed discipline on Complainant for underage drinking in connection with same incident
  - At least one other court has found disciplinary action against a complainant is evidence of institution's substantial control over the context of an off-campus sexual harassment incident
- **Motion to Dismiss** denied – case will continue

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Doe v. Bd. of Supervisors of Univ. of Louisiana System, 2023 WL 143171 (M.D. La., Jan. 10, 2023) (slide 1 of 5)

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Deliberate indifference to actual notice of heightened risk posed by male student

- Complainant reported being raped off-campus by another student
  - **Pre-2020 regs conduct**
- 3 days after she reported the sexual assault, the University informed her that Respondent withdrew from school and University would not be pursuing Complainant's report
- 2 years later, Complainant learned Respondent had been reported for rape and sexual misconduct on five prior occasions
- Complainant alleged Board of Supervisors of the University of Louisiana System (ULS), Louisiana State Univ. (LSU), and local law enforcement were aware of Respondent's prior conduct; failed to suspend, expel, criminally prosecute, or meaningfully investigate him; and allowed him to transfer between campuses
- Court, accepting Complainant's allegations as true, denied Defendants' **Motion to Dismiss** Complainant's lawsuit seeking damages in part

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Doe v. Bd. of Supervisors of Univ. of Louisiana System, 2023 WL 143171 (M.D. La., Jan. 10, 2023) (slide 2 of 5)

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Deliberate indifference to actual notice of heightened risk posed by male student

- Plaintiff must allege (and ultimately prove):
  - (1) ULS had actual knowledge of the harassment;
  - (2) the harasser was under ULS's control;
  - (3) the harassment was based on the sex of the Complainant-Plaintiff
  - (4) the harassment was "so severe, pervasive, and objectively offensive that it effectively barred the victim's access to an educational opportunity or benefit; and;
  - (5) ULS was deliberately indifferent to the harassment.

ULS challenged #2, #4, and #5 in its **Motion to Dismiss**

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Doe v. Bd. of Supervisors of Univ. of Louisiana System, 2023 WL 143171 (M.D. La., Jan. 10, 2023) (slide 3 of 5)

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Title IX pre-and post-assault deliberate indifference in violation of Title IX claims

- ULS had **control** over harasser and context – Complainant first met Respondent on campus; Respondent would not have had access to these locations if he were not a student; and he would not have been a student if he had been properly investigated and disciplined following his earlier arrest for rape
- **Severity** element – ULS' argument that Complainant failed to adequately allege she was injured by the rape "is equal parts obtuse and unfounded. Unquestionably, rape is severe and objectively offensive sexual harassment sufficient to support an actionable Title IX claim, even in the absence of allegations that a plaintiff's academic track was thrown off course."
- Complainant's allegations that ULS had actual knowledge of student-on-student rape and did nothing satisfied the "high bar" of Title IX's **deliberate indifference** element

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Doe v. Bd. of Supervisors of Univ. of Louisiana System, 2023 WL 143171 (M.D. La., Jan. 10, 2023) (slide 4 of 5)

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Heightened risk

- Accepting allegations as true, an "appropriate person" at ULS knew of Respondent's prior rape arrest but failed to investigate and placed him on disciplinary probation instead

Timeliness of heightened risk claim – ULS argues for 2 year SOL

- Fifth Circuit has not addressed accrual date of similar type of heightened risk claim
- Court cited Sixth Circuit's decision in *Snyder-Hill v. The Ohio State University* and other district court authorities and determined that Complaint's heightened risk claim accrued when she reasonably should have known of the causal connection between her assault and the misconduct of ULS staff and officials
- Complainant plausibly alleged she discovered this connection when she read the news article about Respondent, and that she could not have independently discovered this information even if she tried

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Doe v. Bd. of Supervisors of Univ. of Louisiana System, 2023 WL 143171 (M.D. La., Jan. 10, 2023) (slide 5 of 5)

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Timeliness of post-reporting claim

- Complainant learned from the news article that after she reported her assault, ULS permitted Respondent to transfer another campus
- Based on allegations, plausible to conclude ULS misrepresented its intent to investigate Respondent and prevented Complainant from pursuing her post-assault Title IX claim

- State law negligence claims against LSU dismissed to be pursued in state court as LSU declined to waive its 11th Amendment immunity

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Owens, et al. v. La. State Univ., 2023 WL 2764760 (M.D. Louisiana, March 31, 2023) (slide 1 of 2)

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Timeliness of claim; heightened risk

- Ten former students alleged University handled Title IX complaints made against student-athletes differently than complaints against non-athletes "so as to ensure that those complaints were never properly investigated or addressed," and that they did not learn of these inadequate Title IX reporting policies until an investigative report was issued in 2021.
- The University filed a **Motion to Dismiss**, arguing claims were time-barred based on state's one-year statute of limitations
  - Court dismissed all but one of the Title IX deliberate indifference and hostile environment claims
  - The alleged harassment and abuse, with one exception, occurred between **2009 and 2020**, and Complainants would have understood the University's deliberate indifference to their reports was the cause of their post-reporting injuries, or could reasonably have been expected to inquire further, and hostile environment claim was duplicative of deliberate indifference claim
  - Claim alleging deliberate indifference to violation of no-contact order could proceed, but related hostile environment claim dismissed as none of the allegations connect the deprivation of educational opportunities and benefits to the violation of the non-contact directive

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Owens, et al. v. La. State Univ., 2023 WL 2764760 (M.D. Louisiana, March 31, 2023) (slide 2 of 2)

- Heightened risk claim allowed to proceed
  - It was plausible that, until the investigative report was released, Complainants did not have reason to know the University had specific knowledge of pervasive harassment and heighted risk of sexual assault
  - While Fifth Circuit has not recognized a Title IX heightened risk claim, it has not foreclosed possibility of such a claim in context of student-on-student sexual assault allegations

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V.E. v. Univ. of Md. Balt., 2023 WL 3043772 (D. Maryland, April 10, 2023)

Post-assault deliberate indifference time-barred

Complainant alleged her former romantic partner (who was also a fellow swimming and diving team member) subjected her to a pattern of sexual abuse, harassment, and relationship violence, and that the University did nothing to protect her from continued harassment

- Complainant alleged she was not aware of University's alleged mishandling or attempt to cover up Respondent's assaults and harassment after she reported them until an independent report was released in May 2022
- Court ruled Title IX claim was time-barred under state's 3-year statute of limitations as her claimed accrued no later than the Fall of 2018
- Facts alleged by Complainant different from those in *Snyder-Hill v. Ohio State Univ.* (6th Circuit)
  - Unlike in *Snyder-Hill*, Complainant's allegations are focused on whether University was deliberately indifferent to her report of assault and harassment by Respondent
  - Complainant did not allege her injury arose from University's creation of heightened risk that she would be abused by Respondent by turning a blind eye to notice of Respondent's abuse of others

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Czerwienski v. Harvard University, 2023 WL 2763721
(D. Massachusetts, March 31, 2023) **(slide 1 of 4)**

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Deliberate indifference to professor's alleged history of sexually harassing students

- Female graduate students alleged a prominent male professor sexually harassed and retaliated against them, that professor's behavior was part of a long-term pattern of sexual harassment and retaliation against students, university was aware of his misconduct even before hiring him, and university's long-term failure to address reports of harassment by this professor and other prominent professors in the anthropology department enabled the misconduct
  - **Conduct is alleged to have occurred pre-2020 regs, but formal complaint filed in May 2020**
- Complainants also alleged university's reluctance to investigate complaints in a timely manner, and deficiencies in investigatory process, exacerbated complainant's harm and perpetuated hostile environment for women in graduate anthropology program
- Ruling on university's motion to dismiss, court dismissed Title IX gender discrimination claim, but otherwise allowed the deliberate indifference, state law, negligence, and breach of contract claims to proceed

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Czerwienski v. Harvard University, 2023 WL 2763721
(D. Massachusetts, March 31, 2023) **(slide 2 of 4)**

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- Title IX claims - Timeliness
  - Pre-harassment deliberate indifference claims based on university's response to prior reports of harassment
    - Court ruled these claims were not time-barred – while complainants may have been aware of their harm at the moment when they were subjected to professor's abusive misconduct, no facts were alleged to suggest that at the time of this misconduct, there was any reason to believe the university was at fault
  - Post-harassment claims based on university's alleged failure to adequately respond to complainants own complaints of sexual harassment and retaliation
    - Court ruled that question of when two of the complainant's knew or should have known that university's response to their complaints was inadequate was not clear on face of Amended Complaint and could not be resolved without further development of evidentiary record

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Czerwienski v. Harvard University, 2023 WL 2763721 (D. Massachusetts, March 31, 2023) (slide 3 of 4)

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- **Hostile Environment** - Complainants' allegations were sufficient to state plausible claims for relief under Title IX hostile environment theory based on university's alleged deliberate indifference to sexual harassment
  - Complainants claimed university maintained a policy or practice of deliberate indifference to a known overall risk of sexual harassment, retaliation, and gender-based disparate treatment that placed them at risk of sexual harassment and retaliation by professor
  - First Circuit has not addressed such a claim; Ninth Circuit case on pre-assault claims states plaintiff must plausibly allege school maintained policy of deliberate indifference which created heighted risk of sexual harassment that was known or obvious in a context subject to school's control, and that as a result plaintiff suffered harassment "so severe, pervasive, and objectively offensive that it can be said to [have] deprive[d] the [plaintiff] of access to the educational opportunities or benefits provided by the school."
  - Professor's alleged threats against Complainants were sufficiently severe and pervasive under the circumstances to detract from their educational experiences, and Complainants sacrificed academic goals because of the threats

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Czerwienski v. Harvard University, 2023 WL 2763721 (D. Massachusetts, March 31, 2023) (slide 4 of 4)

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- Retaliation - students stated claim that university engaged in Title IX sex discrimination through deliberate indifference to retaliation against them
  - Complainants' alleged professor engaged in "campaign of retaliation" that sought to disparage Complainants publicly and rally faculty around claim that Complainants complaints were an "attack on freedom"
- Title IX gender discrimination claim
  - Insufficient facts alleged to establish unfairness of university's disciplinary process occurred because of Complainants' gender
- Complainants stated state law breach-of-contract and breach of the duty of good faith and fair dealing based on university's policy on sexual and gender-based harassment

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Czerwienski v. Harvard University, 2023 WL 2647066
(D. Massachusetts, March 27, 2023) **(slide 1 of 2)**

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Failure to get student's consent before obtaining therapy records

- One of the Complainants involved in the Title IX case alleged the University, during its investigation, wrongfully obtained and disseminated Complainant's therapy records without her permission
  - Interviewed the Complainant's therapist after Complainant identified them as a witness
  - Obtained notes from the therapist that were sent to the parties with evidence
- Complainant raised common law and state law privacy claims
- University filed a **Motion for Summary Judgment** on the issue early in the case – denied because more facts were needed during discovery

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Czerwienski v. Harvard University, 2023 WL 2647066
(D. Massachusetts, March 27, 2023) **(slide 2 of 2)**

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Failure to get student's consent before obtaining therapy records

- Policy language provided to student was unclear as to what information would be shared, there was no reference to medical or psychiatric information, and there was no dispute that Complainant did not initial policy provisions or otherwise specifically consent in writing to dissemination of personal medical information
- Court did not resolve whether C.F.R. § 106.45(b)(5), which went into effect Aug. 14, 2020, was binding on University – challenged conduct took place before Aug. 2020, but investigation not concluded until Aug. 2021 – University's knowledge of regulation may be relevant to determining whether University believed it was acting reasonable in obtain/disseminating therapy records without confirming Complainant provided consent

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Radwan v. Manuel, 55 F.4th 101 (2nd Cir., Nov. 30, 2022) (slide 1 of 3)

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Title IX selective enforcement

- Complainant, a women's soccer player on a one-year athletic scholarship, raised her middle finger to a television camera during her team's post-game celebration – the game was being nationally televised
- Complainant was suspended from further tournament games, and her athletic scholarship was terminated mid-year
- On the Title IX claims, the district court **granted summary judgment** in favor of defendants - the Second Circuit reversed – **case will need to be heard by a jury**
- Second Circuit concluded Complainant put forth sufficient evidence to raise a triable issue of fact as to whether she was subject to a more serious disciplinary sanction (termination of her scholarship) because of her gender

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Radwan v. Manuel, 55 F.4th 101 (2nd Cir., Nov. 30, 2022) (slide 2 of 3)

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Disparate treatment:

- Male football player kicked a dead ball into the stands during a game and incurred a 15-yard penalty for "unsportsmanlike conduct" – he was not disciplined
- Both the Complainant and the football player were on full athletic scholarships and engaged in unsportsmanlike conduct while in uniform playing on the field in public, both were first-time offenders, the AD was personally aware of both incidents, and both athletes expressed remorse
- A jury needs to decide whether the novelty of Complainant's conduct, its timing in relation to the game, and the relative level of embarrassment to the University renders the athletes' situations different

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Radwan v. Manuel, 55 F.4th 101 (2nd Cir., Nov. 30, 2022) (slide 3 of 3)

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Disparate treatment (cont.):

- Complainant also pointed to four male basketball players who were sent home early for violating curfew during a tournament in Puerto Rico, but retained their scholarships
- A male soccer player on scholarship was arrested for theft and received a warning and had to participate in a workshop
- Given these facts, a reasonable jury could conclude these athletes were similarly situated to raise inference that, but for her gender, Complainant would not have received more severe punishment of scholarship termination
- Complainant also pointed to internal inconsistencies in the University's justifications for terminating her scholarship, from which a reasonable jury could infer pretext and discriminatory intent

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Luskin v. Univ. of Maryland, College Park, Maryland, 2023 WL 2985121 (4th Cir., April 18, 2023) (slide 1 of 2)

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University not deliberately indifferent to harassment

- Complainant, a Ph.D. student, alleged University's inadequate response to harassment by Respondent violated Title IX
  - University treated report of harassment as a student conduct matter, *not* Title IX (not "on the basis of sex")
- Respondent's harassing conduct included 4 incidents: 1) punching a wall and screaming vulgarities at a group of students, including Complainant; 2) confronting Complainant in their shared office and accusing her of excluding him from the cohort group; 3) texting Complainant asking why she excluded him, why she wore a ring on same finger as Respondent, and asking her questions about the relationship she was in; and 4) violating a no-contact order by angrily confronting Complainant about the order
- University filed a **Motion for Summary Judgment,** which was granted and affirmed by the Second Circuit

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Luskin v. Univ. of Maryland, College Park, Maryland, 2023 WL 2985121 (4th Cir., April 18, 2023) (slide 2 of 2)

- Second Circuit agreed with district court that the harassment was based on Complainant's sex and was severe and pervasive
- Disagreeing with district court, Second Circuit concluded the harassment deprived Complainant of educational opportunities or benefits as she altered her academic pursuits because of it, delaying her Ph.D. by at least one year and switching to online Ph.D. program
- But, even if University should have categorized the harassment as sex-based, the University's response was not clearly unreasonable
  - University quickly responded to each incident; contacted Respondent's professors to ask about his behavior; contacted Complainant about moving her office (she had already moved); issued no-contact order within two days of text message incident; and following no-contact order violation had Respondent agree to psychiatric evaluation, transitioned Respondent to online classes for any classes he had with Complainant, and placed him on disciplinary suspension
  - Fact that University did not suspend or expel Respondent does not establish deliberate indifference where University responded swiftly and reasonably to the complaints

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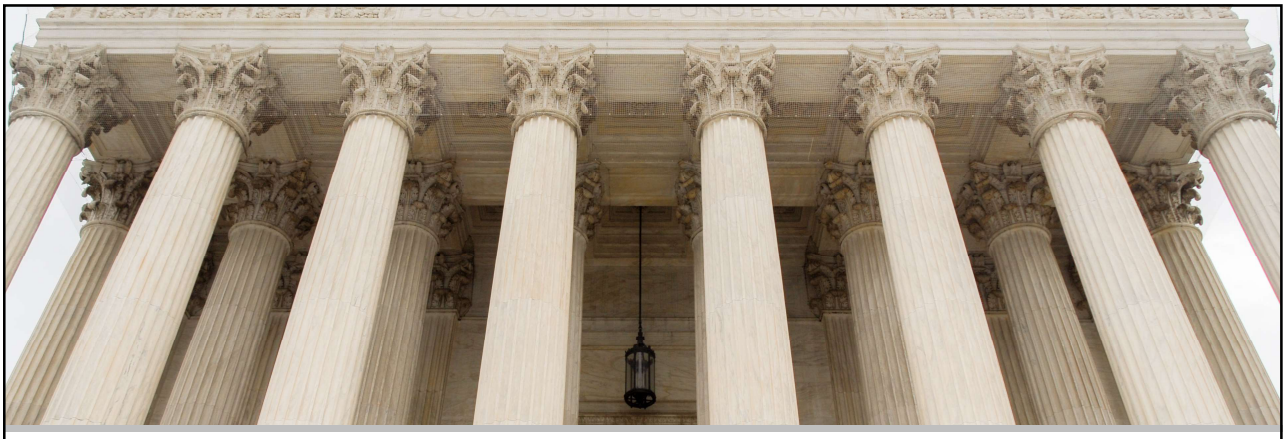

Cases Brought by Student Respondents

Doe v. Stonehill College, Inc., 55 F.4th 302 (1st Cir., Dec. 14, 2022) (slide 1 of 4)

Prejudicial investigative flaws support breach of contract allegations, but not Title IX violation

- Male student respondent expelled for violating private college's sexual misconduct policy by engaging in nonconsensual sexual intercourse
- Respondent alleged college's process was unfair and biased – asserted state law breach of contract claims and Title IX sex discrimination
- Respondent alleged multiple procedural errors in the investigation denied him fair and thorough process promised by college's sexual misconduct policy, and that flaws in the proceedings resulted from sex bias of college's investigators and administrators
- District court granted college's motion to dismiss for failure to state a claim
- On appeal, First Circuit reversed in part, affirmed in part

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Doe v. Stonehill College, Inc., 55 F.4th 302 (1st Cir., Dec. 14, 2022) (slide 2 of 4)

— Respondent asserted plausible breach-of-contract claim based on his reasonable expectations under college's policy

- Opportunity to review all relevant facts: Investigators' emphasis on an exchange between Complainant and a witness as corroboration of Complainant's account of the incident, that Respondent was not given an opportunity to review and respond to, denied Respondent the opportunity to investigate and possibly challenge the comment's accuracy
- Notice of witness interviews: Policy language may reasonably be read to promise advance notice of witness interviews, and investigators' failure to provide Respondent with advance notice that they were conducting 2nd interview with Complainant, breached the contract and plausibly harmed Respondent's defense

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Doe v. Stonehill College, Inc., 55 F.4th 302 (1st Cir., Dec. 14, 2022) (slide 3 of 4)

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- Fair and thorough investigation:
  - Part 1 of investigation report omitted the description of the alleged misconduct, supporting Respondent's view that investigator's initially complied with Complainant's desire not to inquire into details of the sexual encounter, thereby failing to adequately probe veracity of most important part of Complainant's account
  - Investigators failed to verify Complainant's level of intoxication – determining whether Complainant had or had not been drinking would have been significant, and Complainant's credibility may have been damaged if it was determined she had not been drinking
  - Investigators' failure to accurately describe Complainant's failure to disclose highly relevant information about her prior sexual activity with Respondent, or of how investigators elicited a "clarification" from Complainant on this point, could have affected administrators' credibility assessment
  - Investigator's failed to offer any rationale for rejecting Respondent's characterization of Snapchat messages he sent to Complainant, despite corroborated evidence supporting Respondent's rationale, suggesting a "a deficiency in the weighing of the competing evidence that plausibly may have affected both the finding of a violation and, as discussed below, the decision of Stonehill's administrators to expel Doe"
- AVPSA's deference to investigators supports Respondent's allegation that AVPSA failed to conduct independent review of facts

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Doe v. Stonehill College, Inc., 55 F.4th 302 (1st Cir., Dec. 14, 2022) (slide 4 of 4)

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— Selective enforcement: Respondent did not plausibly that college's decision to initiate disciplinary proceedings was the result of sex-based bias
  - Respondent could not rely on assertion that virtually all accused students are male, and provided no other support for bias claim

— Erroneous outcome: While Respondent's complaint plausibly alleged articulable doubt on result of disciplinary proceedings, he did not plausibly allege the flaws were due to sex bias
  - Deference to Complainant, without more, does not show her treatment was attributable to sex bias
  - Disciplinary process was not as inexplicably and egregiously one-sided as in cases where courts have found reasonable inference of sex bias
  - Link between external pressures and Respondent's disciplinary proceedings too weak to create plausible inference that sex bias played a role

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Doe v. William March Rice Univ.,

2023 WL 3373316 (5th Cir., May 11, 2023) **(slide 1 of 4)**

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Erroneous outcome, selective enforcement, and archaic assumptions

Respondent was disciplined and lost his football scholarship based on allegations that he failed to clearly disclose to Complainant that he had herpes before engaging in unprotected sex.

- District court granted University's motion for summary judgment and dismissed Doe's suit, finding Respondent's Title IX claim failed to raise genuine issue of material fact, and university code and policy did not create implied contract.
- 5th Circuit Court of Appeals reversed in part and remanded Title IX claims remanded for further proceedings.
- 5th Circuit agreed with district court on breach of contract claim

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Doe v. William March Rice Univ.,

2023 WL 3373316 (5th Cir., May 11, 2023) **(slide 2 of 4)**

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Title IX claims - deficient due process procedures consistent with overarching claims of gender bias

- Evidence of gender bias includes prohibiting Respondent from coming onto campus before he had a chance to present his side story, treating Respondent as guilty and as a threat to University until he "participated" in investigation without advice of counsel
- Respondent's lawyer was not allowed to participate in process or view documents in disciplinary file
- Resource navigator assigned to Respondent also met with Complainant and a police officer to take Complainant's statement and may have had a conflict of interest
- University ignored as "irrelevant" Complainant's credibility issues raised by Respondent
- University failed to clearly notify Respondent of Complainant's charges, leading Respondent to defend against claim of failing to disclose herpes diagnosis
- Respondent was found to have informed Complainant of diagnosis, but was sanctioned anyway for failing to fully inform Complainant of the risks of having sex with a herpes carrier, even though student code does not have such a rule

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Doe v. William March Rice Univ.,

2023 WL 3373316 (5th Cir., May 11, 2023) **(slide 3 of 4)**

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Erroneous outcome

- District court concluded University's decision was based on unrebutted evidence about the encounter found in text messages, not Respondent's gender
- 5th Circuit disagreed, concluding record supported Respondent's argument that Complainant knew about Respondent's herpes, had unprotected sex with him anyway, and may have already had herpes
- Respondent was kicked off campus for not disclosing his herpes but Complainant was immunized for the same conduct
- Respondent was ultimately sanctioned with what amount to an expulsion for failing to inform Complainant of all the risk of having sex with a herpes carrier despite code of conduct not including such a requirement and immunizing Complainant for doing the same thing
- Complainant consistently misrepresented facts and changed her story
- In light of this evidence, material fact issues remain concerning whether University reached erroneous outcome

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Doe v. William March Rice Univ.,

2023 WL 3373316 (5th Cir., May 11, 2023) **(slide 3 of 3)**

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Selective enforcement

- Material fact question exists as to whether University selectively enforced policies against Respondent based on University's refusal to investigate whether Complainant already had herpes and failed to warn Complainant because they "did not have a report about [Complainant]."

Archaic assumptions

- Based on text message exchanges, Complainant appeared to be more knowledgeable about herpes transmission than Respondent
- Rational juror could conclude that by absolving Complainant of responsibility for her own risk-assessments and placing that burden on her male partner, University acted on archaic assumptions

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Doe v. University of Virginia, 2023 WL 2873379 (W.D. Virginia, April 10, 2023) (slide 1 of 2)

Respondent not similarly situated to Complainant for purposes of Equal Protection claim, but Title IX claim alleging procedural irregularities allowed to proceed

- Equal Protection Claim
  - Respondent argued he was treated differently than Complainant throughout the Title IX process, in violation of Equal Protection Clause
  - To state equal protection claim, Respondent must plead facts demonstrating he was treated differently from others who were "similarly situated" as a result of discriminatory animus
  - Court cited Eighth Circuit and other Virginia district court decisions and ruled Respondent and Complainant were not similarly situated for purposes of an equal protection claim
- Due Process Claim dismissed
  - Respondent did not allege he lost employment in addition to damage to his reputation, and did not have a legal right to attend a public university under Virginia law

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Doe v. University of Virginia, 2023 WL 2873379 (W.D. Virginia, April 10, 2023) (slide 2 of 2)

- Respondent's Title IX discrimination claim allowed to proceed
- Taking allegations as true, Respondent sufficiently alleged evidence of procedural irregularities and insufficient evidence to support inference of sex discrimination
  - Alleged University gave preferential treatment to female accuser throughout investigation and adjudication proceedings
    - Did not interview Respondent's witnesses or other party accused of assault
    - Refused to consider his polygraph results without reviewing scientific literature
    - Did not permit Respondent to meaningfully challenge testimony during review panel hearing
    - Ignored inconsistent statements made by his accuser
    - Found accuser was incapacitated despite significant contradictory evidence
    - Investigator stated she "could go on and on and on as to [her] opinions [about the parties] but that may not be fair to [Plaintiff]"
  - Also alleged University was under pressure from Dept. of Education letter that found University violated Title IX by not sufficiently addressing complaints of sexual assault and harassment

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Doe v. The Coll. of N.J.,

2023 WL 2812362 (D. New Jersey, April 6, 2023) **(slide 1 of 3)**

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Procedural irregularities and external pressures

- Following his graduation, Respondent was found responsible for sexual assault and harassment and sanctioned with retroactive two-year suspension that appears on his transcript
- Ruling on Motion to Dismiss – accepting well-pleaded allegations as true and construing factual allegations in light most favorable to plaintiff (the Respondent)
- Court denied MTD, finding Respondent sufficiently alleged facts raising plausible inference of gender bias

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Doe v. The Coll. of N.J.,

2023 WL 2812362 (D. New Jersey, April 6, 2023) **(slide 2 of 3)**

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Alleged procedural flaws in investigation and enforcement process supporting plausible inference of discrimination include:

- Not providing Respondent with proper notice of Complainant's allegations and not notifying him of Complainant's initial complaint until 3 years later
- Failing to ask Complainant any questions that would challenge her credibility, including questions regarding her evidence or motives
- Failing to question Complainant about her inconsistent statements throughout investigation
- Failing to take Respondent's statements of innocence into account in rendering decision
- Failed to apply preponderance of evidence standard, and made decision that went against the weight of evidence
- Refused to provide Respondent opportunity to be heard once Respondent obtained appropriate advisor despite his requests in his appeal before sanction became final
- Failed to consider Complainant did not bring a complaint until she began dating someone that she did not want to learn of her encounter with Respondent

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Doe v. The Coll. of N.J.,

2023 WL 2812362 (D. New Jersey, April 6, 2023) **(slide 3 of 3)**

- Alleged external pressures, along with alleged procedural flaws, were sufficient to state Title IX claim
- Respondent's claim against University' President not barred by Eleventh Amendment sovereign immunity because relief sought was for prospective injunctive (expungement of Respondent's disciplinary record)

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Doe v. Princeton Univ.,

2023 WL 1778832 (D. New Jersey, Feb. 6, 2023)

External pressures, disparate treatment, and selective enforcement

- Former student suspended for violating University's sexual misconduct policy
- Court denied University's and other defendants' motion to dismiss erroneous outcome and selective enforcement Title IX claims
- Construed in light most favorable to Respondent, allegations of disparate treatment and selective enforcement, combined with allegations related to external pressures and facts alleged in 7th Circuit *Univ. of Sciences* decision, support plausible claim of sex discrimination
- Court gave greatest weight to fact that Respondent shared with Title IX administrator an occasion where he was intoxicated, woke up the next morning with Complainant in his bed, had no memory of going to bed with Complainant, and "numerous witnesses saw Roe pursuing Doe while he was extremely intoxicated and incapacitated by alcohol."

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Cephus v. Blank, 2023 WL 17668793 (W.D. Wisconsin, Dec. 14, 2022)

External pressures, disparate treatment, and selective enforcement

Former student-football player was expelled for sexually assaulting two female students while they incapacitated by alcohol, but was reinstated after additional evidence came to light following his acquittal on criminal charges.

- Title IX claim – facts alleged, if true, raise plausible inference that University discriminated against Respondent because of his sex
  - Respondent pointed to 2011 DCL and multiple OCR investigations underway at University at the time of the events, and 7th Circuit controlling precedent has recognized these and related background events are relevant in evaluating plausibility of Title IX sex discrimination claims
  - Respondent alleged some University programs and staff equated "victims" with "women" and "perpetrators" with "men; "Don't Be That Guy" campaign, reports, and training programs allegedly depicted males as the sole perpetrators of sexual assault; and educational programs blamed men and masculinity for sexual assault
  - The above generalized information, combined with allegations that the University treated Respondent differently during the investigation because of his sex, support an inference of sex-bias
- Due process claim – no evidence he was deprived of a liberty interest protected by U.S. Constitution as he was ultimately able to pursue a career in the NFL

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Doe v. Va. Polytechnic Inst. & State Univ., 2023 WL 2188737 (W.D. Virginia, Feb. 23, 2023)

Title IX discrimination and retaliation; due process

Plaintiff alleged his graduate advisor denied him a research stipend and gave it a to female, and responded to Plaintiff's question about the grant by stating "[W]ho can resist a Persian princess?" Plaintiff also alleged that after he reported advisor's conduct, the advisor retaliated against him.

Around the same time, Plaintiff was accused of sexual assault and was expelled after being found responsible.

- Title IX discrimination claim against University – Plaintiff plausibly alleged he was denied grant funding because of his sex based on advisor's "princess" comment for purposes of motion to dismiss
- Title IX Hostile environment – allegations that advisor met with female students but ignored Plaintiff's requests to meet not sufficient to state plausible claim
- Retaliation – allegations that after Plaintiff reported advisor, the advisor purposely created unnecessary obstacles that impeded Plaintiff's ability to finish his degree, was sufficient to survive MTD
- Procedural due process claim dismissed – alleged property interest in continued enrollment at University was conclusory

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Zonshayn v. Sackler Sch. Of Med. (N.Y.),

2023 WL 24379 (S.D. New York, Jan. 3, 2023)

Bricker Graydon

Title IX does not apply extraterritorially

Respondent was a student at a University located in Israel and was enrolled in the University's American Medical Program. Respondent was accused sexual misconduct, and while the investigation was proceeding, Respondent filed suit for claims including injunctive relief and damages under Title IX.

- While the Court found it could exercise personal jurisdiction over the claims, it dismissed the Title IX claim.
- Title IX applies only to domestic conduct: "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 education program or activity receiving Federal financial assistance."
- Facts alleged did not warrant domestic application of Title IX – the alleged misconduct occurred in Israel, disciplinary proceedings were conducted in Israel by Israeli faculty, and no New York-based employees played a role in the disciplinary process

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Cases brought by Employees

Lashley v. Spartanburg Methodist College, 2023 WL 2977754 (4th Cir., April 18, 2023)

College did not terminate professor in retaliation for professor raising Title IX complaints on behalf of students

- Professor alleged she was terminated in retaliation for Title IX complaints she raised on behalf of students, and for engaging in ADA-protected activity
- Court applied Title VII framework to Title IX claims, and found record contained ample evidence that College had legitimate reasons to not renew professor's contract
- Professor failed to establish that College's proffered reasons were a pretext for unlawful Title IX or ADA retaliation
  - No evidence primary decision makers were aware of professor's Title IX protected activity
  - Professor helped students file Title IX complaints in fall of 2017, yet she was extended a separate contract to teach an additional class in January 2018
  - College's explanations were consistent – record lacked any evidence of deviation that would suggest college's reasons were pretextual

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Goldblum v. Univ. of Cincinnati, 62 F.4th 244 (6th Cir., March 10, 2023) (slide 1 of 2)

Letter to College newspaper was not activity protected from Title IX retaliation

- University asked Title IX Coordinator to resign after she sent letter to university's student newspaper despite being directed not to. The letter addressed a controversy about a student who was a classified sex offender.
- Coordinator alleged her forced resignation was retaliatory in violation of Title IX.
- **District court granted university's motion for summary judgment. On appeal, Sixth Circuit affirmed.**
- University cited two non-retaliatory reasons for asking Coordinator to resign, and Coordinator failed to demonstrate its reasons were pretext for discrimination.

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Goldblum v. Univ. of Cincinnati,

62 F.4th 244 (6th Cir., March 10, 2023) **(slide 2 of 2)**

- Coordinator's letter to newspaper wasn't protected activity because it didn't complain of sex discrimination –
  - It did not specifically accuse University of intentional discrimination based on sex - "at most, the letter hints at UC's possible failure to provide the appropriate resources required by Title IX's implementing regulations."
  - It was not sent to an official authorized to address the controversy and institute corrective measures.
- Title IX coordinator cited no authority for her argument that a coordinator cannot be insubordinate
- Coordinator's argument that University asked her to resign to prevent her from discovering systemic issues with University's admissions process also failed
  - University never opposed Coordinator's independent investigation and largely shared and addressed her concerns
  - Coordinator created an investigation file but made no findings, took no notes, and logged no investigative work during the month before her employment ended

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Graham v. State Univ. of New York at Albany, 2023 WL 28076

(2nd Cir., Jan. 4, 2023) **(slide 1 of 2)**

Disagreement with University's decision to eliminate women's tennis team did not establish that decision was pretext for discrimination

- Former women's varsity tennis coach, whose contract was not renewed after the University disbanded the team, brought a Title IX claim for gender discrimination because of the disbanding of the program
- University filed a **Motion for Summary Judgment**, which was granted and affirmed
  - Even if statistics showing a persistent gender-based disparity in athletic opportunities for women sufficed as proof that the University intended to discriminate against female athletes, University stated non-discriminatory reasons for disbanding women's team: the team did not have a competitive conference in which to participate after the athletic conference ceased sponsoring women's tennis

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Graham v. State Univ. of New York at Albany, 2023 WL 28076 (2nd Cir., Jan. 4, 2023) (slide 2 of 2)

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Disagreement with University's decision to eliminate women's tennis team did not establish that decision was pretext for discrimination

- (Cont.)
  - University could not identify other viable alternatives, so decided to divert women's tennis resources to other women's athletic programs
  - Testimony of coach "evidences merely his disagreement with the University's decision to terminate the team, not that the decision was a pretext for discrimination."
- Student-plaintiffs either graduated or were no longer eligible to participate in varsity athletics, and because they sought only prospective injunctive relief, their claims were moot

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Conviser v. DePaul Univ., 2023 WL 130483 (N.D. Illinois, Jan. 9, 2023) (slide 1 of 2)

Bricker Graydon

Contractor had standing to pursue Title IX claims

- Plaintiff, an independent contractor, brought Title IX claims against DePaul University when it stopped referring sports psychology patients to her shortly after she reported sex discrimination in the athletic program.
- University filed a **Motion to Dismiss**
- The issue before the court was whether independent contractors have standing to bring employment-related Title IX claims
- Court held that Plaintiff's claims were within the "zone of interests" protected by Title IX – which gave Plaintiff standing to sue

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Conviser v. DePaul Univ., 2023 WL 130483 (N.D. Illinois, Jan. 9, 2023) (slide 2 of 2)

Bricker Graydon

Contractor had standing to pursue Title IX claims

- "Zone of interests" protected by Title IX –Court considered the purpose of Title IX as articulated in *Jackson v. Birmingham Board of Education*
  - (1) prohibiting a funding recipient from subjecting a person to discrimination
  - (2) provides individuals with protection against discriminatory practices
- Plaintiff's interests in this case (to be free from retaliation for protected activity under Title IX) are among the interests protected by Title IX
- Case will be allowed to proceed

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U.S. Supreme Court

Health and Hospital Corporation of Marion County v. Talevski, No. 21-806 (U.S. Supreme Court)

Bricker & Eckler ATTORNEYS AT LAW

Does the Spending Clause give rise to privately enforceable rights under Section 1983?

Oral arguments held Nov. 8, 2022 in case addressing whether, in light of compelling historical evidence to the contrary, the Court should reexamine its holding that Spending Clause legislation gives rise to privately enforceable rights under Section 1983.

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TIX Other Cases

B.P.J. v. West Virginia State Bd. of Educ., 2023 WL 111875 (S.D. West Virginia, Jan. 5, 2023)

West Virginia law barring transgender student from participating on girls' track team on hold pending appeal

A transgender girl entering middle school was told she would not be able to join the girls' track team because of a recently enacted state law that prohibits "biological males" from participating on girls' sports teams. Initially, the court granted a preliminary injunction prohibiting enforcement of the law. However, ruling on a motion for summary judgment, the court dissolved the injunction and held the law was constitutional and complied with Title IX.

- This decision was appealed to the Fourth Circuit Court of Appeals on Feb. 6, 2023. On Feb. 22, 2023, a panel of the Fourth Circuit stayed the district court's Jan. 5 order dissolving its preliminary injunction pending appeal.
- On March 9, 2023, West Virginia filed with the U.S. Supreme Court an application to vacate the injunction. The Supreme Court denied the application on April 6, 2023.

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Adams v. School Board of St. Johns County, 2022 WL 18003879 (11th Cir., Dec. 30, 2022)

Transgender restroom policy did not violate Title IX

- School policy prohibited transgender student from using boys' restroom
- A panel of the 11th Circuit Court of Appeals ruled this policy violated Title IX and equal protection
- Petition for en banc hearing was granted, and in Dec. 2022, 11th Circuit reversed, holding that separating school bathrooms based on biological sex did not violate Title IX or the Equal Protection Clause of the Fourteenth Amendment.
- The court noted "Title IX, unlike Title VII, includes express statutory and regulatory carve-outs for differentiating between the sexes when it comes to separate living and bathroom facilities, among others."

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Soule v. Connecticut Ass'n of Schools, 2022 WL 17724715 (2nd Cir., Dec. 16, 2022)

Bricker Graydon

Cisgender student athletes request for injunctive relief denied

Cisgender athletes alleged athletic conference's transgender participation policy violated Title IX and asked the court to order injunctions to enjoin future enforcement of the transgender participation policy and to alter records to remove records achieved by two transgender girls

- 2nd Circuit ruled plaintiffs did not have standing as they did not allege an "injury in fact"
- Two theories advanced by plaintiffs – that policy denied them the "chance to be champions" and future employment opportunities
- Court determined policy did not deprive the cisgender athletes a *chance* to be champions (they often were champions in various events), and an injunction to revise records would not redress the alleged deprivation of a chance to be a champion
- While it is true employers often find candidates with athletic experience appealing, it was speculative that altering the records would improve the athletes' prospects for employment
- Conference was not on notice that its policy would violate Title IX, so claims for money damages are barred

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State of Tennessee v. U.S. Dept. of Educ., 2022 WL 2791450 (E.D. Tenn., July 15, 2022)

Bricker Graydon

U.S. ED Title IX interpretation in light of *Bostock* enjoined

- Blocked implementation of non-regulatory application of *Bostock* to Title IX through executive orders and guidance
- Applies in 20 states: Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia
- *Appealed to 6th Circuit Sept. 13, 2022 (No. 22-5807).*
- *Argued in 6th Circuit April 26, 2023.*

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Snyder-Hill v. Ohio State Univ., 48 F.4th 686 (6th Cir., Sept. 14, 2022) (slide 1 of 2)

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Title IX Statute of Limitations

- Refresher - Former university physician and athletic team doctor allegedly abused hundreds of young men during medical examinations between 1978 and 1998. Allegations became public in 2018. Former students and several non-student plaintiffs alleged University was deliberately indifferent to their heightened risk of abuse and filed suit under Title IX. District court ruled claims barred by statute of limitations.
- Reversing district court, a panel of the Sixth Circuit found students adequately alleged "that they did not know and could not reasonably have known that Ohio State injured them until 2018."
- Sixth Circuit denied Petition for Rehearing En Banc on Dec. 14, 2022

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Snyder-Hill v. Ohio State Univ., 48 F.4th 686 (6th Cir., Sept. 14, 2022) (slide 2 of 2)

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Petition for a writ of certiorari filed March 14, 2023 (No. 22-896). Questions presented:

1. Whether, or to what extent, a Title IX claim accrues after the date on which the alleged injury occurred.
2. Whether, or to what extent, Title IX's implied private right of action extends to individuals who are not current or prospective students or employees.

U.S. Supreme Court has not yet decided whether to hear this case.

- Related case – *Ohio State University v. Edward Gonzales* (No. 22-897) asking the Supreme Court to consider "Whether, or to what extent, a claim under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, accrues after the date on which the alleged injury occurred."

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TIX and Religious Institutions

Hunter v. United States Dept. of Educ., 2023 WL 172199 (D. Oregon, Jan. 12, 2023)

Bricker Graydon

Title IX religious exemption

Forty LGBTQ+ students, who attended religious colleges and universities, challenged U.S. Dept. of Education's application of the religious exemption in Title IX.

- Court dismissed the case for failure to state a claim
- Equal protection – no evidence Congress had discriminatory motivation when it enacted the religious exemption, and statute passed intermediate scrutiny as exemption was substantially related to government's objective of accommodating religious exercise
- Establishment Clause – the religious exemption prevented excessive government entanglement religion – without an exemption the Department "must scrutinize religious schools' compliance with the anti-discrimination policies of Title IX, even if such compliance would conflict with the schools' religious tenets"
- First Amendment – no facts alleged established connection between Department's provision of funding to schools and a free speech violation

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Upcoming Events

Higher Education CLE Webinar Series Presented by Bricker Graydon and Southern Illinois University School of Law

Thursday, June 1, 2023 - Thursday, June 22, 2023
1:00 PM to 2:00 PM (EST)
Webinar

AICUO 2023 Collaborative Conference

Thursday, June 8, 2023
9:00 AM to 4:00 PM (EST)
The Point at Otterbein University

Bricker Graydon

www.bricker.com/events
Twitter: @BrickerHigherEd

Melissa Carleton

MCarleton@brickergraydon.com

614.227.4846

www.brickergraydon.com

Jessica Galanos

JGalanos@brickergraydon.com

614.227.2341

www.brickergraydon.com

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