National Association of College and University Attorneys

Presents:

Respondent Litigation in Sexual Misconduct Matters: Lessons Learned from Recent Cases

Webinar

November 30, 2016

12:00 PM – 2:00 PM Eastern
11:00 AM – 1:00 PM Central
10:00 AM – 12:00 PM Mountain
9:00 AM – 11:00 AM Pacific

Presenters:

Lucy France
University of Montana

Scott Roberts
Hirsch Roberts Weinstein LLP

Josh Whitlock
McGuire Woods LLP

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RESPONDENT LITIGATION IN SEXUAL MISCONDUCT MATTERS: LESSONS LEARNED FROM RECENT CASES

SPEAKER BIOGRAPHIES

Lucy France is the legal counsel for the University of Montana. She has held that position since March 2013. She first joined the University in 2008 as the Director of Equal Opportunity & Affirmative Action. Before coming to the University, Lucy was in private practice for 13 years with the law firm of Garlington, Lohn & Robinson, in Missoula. She developed an expertise in discrimination and employment law. Lucy has taught employment law as an adjunct professor at the University of Montana School of Law. Lucy has helped guide the University of Montana through Office for Civil Rights and U.S. Department of Justice compliance reviews and investigations regarding Title IX and Title IV, as well as Section 504 of the Rehabilitation Act and Title II of the ADA regarding electronic and information technology access. She has helped the University create a new affirmative action plan, conduct a Title IX athletics audit and create a University diversity strategic plan. She obtained her B.A. at the University of California, Berkeley and her J.D. from the University of Montana School of Law.

Scott Roberts is the co-managing partner of Hirsch Roberts Weinstein LLP in Boston, where he provides counsel to colleges and universities on faculty and student issues. Scott has successfully defended college and university clients in multiple lawsuits and agency actions involving claims of discrimination, defamation, and claims by students expelled for sexual misconduct. Scott also serves an independent investigator and fact-finder for complaints of sexual misconduct against students and faculty, and he has conducted over a dozen investigations in the past year alone. Scott is a frequent lecturer at seminars for institutions of higher education, including several presentations at NACUA, and has provided training to colleges and universities on Title IX compliance and best practices for investigations. Scott has been selected for inclusion in the Best Lawyers in America in four areas, including Education Law and Labor and Employment Litigation.

Josh Whitlock is a Partner in the Charlotte office of McGuireWoods. He practices primarily in the areas of higher education and commercial litigation and regularly defends and counsels colleges and universities in connection with a variety of issues, including Title IX, ADA, Section 504, FERPA, Title VII, and program integrity rules compliance and student lending, student discipline, tenure and general employment matters. Mr. Whitlock has handled numerous OCR, FSA, and EEOC investigations and defended schools against a broad range of claims from students, parents, and employees. In the Title IX context, Mr. Whitlock routinely assists schools with the drafting, revision, implementation, and application of sexual misconduct policies and procedures and defends them against sexual misconduct-related complaints and claims. Additionally, he frequently makes presentations and publishes articles regarding Title IX compliance and campus sexual misconduct. He served as Chair of the North Carolina Bar Association Education Law Section, annually helps teach the Higher Education Practicum at the Washington and Lee University School of Law, and was named a North Carolina Super Lawyers Rising Star in Schools & Education Law in 2013, 2014, 2015, and 2016.

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ATTENDANCE RECORD

Organization: _____

All participants are asked to sign-in, but if you are an attorney applying for Continuing Legal Education credits (CLEs), you ***must*** sign this attendance sheet to verify your attendance at this seminar. After completion, please return this form to NACUA (clecredit@nacua.org). ***Total CLE Credits = 120 minutes**

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NACUA WEBINAR SERIES

WEDNESDAY, NOVEMBER 30, 2016

RESPONDENT LITIGATION IN SEXUAL MISCONDUCT MATTERS: LESSONS LEARNED FROM RECENT CASES

CERTIFICATE OF ATTENDANCE

- **Attorneys from Connecticut, Maryland, Massachusetts, Michigan, South Dakota or the District of Columbia:** These jurisdictions do not have CLE requirements and therefore require no report of attendance or filing.
- **Attorneys from California, Illinois, New Jersey, New York or Tennessee:** Do not return this form to NACUA. Please keep this form for your records to submit directly to your state CLE commission or in case your state bar audits you for CLE compliance. Please also remember to sign the site roster, indicating your attendance, before you leave.
- **Attorneys from all other states:** Please complete and return this form no later than TODAY to NACUA (clecredit@nacua.org). Please also remember to sign the site roster, indicating your attendance, before you leave.

NACUA certifies that this program has been presumptively approved and conforms to the standards prescribed by the rules and regulations of the State Bars of AZ, AR, CA, CO, DE, HI, MO, NV, NH, NJ, NM, RI, VT, WV and WY. NACUA will apply for CLE credits from the following states: AL, AK, FL, GA, ID, IL, IN, IA, KY, LA, ME, MN, MS, MT, NC, ND, OK, OR, SC, TN, TX, UT, VA, WA and WI)

NACUA certifies that the New York Approved Jurisdiction policy may apply to this program. New York attorneys may apply CLE credit from one of the approved jurisdiction states towards their NY CLE requirement. For more information and to review the policy, please visit www.nycourts.gov/attorneys/cle/approvedjurisdictions.shtml.

Note: Restrictions vary state by state and not all states will accredit this virtual seminar.

Upon receipt of this certificate of attendance and your site roster, NACUA will process the credits through the applicable state if approved.

CERTIFICATION

By signing below, I certify that I attended the above activity and request 120 minutes of CLE credits.

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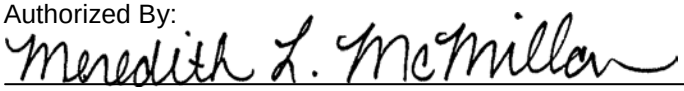
(For NY Attorneys Only)

Authorized By:



Meredith McMillan, CMP
NACUA: Meetings and Events Planner


NACUA NOVEMBER 2016 WEBINAR
Respondent Litigation in Sexual Misconduct Matters:
Lessons Learned from Recent Cases
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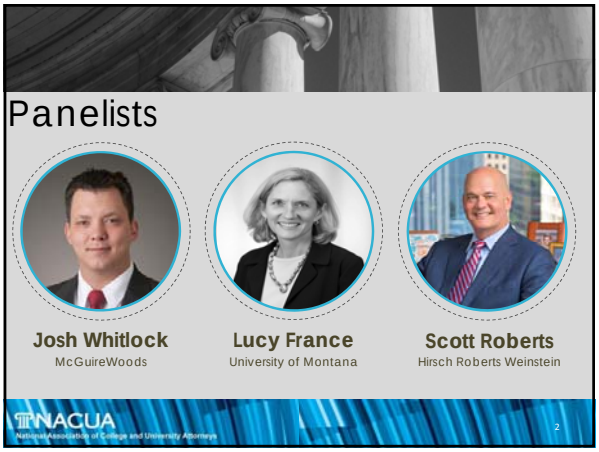
Webinar


Panelists
Josh Whitlock
McGuireWoods
Lucy France
University of Montana
Scott Roberts
Hirsch Roberts Weinstein
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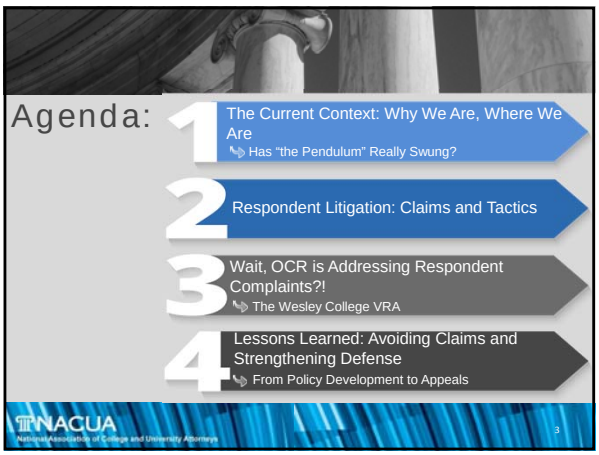
Agenda:
1
The Current Context: Why We Are, Where We Are
Has "the Pendulum" Really Swung?
2
Respondent Litigation: Claims and Tactics
3
Wait, OCR is Addressing Respondent Complaints?!
The Wesley College VRA
4
Lessons Learned: Avoiding Claims and Strengthening Defense
From Policy Development to Appeals
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Why We Are, Where We Are, and Has "the Pendulum" Really Swung?
Protect students from harm
Treat all students fairly
Hold students accountable for sexual misconduct
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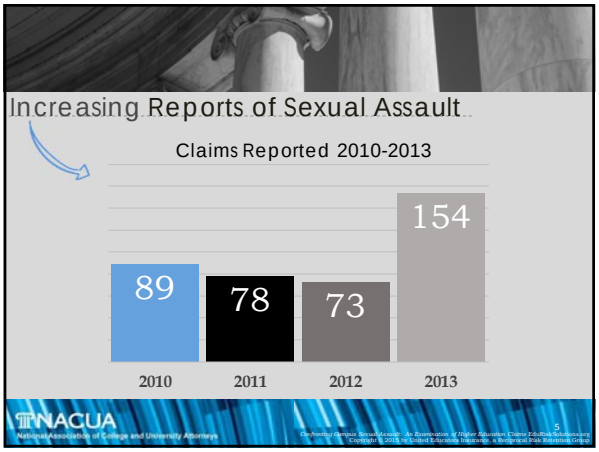
Increasing Reports of Sexual Assault
Claims Reported 2010-2013
89
78
73
154
2010
2011
2012
2013
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Respondent Outcomes - Severe
45 % RESPONSIBLE
43% EXPELLED
25% SUSPENDED > 1 YEAR
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Respondent Litigation On the Rise

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By the Numbers

At least 246 ongoing OCR Title IX investigations at 195 postsecondary institutions

One resolution of a complaint filed by a respondent with OCR finding that a college violated Title IX rights of accused students

Over 50 reverse Title IX lawsuits filed against higher education institutions in 2014 and 2015

Since March of 2014, at least 20 favorable results for respondent plaintiffs in reverse Title IX lawsuits

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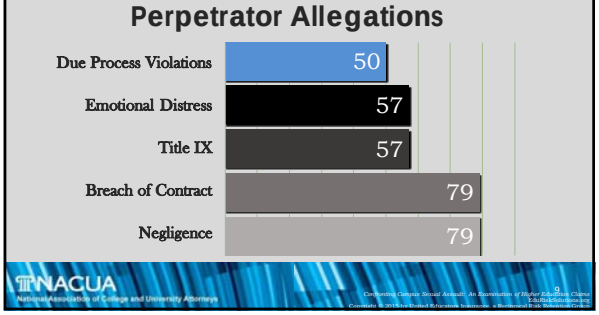
Respondent Claims



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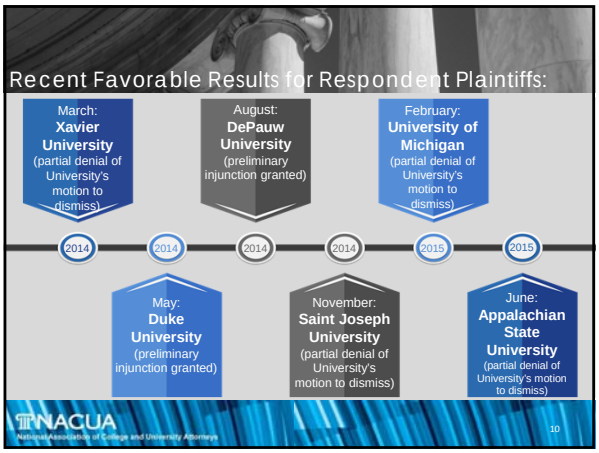
Recent Favorable Results for Respondent Plaintiffs:
March: Xavier University (partial denial of University's motion to dismiss)
August: DePauw University (preliminary injunction granted)
February: University of Michigan (partial denial of University's motion to dismiss)
2014
2014
2014
2014
2015
2015
May: Duke University (preliminary injunction granted)
November: Saint Joseph University (partial denial of University's motion to dismiss)
June: Appalachian State University (partial denial of University's motion to dismiss)
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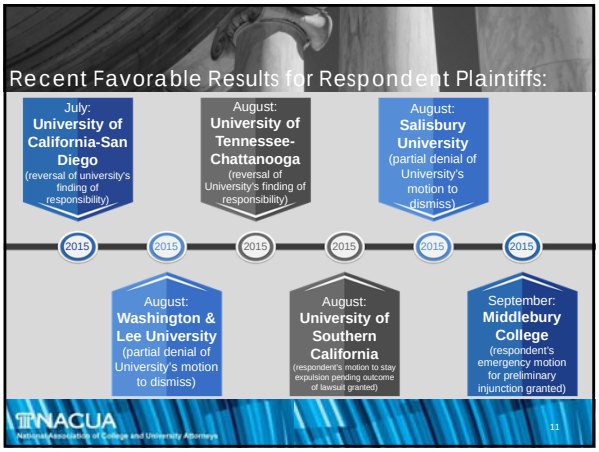
Recent Favorable Results for Respondent Plaintiffs:
July: University of California-San Diego (reversal of university's finding of responsibility)
August: University of Tennessee-Chattanooga (reversal of University's finding of responsibility)
August: Salisbury University (partial denial of University's motion to dismiss)
2015
2015
2015
2015
2015
2015
August: Washington & Lee University (partial denial of University's motion to dismiss)
August: University of Southern California (respondent's motion to stay expulsion pending outcome of lawsuit granted)
September: Middlebury College (respondent's emergency motion for preliminary injunction granted)
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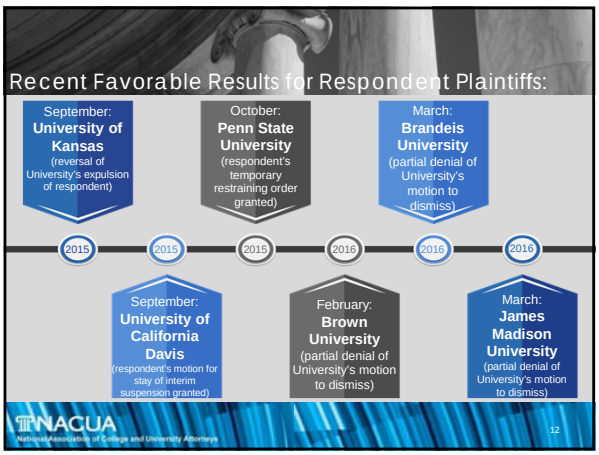
Recent Favorable Results for Respondent Plaintiffs:
September: University of Kansas (reversal of University's expulsion of respondent)
October: Penn State University (respondent's temporary restraining order granted)
March: Brandeis University (partial denial of University's motion to dismiss)
2015
2015
2015
2016
2016
2016
September: University of California Davis (respondent's motion for stay of interim suspension granted)
February: Brown University (partial denial of University's motion to dismiss)
March: James Madison University (partial denial of University's motion to dismiss)
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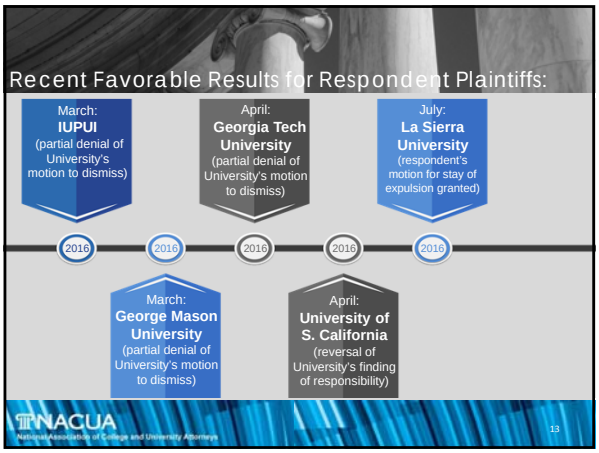
Recent Favorable Results for Respondent Plaintiffs:
March:
IUPUI
(partial denial of University's motion to dismiss)
April:
Georgia Tech University
(partial denial of University's motion to dismiss)
July:
La Sierra University
(respondent's motion for stay of expulsion granted)
2016
2016
2016
2016
2016
March:
George Mason University
(partial denial of University's motion to dismiss)
April:
University of S. California
(reversal of University's finding of responsibility)
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Practical Lessons Learned
Tread very lightly with the use of single investigator (or single investigator-like) models.
Watch for other investigation-related pitfalls.
Be careful not to shift the burden of proof when analyzing consent.
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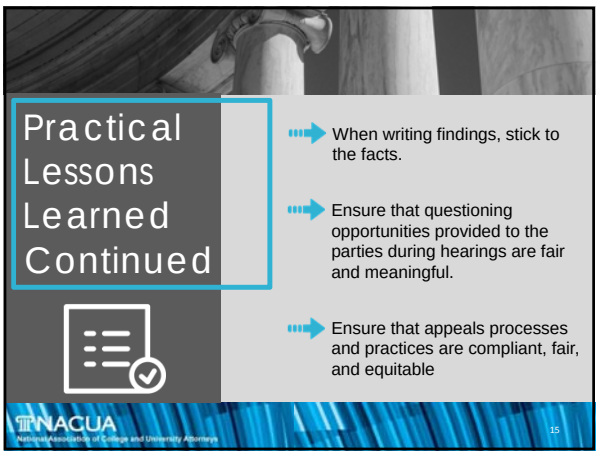
Practical Lessons Learned Continued
When writing findings, stick to the facts.
Ensure that questioning opportunities provided to the parties during hearings are fair and meaningful.
Ensure that appeals processes and practices are compliant, fair, and equitable
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Stop, in the Name of the Law!
Over 33% of Respondents seek an Injunction
Respondent Goals:
Stop the disciplinary matter from proceeding
Stop the sanction from being imposed
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You be the Judge (Part 1)
Injunction or No Injunction?
INJUNCTION!
Student seeks injunction barring his expulsion and permitting him to remain on campus
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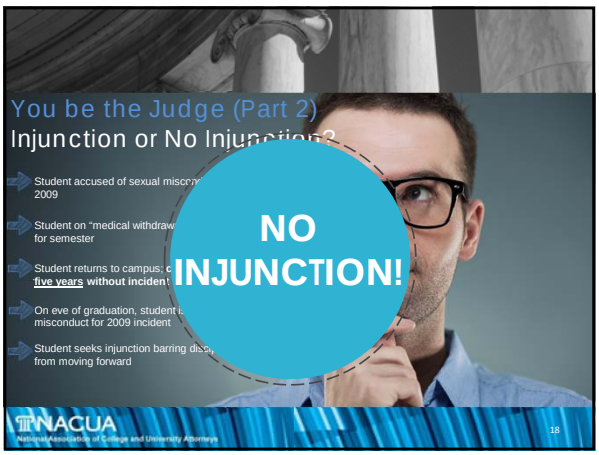
You be the Judge (Part 2)
NO INJUNCTION!
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Before Litigation – Positioning the Institution for a Favorable Ruling

- Conduct disciplinary proceeding in compliance with institution's sexual misconduct policies
- Gather documents from key administrators
- Transcribe any hearings for submission to court
- Copy inside or outside counsel on fact-gathering communications to provide a foundation for privilege
- If you plan to raise safety concerns, be ready to back that up

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Grab the White Hat

Establish that the Institution:

01 Takes sexual misconduct allegations seriously

02 Affords the respondent a fair process – including fair notification of the charges and an opportunity to respond

03 Acted reasonably, even if not perfectly

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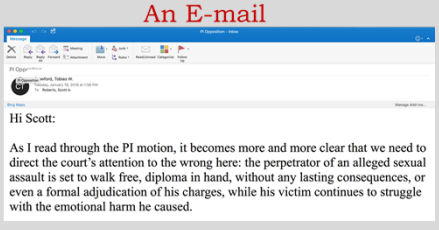
Emphasize Your Fairness Theme

An E-mail



Hi Scott:

As I read through the PI motion, it becomes more and more clear that we need to direct the court's attention to the wrong here: the perpetrator of an alleged sexual assault is set to walk free, diploma in hand, without any lasting consequences, or even a formal adjudication of his charges, while his victim continues to struggle with the emotional harm he caused.

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Emphasize Your Fairness Theme

The Brief

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

The perpetrator of an alleged sexual assault at the College seeks to walk away, diploma in hand, without any formal adjudication of the charges against him, while the former student who experienced the assault continues to struggle with the emotional harm he reportedly caused.

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Emphasize Your Fairness Theme

The Press

Part of that opposition motion — filed by attorney Scott A. Roberts of Boston — reads, "The perpetrator of an alleged sexual assault at Amherst College seeks to walk away, diploma in hand, without any formal adjudication of the charges against him, while the former student who experienced the assault continues to struggle with the emotional harm he reportedly caused."

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Meet John Doe

Reasons for Anonymity:

1. Stigma
2. Prevent Further Reputational Harm

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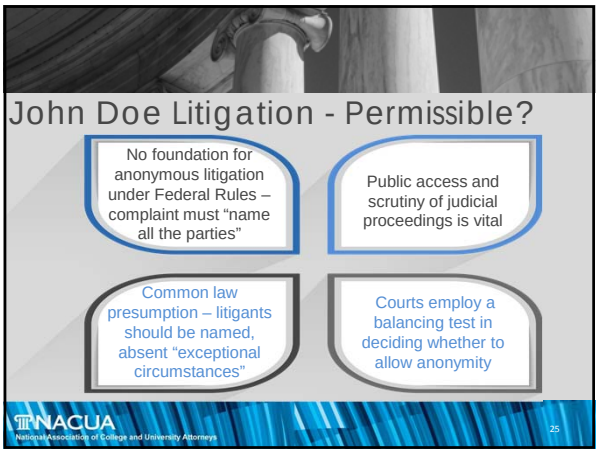
John Doe Litigation - Permissible?
No foundation for anonymous litigation under Federal Rules – complaint must "name all the parties"
Public access and scrutiny of judicial proceedings is vital
Common law presumption – litigants should be named, absent "exceptional circumstances"
Courts employ a balancing test in deciding whether to allow anonymity
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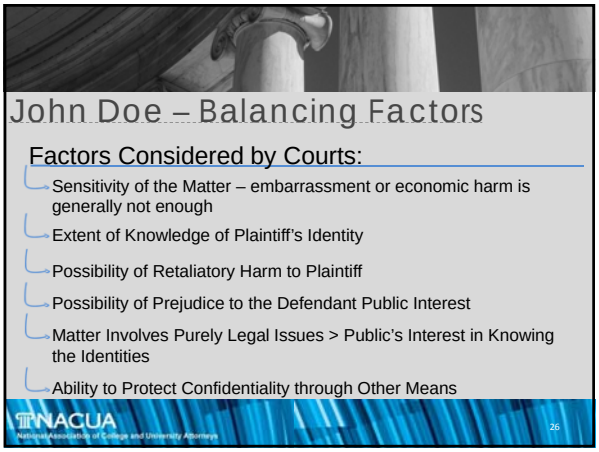
John Doe – Balancing Factors
Factors Considered by Courts:
Sensitivity of the Matter – embarrassment or economic harm is generally not enough
Extent of Knowledge of Plaintiff's Identity
Possibility of Retaliatory Harm to Plaintiff
Possibility of Prejudice to the Defendant Public Interest
Matter Involves Purely Legal Issues > Public's Interest in Knowing the Identities
Ability to Protect Confidentiality through Other Means
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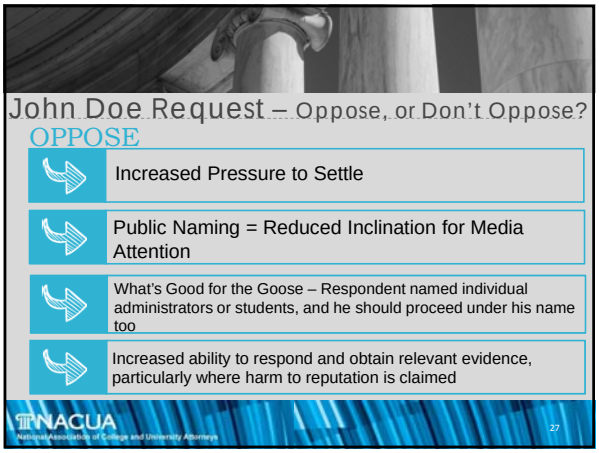
John Doe Request – Oppose, or Don't Oppose?
OPPOSE
Increased Pressure to Settle
Public Naming = Reduced Inclination for Media Attention
What's Good for the Goose – Respondent named individual administrators or students, and he should proceed under his name too
Increased ability to respond and obtain relevant evidence, particularly where harm to reputation is claimed
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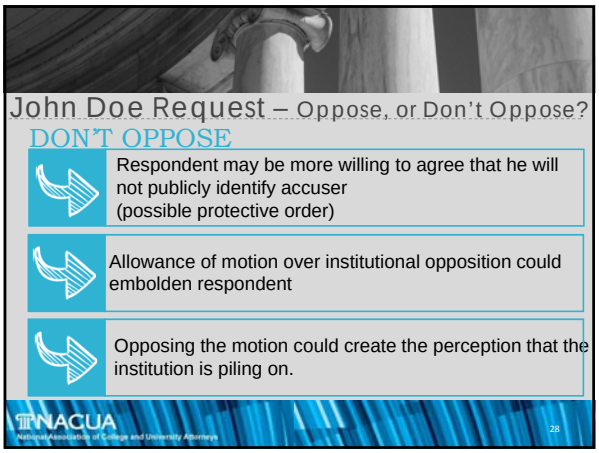
John Doe Request – Oppose, or Don't Oppose?
DON'T OPPOSE
Respondent may be more willing to agree that he will not publicly identify accuser (possible protective order)
Allowance of motion over institutional opposition could embolden respondent
Opposing the motion could create the perception that the institution is piling on.
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Don't Give Traction to Litigation
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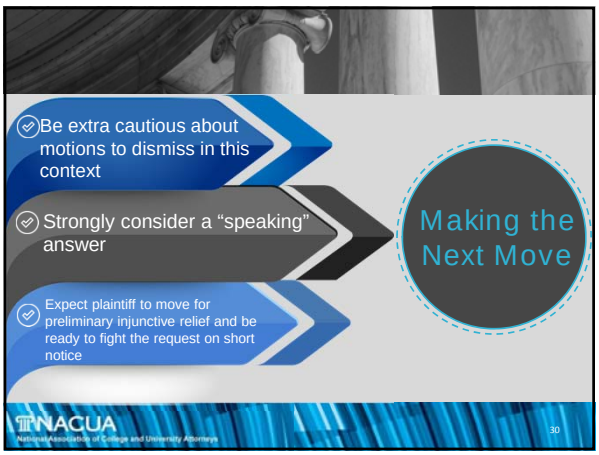
Be extra cautious about motions to dismiss in this context
Strongly consider a "speaking" answer
Expect plaintiff to move for preliminary injunctive relief and be ready to fight the request on short notice
Making the Next Move
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Wesley College Resolution Agreement

OCR Concerns:

Interim Suspension

Respondent not given the opportunity to show why the interim suspension should not be implemented. Immediate suspension without assessing the risk to the community and the rights of the parties.

"While a school must assess whether the presence of an accused student threatens the safety of individuals within the school community, a sufficient level of inquiry – that is here not evident – must be undertaken in determining the appropriateness of interim suspensions."

OCR Concerns:

Investigation

- The College did not interview the Accused Student prior the hearing.

Notice of the Hearing:

- Inadequate notice of nature of hearing
- Due to confusing language / application of applicable procedures, respondent believed that the hearing was an educational conference or a resolution without a hearing.

OCR Concerns:

Before the Hearing:

- Respondent not given copy of incident report, investigative findings, or the statement made by the student who implicated him in the misconduct prior to the hearing.

During the Hearing:

- Only witnesses called were the reporting professor and the alleged victim.
- Respondent didn't know what the other respondent students said. Respondent didn't know what the student who planned the live streaming said – nor was he able to question him.

After the Hearing:

- Hearing recording deleted within 10 days after the completion of the app

Resolution:

- Reconsider interim suspension. If warranted, remove expulsions from students' education records, offer them to complete their degrees at the College, and reimburse them for costs incurred for enrollment at a different school.
- Revise TIX policies to:
  - Provide for an adequate, reliable and impartial investigation of all complaints prior to a hearing, which will include interviews with the victim and the accused, and any relevant witnesses, and a review of any other relevant evidence.
  - Provide for the adequate, reliable, and impartial investigation of all complaints, including an equal opportunity for the parties to present witnesses and other evidence and equal access to information being considered in the grievance process (consistent with FERPA).
  - Include a description of the rights of students, including the accused, and available resources, including complete information about the hearing process and confidential counseling and support services.


Tips for Giving the Institution a Favorable Position in Litigation
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Be fair and balanced in your process
– be aware of the "smell test"
01
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Interesting perspective from the film maker... https://lnkd.in/ejzREY3
'Hunting Ground' Filmmaker: Harvard Law Turned On A Sexual Assault Victim
live.huffingtonpost.com · Kirby Dick discusses the purpose of his film "Hunting Ground."
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Position in Litigation
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Have a process,
and FOLLOW IT
03
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Don't over promise in your policy
Don't create obligations greater than the law imposes (e.g., no "due process" right at a private institution)
Avoid words of obligation: "rights," "will," "promise," "entitled"
"Institution will endeavor to complete an investigation in 60 days," not the "institution will complete an investigation in 60 days"
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Give the institution flexibility in its policy
Timetables
Extensions
Decisions on information considered, and not considered
Unilateral right to update
Disclaim intention to create a contract (where permissible)
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Publicize your policies, educate your community
EXTRA! EXTRA!
06
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Document, document, document EVERYTHING
Interim measures
Communications with Complainant and Respondent
Investigation
Accommodations, and rationale: academic, investigative, conduct of hearing
07
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Provide a clear, crisp rationale for actions
08
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Provide respondent fair notification of the charge and opportunity to respond
No "Eleventh Hour" New Claims
09
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Carefully vet notification to community regarding findings of responsibility
Be aware of the law in your jurisdiction
Truth is *not always* a defense
Don't name respondent by name
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Preserve your non-deliberative documents
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- The transmission of information in this presentation does not establish an attorney-client relationship with the recipient. The recipient should not act on the information contained in this presentation without first consulting retained legal counsel.
- If you desire legal advice for a particular situation, you should consult an attorney.

ANTICIPATING AND AVOIDING RESPONDENT LITIGATION IN SEXUAL MISCONDUCT MATTERS

June 26-29, 2016

Tejuana A. Roberts
Moderator
Fashion Institute of Technology
New York, NY

Leslie M. Gomez
Pepper Hamilton
Philadelphia, PA

Daniel Park,
University of California San Diego
La Jolla, CA

Susan Sawyer
Yale University
New Haven, CT

I. The Context

Over the past five years, since the Department of Education issued its Dear Colleague Letter and the Office of Civil Rights (OCR) vigorously began to investigate alleged violations of Title IX on university campuses, colleges and universities have stepped up efforts to address sexual misconduct. These initiatives have been wide-ranging, including enhanced educational programs, increased counseling and support services, and the creation of new or revised adjudicatory models to investigate and address complaints consistent with state and federal law and OCR guidance. As a result of the increased attention to these issues, universities have witnessed a rapid rise in reports of sexual misconduct and have committed to adjudicating and taking effective action against those found in violation of their rules. Increasing numbers of sexual misconduct disciplinary actions have led to a growing class of respondents dissatisfied with the outcomes of their cases or with campus processes. These students and their parents have established online networks and support groups and have become increasingly vocal in defense of their legal rights and about the procedural and evidentiary shortcomings of their particular cases. As their numbers have grown, they have more frequently turned to litigation, relying on a common set of claims. We will examine the most frequently brought respondent claims and outline responsive and protective measures schools may take to prevent and defend against them.

II. Overview of the Regulatory Framework

A. Title IX

Title IX of the Educational Amendments of 1972 ("Title IX") provides that 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."[1] Title IX applies to all educational institutions that receive federal financial assistance either directly or indirectly, including public and private elementary and secondary schools, school districts, colleges and universities.[2] Title IX applies to a broad spectrum of conduct, including all forms of sex discrimination, sexual and gender-based harassment, sexual misconduct and sexual violence.[3] Title IX's protections apply to conduct that occurs on campus, in the context of any institution-related education program or activity, or where there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment.[4]

Under Title IX, when an educational institution knows or reasonably should know about sexual harassment that creates a hostile environment, the institution must take immediate and appropriate steps to investigate or otherwise determine what occurred;[5] if an investigation reveals the existence of a hostile environment, the institution must then take prompt and effective steps reasonably calculated to eliminate the hostile environment, prevent its recurrence and address its effects.[6]

The implementing regulations require, among other obligations, that schools adopt grievance procedures that are prompt and equitable.[7] Grievance procedures must include: provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and respondent to present witnesses and evidence; designated and reasonably prompt time frames for the major stages of the complaint process; written notice to the complainant and respondent of the outcome of the complaint; and assurance that the institution will take steps to prevent recurrence of any sexual violence and remedy

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[1] 20 U.S.C. § 1681(a).

[2] 20 U.S.C. § 1681(a); 34 C.F.R. § 106.11.

[3] U.S. Department of Education, Office for Civil Rights Dear Colleague Letter, April 4, 2011 (2011 DCL) at 1.

[4] Questions and Answers on Title IX and Sexual Violence, Office for Civil Rights, April 29, 2014 (Title IX Q & A) at 29.

[5] Title IX Q & A at 2.

[6] An institution is deemed to have notice if a responsible employee knew or, in the exercise of reasonable care, should have known, about the harassment. A responsible employee includes any employee who: (1) has the authority to take action to redress the harassment; (2) has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees; or (3) a student could reasonably believe has the authority or responsibility to take action. Notice may come from a direct report or complaint by a student, employee or third party victim, or a responsible employee may observe or witness prohibited conduct. Notice may also come from indirect sources: a parent, friend or third party witness; social networking sites; the media; an open, pervasive or widespread pattern; or other facts and circumstances that should cause an institution, in the exercise of reasonable care, to initiate an investigation that would lead to the discovery of additional incidents. *Id.* at 4; Title IX Q & A at 2-3, 14-18.

[7] 34 C.F.R. § 106.8(b).

discriminatory effects on the complainant and others, if appropriate.[8] Grievance procedures should also include: a statement of the institution's jurisdiction over Title IX complaints; adequate definitions of sexual and gender-based harassment and violence and an explanation as to when such conduct creates a hostile environment; reporting policies and protocols, including provisions for requesting confidentiality when making a report; identification of the employee or employees responsible for evaluating requests for confidentiality; notice that Title IX prohibits retaliation; notice of an individual's right to file a criminal complaint and a Title IX complaint simultaneously; notice of available interim measures that may be taken to protect the student in the educational setting while the investigation is pending; the evidentiary standard that must be used (preponderance of the evidence) in resolving a complaint; notice of potential remedies for the complainant; notice of potential sanctions against respondents; and sources of counseling, advocacy, and support.[9]

OCR is the federal enforcement agency tasked with enforcing Title IX and other civil rights laws. In the context of Title IX grievance procedures, OCR defines "investigation" as the process an institution uses to resolve sexual violence complaints, including the fact-finding investigation and any hearing and decision-making process the institution uses to determine whether the conduct occurred, and if the conduct occurred, what actions the institution will take to end the sexual violence, eliminate the hostile environment and prevent its recurrence.[10] Those actions may include imposing sanctions for the respondent and providing individual and community remedies.[11] In 2011, OCR announced that educational institutions "must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred)" for the institution's "grievance procedures to be consistent with Title IX standards."[12] While an investigation may include a hearing to determine whether the conduct occurred, Title IX does not require a hearing.[13] Furthermore, neither Title IX nor available guidance from OCR specify who should conduct the investigation or serve as the adjudicator.

Despite the list of requirements issued by OCR in various guidance documents, to date, there has been no detailed discussion of "best practices" provided by federal law or guidance. Thus, educational institutions have had great discretion to design and implement investigative and adjudicative models.

B. The Clery Act, as Amended by the Violence Against Women Reauthorization Act of 2013 (VAWA)

Additionally, the Clery Act, as amended by VAWA, provides statutory obligations for campus investigative responses. The Clery Act, a federal statute enacted in 1990, requires all educational institutions that receive federal financial assistance, either directly or indirectly, to keep and publish information about crime on or near their campus through a daily crime log, an annual security report, and timely warning notifications to the community.[14] The

[8] *Id*.
[9] *Id*.
[10] Title IX Q & A at 24-25.
[11] Title IX Q & A at 24-25.
[12] April 4, 2011 DCL, p. 11.
[13] Title IX Q & A at 25.
[14] *See generally* 20 U.S.C. § 1092 (f); 34 C.F.R. § 668.46.

Clery Act mandates that educational institutions develop policies, procedures, and programs regarding sex offenses. [15] In 2013, the reauthorization of VAWA significantly revised and expanded the Clery Act's requirements with respect to education and prevention, reporting, and policy and procedures related to sexual assault, and required the same steps for domestic violence, dating violence and stalking offenses.

Under the amended Clery Act, an educational institution's policy must contain: a list of all possible sanctions and the range of protective measures that the school may impose following a final determination of sexual assault, domestic violence, dating violence, or stalking;[16] procedures individuals should follow if a sex offense, domestic violence, dating violence, sexual assault or stalking occurs;[17] information regarding the importance of preserving evidence;[18] identification of the administrator to whom alleged offenses should be reported;[19] options regarding notifying law enforcement and campus authorities about alleged offenses, including the option to be assisted by campus authorities in notifying law enforcement authorities or to decline to notify authorities;[20] and individuals' rights and the school's responsibilities regarding orders of protection, no contact orders, restraining orders or similar lawful orders issued by a criminal, civil or tribal court.[21]

Educational institutions must also publish procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault or stalking. These procedures must include a statement that the proceedings will entail a prompt, fair and impartial investigation and resolution.[22] During disciplinary actions, both parties must have the same opportunities to have others present during a disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice.[23] Furthermore, both parties must be simultaneously informed in writing of: the outcome of any institutional disciplinary proceeding that arises from an allegation of domestic violence, dating violence, sexual assault or stalking; the institution's procedures for both parties to appeal the results of the disciplinary proceeding; any change to the results of the proceeding that occurs prior to the time that such results become final; and when results of the proceeding become final.[24]

Finally, the Clery Act, as amended by VAWA, requires that all implementers must receive "annual training on the issues related to domestic violence, dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability."[25]

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[15] *Id*.
[16] 34 C.F.R. § 668.46 (k)(1)(iii) and (iv);
[17] 34 C.F.R. § 668.46 (b)(11)(ii).
[18] 34 C.F.R. § 668.46 (b)(11)(ii)(A).
[19] 34 C.F.R. § 668.46 (b)(11)(ii)(B).
[20] 34 C.F.R. § 668.46 (b)(11)(ii)(C)(1)(2) and (3).
[21] 34 C.F.R. § 668.46 (b)(11)(ii)(D).
[22] 34 C.F.R. § 668.46 (k)(2)(i).
[23] 34 C.F.R. § 668.46 (k)(2)(iii).
[24] 34 C.F.R. § 668.46 (k)(2)(v).
[25] 34 C.F.R. § 668.46 (k)(2)(iv).

C. Procedural Due Process

With respect to public institutions, there is a constitutional framework that informs institutional responses. Public institutions are required to provide due process in disciplinary proceedings.[26] Courts have generally interpreted the due process clause to require that a respondent have "notice and an opportunity to be heard."[27] What this means, however, is a case by case determination considering the facts of each particular situation, including the severity of the potential punishment and the nature of the proceeding.[28] Generally, the "notice" and "hearing" requirement for due process must follow "rudimentary elements of fair play."[29] The notice requirement is fulfilled when there is a "statement of the specific charges and grounds, which, if proven, would justify expulsion."[30] The hearing requirement will vary depending on the circumstances of the particular case and is not as clearly delineated as the notice requirement. For example, the Fifth Circuit Court of Appeals held that a hearing complies with due process if the nature of the hearing gives the administrative authorities of a college an opportunity to hear both sides in considerable detail and is suited to protect the rights of all involved.[31]

III. Overview and Lessons Learned from Recent Respondent Litigation

A. Recent Claims of Due Process Violations Under Title IX

Due-process jurisprudence for student misconduct cases may be experiencing significant changes. For decades, guided by the loose "some kind of notice" and "some kind of hearing" standards established in the U.S. Supreme Court's decision in *Goss v. Lopez*, 419 U.S. 565, 579 (1975), colleges and universities have enjoyed significant deference in setting up and implementing student discipline procedures. With the rise of respondent challenges to student sexual assault cases, some courts have taken a harder look at how colleges and universities handle student discipline in cases where the charges and penalties are particularly serious.

As outlined above, at its most basic level, due process requires merely "notice" and "a meaningful opportunity to be heard." Colleges and universities have codified these requirements in internal policies and procedures, which add an additional layer of process that must be afforded respondents. Because of the seriousness of the charge of sexual assault and the stigma associated with finding a respondent to be a sex offender, some courts have applied greater scrutiny than seen in the past to compliance with due process requirements and with schools' local policies and procedures.

For example, in *Doe v. The Rector and Visitors of George Mason University*, 2016 WL 775776 (E.D. Va. 2016), the court found that, despite giving a respondent three rounds

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[26] *Goss v. Lopez*, 419 U.S. 565, 599 (1975).

[27] *Smith v. The Rector and Visitors of the University of Virginia*, 78 F. Supp. 2d 533 (W.D. Va. 1999); *see also Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961); *Gorman v. University of Rhode Island*, 837 F.2d 7 (1st Cir. 1998); *Reilly v. Daly*, 666 N.E.2d 439 (Ind. Ct. App. 1996).

[28] *See Goss v. Lopez*, 419 U.S. 565, 577-579 (U.S. 1975).

[29] *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir. 1961)

[30] *Id*.

[31] *Id*.

of notice plus a statement from the complainant, the notice of the charges of sexual misconduct did not adequately put the respondent on notice any more than one night in his relationship with the complainant. The first notice informed the student only that George Mason University (GMU) was "in receipt of a referral for an incident that occurred last semester involving a possible violation of the George Mason University Code of Conduct." In the opinion of the court, this vague statement did not provide any notice at all, except the reference to a singular incident suggested a single event, rather than multiple events. The next notice the student received referred to the respondent's "alleged involvement in an incident that took place on or about October 27th 2013 (and continuing) in a George Mason University Residence Hall." The broad "and continuing" language was negated, in the court's view, by the remainder of the notice that again referred to an incident in the singular and not the plural. A third notice letter made reference to events "on or around November 2013," which the court found was close enough to the October 27 date to suggest that only that one day was at issue in the case.

Although GMU furnished the respondent with the complainant's statement that included the allegation that "[o]n many occasions, without [her] consent, [the respondent] forced sex on [the complainant]," the court found that this did not provide the respondent with the constitutionally required notice because it did not come from GMU, so the respondent could have concluded that GMU was prosecuting the case solely based on the alleged events on a single day. Further confirming the limits of the notice provided, at the respondent's initial hearing, the events of that one day were the central focus, and the panel hearing the case ultimately found the respondent to be not responsible for violating the conduct code. On appeal, however, everything changed, when respondent's entire relationship with the complainant was examined, and based on this broader review, GMU concluded that the respondent was responsible for sexual assault and expelled him.

The respondent petitioned the federal courts for relief, and relief was granted. Because the respondent had not received proper notice of the charges, the court reversed the expulsion and ordered that the respondent be reinstated as a student in good standing. The court noted that the school could have avoided the notice problem by merely sending an email that stated plainly that respondent's entire relationship with complainant was at issue in this case.

In addition to questioning the adequacy of the notice provided to the respondent, the court found other problems with GMU's handling of the case. The court concluded that GMU had failed to follow its own processes by allowing the complainant to appeal the original finding in the respondent's favor on a grounds not allowed in the student conduct code. The court also concluded the GMU had improperly prejudged the case and had prejudiced the respondent by having *ex parte*, off-the-record communications with the complainant.

In *Doe v. University of Southern California*, 246 Cal.App.4th 221 (Cal. App. 2016), the respondent was found responsible for, among other things, "[e]ncouraging or permitting others to engage in misconduct prohibited within the university community" when in a group sex encounter he allegedly permitted or encouraged two other students to slap the buttocks of the complainant and the respondent failed to intervene to stop the slaps. USC provided the respondent with notice of the sections of the conduct code he was alleged to have violated, the date of the incident, and the name of the complainant, but USC failed to apprise the

respondent of the factual basis of any of the allegations against him. The court found that the investigation and initial hearing focused on whether the respondent himself had sexually assaulted the complainant, but only later in the process did USC decide that he was responsible for allowing others to assault the complainant by slapping her buttocks without her consent.

The court concluded: "We recognize that universities need adequate tools to address the very serious and sensitive problem of sexual assault on campus. But it is not too heavy a burden to require that students facing disciplinary action be informed of the factual basis for the charges against them." The court also expressed concern with the fact that USC did not offer the respondent a formal hearing where he could hear the witnesses against him and respond directly to their testimony. In conducting its investigation, USC had provided copies of the investigator's notes for every witness to the complainant, but the respondent did not receive any information about what the other witnesses had said.

An influential case on due process in student misconduct hearings is *Dixon v. Alabama State Bd. of Ed.* 294 F.2d 150 (5th Cir. 1961). *Dixon* was cited in both the GMU and USC cases. In *Dixon*, the Fifth Circuit opined that in student misconduct cases:

> a hearing which gives the...administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required...Nevertheless,...the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to...an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the [administrator] directly, the results and findings of the hearing should be presented in a report open to the student's inspection.

The most important point is that the respondent should be apprised of all the evidence that will be considered in his case and the decision-maker should rely only on evidence that has been provided to the respondent. In the USC case, the court rejected the argument that it was sufficient for the evidence to be available to a respondent upon request. Instead, the court found that due process required that the university affirmatively inform the respondent of the evidence in order to give him a meaningful opportunity to respond.

To minimize due process challenges, notices should identify the provisions of the student conduct code that were allegedly violated and describe the actions alleged to constitute a violation. Hearings, whether formal or conducted through an investigator model, should ensure that the respondent is provided all of the evidence that will be considered in the case and given an opportunity to respond to the evidence, either directly or by presenting evidence or testimony of the respondent's own. The burdens of due process are not great, but failing to adhere to those requirements can negate the outcome of a misconduct case.

While it is clear that due process requires notice and an opportunity to be heard, the "opportunity to be heard" requirement has also presented some particular challenges. For example, in an ongoing case in the Middle District of Pennsylvania, the Plaintiff, a Pennsylvania State University (Penn State) student, was granted an Emergency Temporary Restraining Order (TRO) prohibiting Penn State from enforcing the student's suspension after he was found responsible for sexual misconduct. The student complained about Penn State's process, whereby a Title IX Investigator prepares a written investigative packet that is presented to a Title IX Decision Panel (Panel) on the basis of which responsibility is adjudicated and sanctions are assigned. The student alleged that the process did not provide the student a right to be heard in-person before the Panel, and did not provide an opportunity to question adverse witnesses or to present the oral testimony of his own witnesses, thereby claiming that there was no right to be heard in any meaningful sense. The court granted a TRO because the student had demonstrated that he was reasonably likely to succeed on the merits of his claim in light of the potential inadequacy of the procedure afforded him by the university during a disciplinary hearing.[32]

In another case, Vito Prasad, a senior at Cornell University (Cornell) was found to have violated the University's sexual harassment policy after a complaint was made by a student that Mr. Prasad raped her while she was incapacitated. Cornell conducted an investigation and recommended expulsion. Mr. Prasad commenced an action in the United States Court for the Northern District of New York asserting claims under Title IX and New York state law. Cornell moved to dismiss the claim and the motion was granted in part and denied in part. The surviving claim was a claim of erroneous outcome, namely that the hearing was discriminatory based on his gender.

The Court ruled that given the totality of circumstances, including that the complainant was treated more favorably than the accused, that the investigators seemingly slanted the Investigative Report against the accused, and the possibility that male respondents in sexual assault cases are invariably found guilty at Cornell, Mr. Prasad plausibly established a causal connection between gender bias and the outcome of his disciplinary hearing. The facts underlying this case allege that the complainant was given more time to submit her appeal despite the fact that the accused's requests for additional time were denied. Further, Mr. Prasad alleged that an anti-male bias was exhibited by the deferential treatment the complainant received, and by the outcome determinative style in which the Investigative Report was drafted.[33]

These cases illustrate the importance of ensuring that both parties be given a fair and equal opportunity to present their evidence. Absent a balanced process, courts may find respondents' due process rights to be violated on the grounds that they were not given an opportunity to be heard.

In the vast majority of cases, educational institutions have been able to establish policies and procedures to both comply with the Dear Colleague Letter and provide a procedure that complies with the due process clause. Yet there are cases where Courts have struggled with the procedures educational institutions have created and relied on to provide a fair hearing or

[32] *Doe v. Pennsylvania State University*, No. 4:15-cv-02072 (M.D. Pa. October 28, 2015).
[33] *Prasad v. Cornell University*, No. 5:15-cv-322 (N.D.N.Y. February 24, 2016).

investigation. The main takeaway from recent case law is to maintain an unbiased procedure that allows for both parties to present their evidence free of a pre-determined outcome. Clearly, these hearings and investigations highlight challenges in balancing trauma-informed practices for the complainant with the due process rights of the accused, but the "rudimentary elements of fair play" must still be maintained.[34]

B. Reverse Title IX Discrimination Suits

Respondents, with increasing frequency, are filing claims against colleges and universities that have taken action against them in responding to Title IX complaints. According to a study conducted by United Educators, ninety-nine percent of respondents who make claims against institutions are male.[35] As Title IX's prohibition against sex discrimination is not limited to only female students, respondents often assert what are known as "reverse Title IX" discrimination claims. To be successful in these types of claims, a respondent must establish that gender was a motivating factor in the decision to discipline him.

In analyzing reverse Title IX claims, courts have recognized four theories advanced by respondents: (1) erroneous outcome; (2) selective enforcement; (3) archaic assumptions; and (4) deliberate indifference. Using an erroneous outcome theory, a respondent argues that the university was wrong in finding him responsible for the alleged conduct and that gender bias against him was a motivating factor behind the decision to hold him responsible. Through the selective enforcement theory, the respondent alleges that the college or university treats similarly situated female students differently, with regard to pursuing complaints and in relation to complaint outcomes, when Title IX claims are brought against women. The respondent does not address whether the outcome of his own proceeding was correct or incorrect. A respondent using the archaic assumptions theory claims a college or university based its decision on "classifications based upon archaic assumptions" about gender. This theory is less frequently asserted than the erroneous outcome and selective enforcement theories. Finally, respondents allege under the deliberate indifference theory, that the college or university acted with deliberate indifference to the gender bias that influenced its disciplinary process under Title IX. Respondents assert this theory infrequently, preferring the erroneous outcome and selective enforcement theories.

1. Erroneous Outcome Theory

The "erroneous outcome" theory was first recognized in the influential reverse Title IX case *Yusuf v. Vassar College*, 35 F.3d 709, 715, 1994 U.S. App. LEXIS 25853, *16 (2d Cir. N.Y. 1994). In *Yusuf*, Syed Saifuddin Yusuf challenged the lower court's dismissal of his complaint after a 12(b)(6) motion hearing.[36] In his complaint, Yusuf had alleged he was brutally attacked by his roommate.[37] After deciding to pursue a criminal complaint against his roommate, Yusuf alleged the roommate's girlfriend retaliated by bringing false sexual harassment charges

[34] *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir. 1961)

[35] Alyssa Keehan, et al., *Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, 3, United Educators (Oct. 2015).

[36] *Id*. at 711.

[37] *Id*.

against him.[38] Vassar's College Regulations Panel found Yusuf guilty of sexual harassment and suspended Yusuf for one term.[39] In bringing suit against Vassar, Yusuf claimed that he was found guilty of sexual harassment and received a harsher penalty than his roommate did for beating him due to impermissible race and gender bias under 42 U.S.C.§ 1981 (Supp. IV 1992) and Title IX.[40] The Second Circuit affirmed the district court's dismissal of the Section 1981 claims but reversed the dismissal of the Title IX claims and reinstated the supplemental state law claims.[41]

The Second Circuit articulated that to win on an erroneous outcome theory, respondents "must allege particular facts sufficient to cast some articulable doubt on the accuracy of the disciplinary proceeding."[42] Claiming that the "pleading burden in this regard is not heavy," the Court noted that the complaint "may allege particular evidentiary weaknesses…such as the motive to lie on the part of a complaint or witnesses, particularized strengths of the defense, or other reason to doubt the veracity of the charge."[43] Alternatively, the complaint can allege "particular procedural flaws affecting the proof."[44]

A respondent may not simply allege that there were flawed proceedings and gender discrimination; this is insufficient to survive a motion to dismiss. Instead, the respondent must also allege "particular circumstances suggesting gender bias was a motivating factor behind the erroneous finding….[which] might include…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." [45] The Court then concluded that Yusuf's complaint should have survived the motion to dismiss concerning his claim that, because of his gender, he was erroneously found to have harassed his roommate's girlfriend.[46]

2. Selective Enforcement Theory

To succeed under the selective enforcement theory the plaintiff must plausibly allege that "regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender"[47] (affirming the District Court's dismissal of the selective enforcement claims). Some courts have also interpreted the standard to require that a plaintiff "allege particular circumstances suggesting that gender bias was a motivating factor behind the inconsistency."[48] Using either standing, most courts have dismissed claims of selective enforcement where the plaintiff could not plausibly allege that "a

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[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] *Yusuf*, 35 F.3d at 711.
[42] *Id*. at 715.
[43] *Id*. at 715.
[44] *Id*. at 715.
[45] *Id*. (emphasis added)
[46] *Id*.
[47] *Yusuf*, 35 F.3d at 715.
[48] *WorldStarHipHop, Inc.*, 2011 U.S. Dist. LEXIS 123273, 2011 WL 5082410, at *6; *see Harris v. Saint Joseph's Univ.*, No. 13-CV-3937 (LFR), 2014 U.S. Dist. LEXIS 65452, 2014 WL 1910242, at *4 (E.D. Pa. May 13, 2014).

school treated similarly situated members of the opposite sex – that is, members of the opposite sex facing comparable disciplinary charges – differently."[49]

For example, in *Yusuf*, the Second Circuit affirmed the dismissal of the selective enforcement claim because the plaintiff failed to allege that any woman was treated differently than he was and that the disparate treatment of another accused student was based on similar disciplinary charges.[50] Similarly, in *Doe v. Columbia University*, 101 F. Supp. 3d 356, 274-75 (S.D.N.Y. 2015), the Southern District of New York dismissed a selective enforcement claim where the complaint "fail[ed] to include any allegations that female students 'were treated more favorably in similar circumstances.'"[51] The Court noted that "Title IX does not provide a private right of action to challenge disciplinary policies based on disparate impact."[52] To succeed in a selective enforcement claim, a plaintiff "must allege facts sufficient to give rise to an inference that the school intentional discriminated against the plaintiff *because of* his or her sex – that the school acted 'at least in part 'because of' not merely 'in spite of,' its adverse effects upon [the protected] group.'"[53] However, in the recent case of *Doe v. Brown University*, No. 15-cv-144 (D. R.I., Feb. 22, 2016), the court denied Brown University's motion to dismiss with respect to Doe's selective enforcement claim. Here, the court only required that the plaintiff plead a claim that was plausible on its face and noted that "requiring that a male student conclusive demonstrate, at the pleading stage, with statistical evident and/or data analysis that female students accused of sexual assault were treated differently, is both practically impossible and inconsistent with the standard used in other discrimination contexts." [54]

3. Archaic Assumption Theory

The archaic assumptions theory springs from case law interpreting Title IX in the athletics context.[55] The theory "finds discriminatory intent in actions resulting from classifications based on archaic assumptions."[56] At least one court has refused to extend the

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[49] *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 374, (S.D.N.Y. 2015); *see Tsuruta v.Augustana Univ.*, 2015 U.S. Dist. LEXIS 136796, *10 (D.S.D. Oct. 7, 2015).

[50] *Yusuf*, 35 F.3d at 716; s*ee also Routh v. Univ. of Rochester*, 981 F. Supp. 2d 184, 211-212, 2013 U.S. Dist. LEXIS 158433, *64, 2013 WL 5943926 (W.D.N.Y. 2013) (affirming dismissal of selective enforcement claim where complaint failed to allege that any similarly-situated female was treated differently); *Scott v. WorldStarHiphop, Inc.*, 2011 U.S. Dist. LEXIS 123273, *16-17, 2011 WL 5082410 (S.D.N.Y. Oct. 24, 2011) (dismissing selective enforcement claim where the complaint did not demonstrate that similarly situated students were treated differently).

[51] (*quoting Curto v. Smith*, 248 F. Supp. 2d 132, 147 (N.D.N.Y. 2003), *aff'd in part, appeal dismissed in part sub nom. Doe v. Anonymous Unnamed Sch. Employees & Officials of Cornell Univ. Coll. of Veterinary Med.*, 87 F. App'x 788 (2d Cir. 2004), and *aff'd*, 93 F. App'x 332 (2d Cir. 2004)).

[52] *Doe,* 101 F. Supp. 3d at 375.

[53] *Id*. (*quoting Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *see also Doe v. Case W. Reserve Univ.*, 2015 U.S. Dist. LEXIS 123680, *15 (N.D. Ohio Sept. 16, 2015) (dismissing selective enforcement claim where complaint failed to identify any female counterpart to support claim).

[54] *Doe v. Brown Univ.*, 2016 U.S. Dist. LEXIS 21027, *24-25 (D.R.I. Feb. 22, 2016).

[55] *See, e.g. Pederson v. La. State Univ.*, 213 F.3d 858, 880-82 (5th Cir. 2000).

[56] *Mallory v. Ohio Univ.*, 76 Fed. Appx. 634, 638-639, 2003 U.S. App. LEXIS 19025, *10 (6th Cir. Ohio 2003).

archaic assumptions theory to reverse Title IX claims.[57] It appears that no archaic assumptions claims have prevailed in court. Further, no court has explained what "archaic assumptions" means in the reverse Title IX context, which is a telling sign that courts are generally unwilling to entertain the theory to support a reverse Title IX claim.

4. Deliberate Indifference Theory

To succeed under a deliberate indifference theory, a plaintiff "must show that an official of the institution who had the authority to institute corrective measures had actual notice of, and was deliberately indifferent to, the misconduct."[58] In *Wells v. Xavier University*, 7 F. Supp. 3d 746, 751-52 (S.D. Ohio 2014), the Southern District of Ohio denied in part a motion to dismiss a respondent's claims, including permitting a deliberate indifference claim. The Court noted that to succeed under the deliberate indifference theory, the plaintiff "must ultimately show that an official of the institution who had the authority to institute corrective measures had actual notice of and failed to correct the misconduct."[59] The Court allowed plaintiff's deliberate indifference claim to survive because it found that the university was on notice of the offensive behavior and took no corrective measures.[60]

In *Doe v. University of the South*, 687 F. Supp. 2d 744, 757, 2009 U.S. Dist. LEXIS 95410, *24 (E.D. Tenn. 2009), the Eastern District of Tennessee noted that the deliberate indifference of the institution "must, at a minimum, cause students to undergo harassment or making them liable or vulnerable to it."[61] In dismissing the deliberate indifference claim, the Court noted that the complaint "fail[ed] to allege any facts to support a finding that the University's actions were at all motivated by…gender or sex or constituted gender or sexual harassment."[62]

C. Breach of Contract Suits

One of the most common causes of action raised in respondent lawsuits is breach of contract. Respondents claim that the student handbook or other similar document creates an enforceable agreement between the school and the student and that the school violated its terms in its investigation and prosecution of claims under Title IX.[63] Many courts have found that

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[57] *Marshall v. Ohio Univ.*, 2015 U.S. Dist. LEXIS 155291, *25-27 (S.D. Ohio Nov. 17, 2015) (dismissing archaic assumption claims after "declin[ing] to broaden the current framework used to analyze allegations about discrimination in a university disciplinary proceeding in the absence of controlling Sixth Circuit precedent.").

[58] *Sterrett v. Cowan*, 85 F. Supp. 3d 916, 936, 2015 U.S. Dist. LEXIS 13056, *40 (E.D. Mich. 2015) (*citing Mallory v. Ohio Univ.*, 76 Fed. Appx. 634, 638 (6th Cir. Ohio 2003)).

[59] *Id*. at 751 (*citing Mallory*, 76 Fed. Appx. at. 640).

[60] *Id*. at 751-52.

[61] (*citing Patterson v. Hudson Area Sch.*, 551 F. 3d 438, 446 (6th Cir. 2009))

[62] *Id*. at 758 (*citing Doe v. Derby Board of Ed.*, 451 F. Supp. 2d 438, 445 (D. Conn. 2006); *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1346-350 (M.D. Ga. 2007) ("Whether gender-oriented conduct rises to the level of actionable harassment depends on a constellation of surrounding circumstances, expectations and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved. Notwithstanding the foregoing principles, a single instance of one-on-one peer harassment is likely not actionable under Title IX.").

[63] Massachusetts courts have typically assumed without deciding that handbooks are enforceable contracts for the purposes of such a claim.

schools are bound by the commitments made in their handbooks and other policy documents.[64] Suits against schools based on breach of contract have included the following kinds of claims: failure to provide appropriate procedural guarantees; claims of inadequate or unfair investigation or disciplinary hearing; and claims regarding sufficiency of evidence. Respondents have also brought suits alleging that the school deviated from established policies, including failure to provide adequate notice, opportunity to present evidence and confront witnesses, and an inadequate or unfair disciplinary hearing.

Respondents have had difficulty succeeding with breach of contract suits because many courts afford schools deference in interpreting their own policies and procedures.[65] Some jurisdictions even require a showing of bad faith to find the institution liable for breach of contract.[66] Nonetheless, some courts have expanded their review of these cases beyond a narrow investigation of whether the school's procedures were followed and are considering a broader review of the facts as encompassed within contractual obligations owed by schools to their students.

D. How Respondents Survive Motions to Dismiss

Following the landmark Supreme Court decisions of *Ashcroft v. Iqbal*, 556 U.S. 662 (U.S. 2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (U.S. 2007), plaintiffs have faced a "heightened pleading standard" that requires them to plead with sufficient specificity factual allegations that would lead a finder of fact to conclude that, if these allegations are taken as true, the plaintiff is entitled to relief as a matter of law. To survive a motion to dismiss, a complaint

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[64] *See, e.g.*, *Kuritzky v. Emory Univ.*, 669 S.E.2d 179, 181 (Ga. App. 2008) ("Georgia law permits an expelled student to bring a breach of contract action against a private educational institution for failure to abide by the hearing procedures set forth in the student handbook"); *Swartley v. Hoffner*, 734 A.2d 915, 919 (Pa. Super. Ct. 1999) ("The relationship between a private educational institution and an enrolled student is contractual in nature; therefore, a student can bring a cause of action against said institution for breach of contract where the institution ignores or violates portions of the written contract."). *See also Corso v. Creighton Univ.*, 731 F.2d 529, 531 (8th Cir. 1984) ("For our purposes, the Creighton University Handbook for Students…is the primary source of the terms governing the parties' contractual relationship"); *Dinu v. President & Fellows of Harvard Coll.*, 56 F. Supp. 2d 129, 130 (D. Mass 1999) ("That the relationship between a university and its students has a strong, albeit flexible, contractual flavor is an idea pretty well accepted in modern case law. So too, is the proposition that a student handbook, like the occasional employee handbook, can be a source of the terms defining the reciprocal rights and obligations of a school and its students") (internal citations omitted); *Doe v. Brown Univ.*, 2016 U.S. Dist. LEXIS 21027, *32 (D.R.I. Feb. 22, 2016)T ("The relevant terms of the contractual relationship between a student and a university typically include language found in the university's student handbook."); *see also Gupta v. New Britain Gen. Hosp.*, 239 Conn. 574, 586 (Conn. 1996); *Jallali v. Nova Southeastern Univ., Inc.*, 992 So. 2d 338, 342 (Fla. Dist. Ct. App. 4th Dist. 2008); *Al-Dabagh v. Case Western Reserve Univ.*, 23 F. Supp. 3d 865, 875 (N.D. Ohio 2014); *Demoulas v. Quinnipiac Univ.*, 2015 Conn. Super. LEXIS 496, *15 (Conn. Super. Ct. Mar. 5, 2015); *Simmons v. Wayne County Cmty. College Dist.*, 2012 U.S. Dist. LEXIS 115586, *28, 2012 WL 3678649 (E.D. Mich. July 26, 2012).

[65] *See, e.g. Amaya v. Brater*, 981 N.E.2d 1235, 1240, 2013 Ind. App. LEXIS 39, *11-12, 2013 WL 353024 (Ind. Ct. App. 2013) (noting that "Indiana courts have taken a very flexible approach to the scope of contractual promises between students and universities…"); *Craine v. Trinity College*, 259 Conn. 625, 663, 791 A.2d 518, 545, 2002 Conn. LEXIS 97, *63 (Conn. 2002) (making clear that academic decisions deserve "deference) (*quoting*

[66] Including: the First Circuit, Indiana, Connecticut, and Massachusetts.

must state a claim that is plausible on its face. Allegations that are merely conclusory will not support a plaintiff's claim and may subject his claims to dismissal.[67]

Since *Twombly* and *Iqbal*, most courts have analyzed breach of contract actions under the heightened pleading standard. To survive a motion to dismiss, a respondent's breach of contract allegations must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[68] In *Harris v. St. Joseph's University*, 2014 U.S. Dist. LEXIS 65452, *8 (E.D. Pa. May 12, 2014), the Eastern District of Pennsylvania dismissed a student's breach of contract claims without prejudice because the Amended Complaint "relie[d] on conclusory and insufficient allegations." The Amended Complaint merely stated that St. Joseph's University "failed to comply with the Handbook…fail[ed] to provide adequate notice of the policies and procedures...fail[ed] to provide fair notice of the parameters of the charged offense."[69] The court concluded that "[c]onclusory allegations such as these, with no clear averments as to what statement or regulations included in the Handbook (which the parties appear to agree for present purposes was a contract) were violated or breached, are insufficient to survive a motion to dismiss."[70]

Surviving a motion to dismiss is especially difficult in the reverse Title IX context. No matter the theory under which a respondent brings a claim against a college or university, he must prove that the institution's conduct in the disciplinary proceedings was motivated or influenced by an impermissible gender bias against him. Even if a respondent can prove he is innocent, he will be unsuccessful in a reverse Title IX claim unless he can advance factual allegations that gender bias motivated or influenced the institution's decision. This high bar explains why the majority of suits have been dismissed or resolved by private settlement. Many of these suits fail to survive motions to dismiss for failure to state a claim.[71]

However, in the recent case of *Doe v. Brown Univ.*, the court only required that the plaintiff plead a claim that is plausible on its face, and the judge concluded that Doe had pled sufficient facts to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding. In addition, the judge found that Doe had presented at least some concrete allegations that gender bias was a motivating factor behind the erroneous outcome, and the judge allowed Doe's Title IX claim to proceed. On Doe's breach of contract claim, the judge found that Doe's complaint contained sufficient allegations to support the conclusion that the actions of

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[67] *See Ashcroft v. Iqbal*, 556 U.S. 662, 664 (U.S. 2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 677-80) (U.S. 2007)

[68] *Iqbal*, 556 U.S. at 678.

[69] *Id*. (*quoting* Amended Complaint).

[70] *Id*. *See also Doe v. Brown Univ.*, 2016 U.S. Dist. LEXIS 21027, *45-46 (D.R.I. Feb. 22, 2016) (analyzing student's breach of contract allegations under heightened pleading standard and dismissing certain allegations for failure to state a claim).

[71] *Marshall v. Ohio Univ.*, No. 15-cv-775, 2015 WL 7254213, *8 (S.D. Ohio Nov. 17, 2015), *Doe v. Case W. Reserve Univ.*, No. 14-cv-2044, 2015 WL 5522001, *4 (N.D. Ohio Sept. 16, 2015); *Doe v. Univ. of Massachusetts-Amherst*, No. 14-cv-30143, 2015 WL 4306521, *8 (D. Mass. July 14, 2015); *Doe v. Columbia University*, 101 F. Supp. 3d 356, 368 (S.D.N.Y. 2015); *Sterrett v. Cowan*, 85 F.Supp. 3d 916, 937 (E.D. Mich. 2015).

certain University officials violated Doe's contractual rights as established by the student handbook.

In analyzing motions in the reverse Title IX context, courts have been reluctant to allow a complaint with only broad allegations about an institution's Title IX process to survive the motion. Claims that a university is generally anti-male or that it acted out of fear of a lawsuit by a complainant if action was not taken against the respondent are generally insufficient for maintaining a reverse Title IX suit.[72] Instead, courts often require respondents to identify specific statements or conduct of the decision makers in the disciplinary process that evince a clear gender bias. If a respondent can demonstrate this, the suit is likely to survive a motion to dismiss.

For example, in *Doe v. Washington & Lee University*, 2015 U.S. Dist. LEXIS 102426, *2 (W.D. Va. Aug. 5, 2015), the United States District Court for the District of West Virginia made clear that a 12(b)(6) motion to dismiss "tests the legal sufficiency of a complaint to determine whether the plaintiff has properly stated a claim; 'it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.'"[73] The court found that the plaintiff had pled sufficient facts "to cast doubt on the accuracy of the outcome reached against him."[74] The allegations in the complaint, which included claims that there were "critical omissions" in the witness statements and failure to consider evidence of post-incident consensual sex between complainant and respondent, if taken as true, "suggest that W&L's disciplinary procedures, at least when it comes to charges of sexual misconduct, amount to 'a practice of railroading accused students.'"[75]

E. Caselaw Demonstrating that Courts Show Deference to Colleges and Universities in Interpretation of Their Own Policies

Frequently in Title IX cases with breach of contract claims, respondents allege that the school has violated a specific procedural requirement laid out in the school's handbook. In *Bleiler v. College of the Holy Cross*, 2013 U.S. Dist. LEXIS 127775, *44, (D. Mass. Aug. 26, 2013), Bleiler brought a breach of contract claim, among others, against Holy Cross. Specifically, he alleged that Holy Cross breached the terms of its contract by: (1) allowing persons with conflicts of interest to serve on the hearing panel; (2) failing to sequester witnesses; (3) admitting the complainant's sexual history; (4) not allowing him to cross examine two witnesses who did not testify but whose statements were part of the record; (5) not allowing him to make a copy of the record; (6) failing to make any record of deliberations; and (7) allowing

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[72] *See, e.g. Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 371, 2015 U.S. Dist. LEXIS 52370, *33-34 (S.D.N.Y. 2015)("And while Columbia may well have treated Jane Doe more favorably than Plaintiff during the disciplinary process, the mere fact that Plaintiff is male and Jane Doe is female does not suggest that the disparate treatment was because of Plaintiff's sex.").

[73] (*quoting Republican Party of North Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992).

[74] *Id.* at *27.

[75] " *Id*. (*quoting Haley v. Virginia Com. Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996). Plaintiff also identified an administrator's endorsement of an article entitled *Is It Possible That There is Something In Between Consensual Sex And Rape…And That It Happens To Almost Every Girl Out There? Doe v. Washington & Lee Univ.*, 2015 U.S. Dist. LEXIS 102426, *28 (W.D. Va. Aug. 5, 2015)

the Director of Student Conduct and Community Standards and Assistant to the Vice President for Student Affairs to participate in deliberations.[76]

Noting that Massachusetts law requires courts interpreting contracts between students and academic institutions to use "the standard of reasonable expectation – what meaning the party making the manifestation, the university, should reasonably expect the other party to give it," the court found there was "no basis" for any contractual breach and granted summary judgment.[77]

Similarly, in *Yu v. Vassar College*, 97 F. Supp. 3d 448, 481(S.D.N.Y. 2015), the Southern District of New York considered a breach of contract claim, among others, brought by a student who was expelled from Vassar after a sexual assault investigation. The court noted that "[i]n New York, the relationship between a university and its students is contractual in nature.[78] A college is "contractually bound to provide students with the procedural safeguards that it promised."[79] Yu claimed, among other things, that there were issues with timeliness of the allegation, failure to receive a copy of the complaint in a timely manner as promised in the handbook, and failure to advise him on the Vassar grievance policies.[80] The court, similar to that in *Bleiler*, dismissed all of Yu's claims as having no basis in Vassar's policies, the law, or as squarely contradicted by the record of the sexual assault hearing and investigation.[81]

The Southern District of New York again considered a respondent's breach of contract claim in *Nungesser v. Columbia Univ.*, 2016 U.S. Dist. LEXIS 32080, *33 (S.D.N.Y. Mar. 11, 2016). Nungesser claimed Columbia University breached three of its policies: "(1) its policy concerning gender-based harassment; (2) its policy concerning confidentiality; and (3) its policy concerning retaliation."[82] The court concluded that "None of these claims withstand scrutiny, however, because Nungesser has not identified the specific promises that Columbia has breached."[83] In dismissing his gender-based harassment policy claims, the court noted that while the Columbia student policies contained some specific provisions that would be actionable, Nungesser was "unable to point to any such concrete, specific promises that were breached in this case."[84] The court similarly dismantled Nungesser's claims concerning the confidentiality policy, noting he "plead[] no basis for his proposition that such failures violated a binding agreement with the university."[85] Finally, the claims concerning the retaliation policy were dismissed because Nungesser failed to demonstrate a causal connection between his participation in the sexual assault investigation and Columbia's failure to discipline his accuser.[86] The court

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[76] *Id.*.

[77] *Id.* at 50, 51 (*quoting Schaer v. Brandeis Univ.*, 432 Mass. 474, 478, 735 N.E.2d 373, 378 (Mass. 2000)).

[78] (*quoting Papaspiridakos v. Educ. Affiliates, Inc.*, No. 10-CV-5628-RJD, 2013 U.S. Dist. LEXIS 129748, 2013 WL 4899136, at *3 (E.D.N.Y. Sept. 11, 2013) aff'd, 580 Fed. App'x 17 (2d Cir. 2014)).

[79] (*quoting Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 243 (D. Vt. 1994))." *Id.* at 481.

[80] *Id*. at note 27.

[81] *Id*.

[82] *Id.*

[83] *Id.*

[84] *Id.* at *34.

[85] *Id.* at *38.

[86] *Id.* at *39-40.

granted Nungesser the opportunity to replead his breach of contract claims but he has not done so as of this time.[87]

These cases are illustrative of the common theme running through breach of contract cases: courts are generally unwilling to interpret universities' policies for them and have shown deference towards the universities' own interpretations.[88] Some courts have even found there is no contract created between the student and the institution based on a school policy.[89] In order to succeed on a breach of contract claim, students generally must point to specific provisions in the student handbook or policies (i.e. a timing provision or some other very specific provision) and demonstrate there was a true violation.[90] Absent a specific showing, courts have shown a willingness to defer to school's interpretations of their own policies. . Those that do make it past the preliminary stage are often settled, as schools are likely hesitant to have their policies and procedures examined in detail by the courts.

IV. Balancing Trauma-informed Practices and Due Process Protections in Campus Policies and Procedures

Federal and state law, guidance from OCR, and a growing understanding of best practices in working with survivors of trauma have led schools to emphasize and provide training in trauma-informed responses to sexual violence and related misconduct. At the same time, increasing attention to respondents' rights has emphasized different aspects of investigations and processes used to adjudicate sexual misconduct cases, namely the necessity of providing for and safeguarding the due process rights of those accused of such conduct. These different emphases and values may in some circumstances come into conflict.[91] Schools should seek whenever possible, to train personnel, conduct investigations, and administer sexual misconduct proceedings in ways that harmonize and balance these sometimes competing concerns.

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[87] *See id.* at *40.

[88] *See also Dempsey v. Bucknell Univ.*, 76 F. Supp. 3d 565, 585 M.D. Pa. 2015) (*aff'd in part Dempsey v. Bucknell Univ.*, 2015 U.S. Dist. LEXIS 27335, *7 (M.D. Pa. Mar. 6, 2015) (dismissing breach of contract claims because plaintiff presented no evidence other than his opinion to substantiate such claims and presented no evidence of damages).

[89] *See, e.g. Doe v. Washington & Lee Univ.*, 2015 U.S. Dist. LEXIS 102426, *32-33 (W.D. Va. Aug. 5, 2015) (dismissing breach of contract claims because neither the Student Handbook nor the Interim Sexual Harassment and Misconduct Policy created a contract between W&L and its students).

[90] For example, in *Doe v. Brown Univ.*, 2016 U.S. Dist. LEXIS 21027, *45-46 (D.R.I. Feb. 22, 2016), the Rhode Island District Court allowed some of plaintiff's breach of contract claims to proceed. Among his claims, the student pointed to a provision in the handbook that allowed him to request that a hearing officer be disqualified that that he had to make that request no more than two days before the hearing. *Id.* The school appointed the hearing officer only the day before the hearing and the Court found that "[b]y appointing [the hearing officer] the day before, Doe was precluded from making a timely investigation and/or request to disqualify."

[91] There are many respects in which both trauma-informed responses and due process protections are aligned and not in conflict. Examples are the prompt and equitable requirements of the Title IX adjudicatory process; the provision of timeframes for the major stages of the process with notice of extensions for good cause; periodic and timely updates to both parties; equal notice and opportunity to respond during the investigative portions of a case; equal opportunity to submit evidence and witnesses; equal and timely notice to all information that will be used in disciplinary meetings; simultaneous written notice of outcomes, rationale and appeal rights; ; and, equal access to an advisor of choice, including an attorney.

A. Suggested Elements of Trauma-informed Practices

- Provide training to administrators and personnel involved in investigating and adjudicating complaints on the neuro-biological response to trauma and on how to implement a trauma-informed response that encourages the participation of complainants

- Train personnel on the societal myths and stereotypes surrounding causes and impacts of sexual misconduct

- Mandate that all implementers have robust training on all content areas set forth under Title IX and VAWA

- Provide on-campus resources to students with a full array of counseling, support, health and safety services

- Provide students with access to community resources through local rape crisis centers or intimate partner violence programs

- Make policies and resources widely available and easily understood

- In policies, educational materials, and training programs, provide clarity with respect to the difference between privacy, confidentiality and anonymity

- Provide interim remedial measures and accommodations that do not unduly burden a complainant, and as facts warrant, provide interim protective measures that may restrict a respondent's access to campus, class or residence pending a full investigation and adjudication

- Consider how best to question complainants and conduct an investigation that minimizes negative impact on victims of trauma (including OCR's suggested restriction on allowing the parties to cross-examine one another)

- Allow complainants to participate in adjudicatory hearings by contemporaneous alternative means

- Clear policy guidance on the limits of how the prior sexual history of a complainant may be used

- Appropriate protections for privacy and confidentiality

- Freedom from retaliation for making a good faith report or participating in a campus investigation or adjudication

- The opportunity to submit an impact statement for consideration in sanctioning

B. Suggested Elements of Due Process Protections

- School policies should include language that specifies the reach of the school (jurisdiction) and the conduct that may subject students to its processes; provides clear definitions of prohibited conduct
- Publish policies and conduct training on them for all students
- Provide written notice regarding charges as well as the specific events at issue
- Maintain specific provisions for addressing counter-complaints in policy and procedures
- Include provision for allowing evidence of prior or subsequent misconduct, including unproven allegations
- Designated and reasonably prompt time frames, with equal extensions of times granted equitably to all parties
- Maintain a presumption of non-responsibility that must be overcome by sufficient evidence (under Title IX, preponderance of the evidence)
- Provide all parties an opportunity to offer information, present evidence, submit documents, and identify witnesses
- Provide the opportunity to be heard, orally and/or in writing, as to the determination of a policy violation and the imposition of any sanction
- Allow both the complainant and the respondent to review all documents and information that will be considered by an investigator or a hearing panel
- Allow parties sufficient opportunity to respond to reports and factual findings
- Allow parties opportunities to present questions to witnesses
- Include provisions for addressing conflicts of interest
- Provide both parties with an opportunity to have an advisor of choice, including an attorney, present at any meeting or proceeding
- Provide both parties with timely notice of meetings at which their presence will be required
- Provide both parties with an opportunity to challenge an outcome or sanction through an appeal process

- Provide simultaneous written notice of outcomes to all parties

- Consistent application and enforcement of policies

C. Trauma-based Responses That May Appear to Conflict With Due Process Protections

- Training of investigators and adjudicators that explains the inconsistent responses, counter-intuitive behaviors and memory lapses in victims of trauma, which may be interpreted by respondents as bias in favor of complainants

- OCR guidance discouraging cross-examination of the parties by one another

- Prohibitions on providing character evidence, unless both parties are permitted to provide character evidence

- Maintaining records of alleged perpetrators for purposes of identifying repeat offenders

- OCR guidance that school disciplinary proceedings not wait for the conclusion of any criminal process thereby exposing a respondent to risk of incrimination at the expense of a robust defense in the school proceeding

- Lengthy or no statutes of limitation for bringing a campus complaint

- Preponderance of the evidence standard

- Single investigator model without providing an opportunity for a hearing and/or review by a neutral party

- Amnesty for complainant substance use in contrast with provisions in school policies that hold respondents accountable for conduct engaged in while under the influence of drugs or alcohol

- Affirmative consent policies

D. Exploring Investigative and Adjudicative Models

For an educational institution, the fact-finding investigation of sexual and gender-based harassment and violence is one of the most sensitive and difficult tasks involved in the institutional response. The quality and integrity of an investigation is vital in providing a sufficient factual foundation to support determinations of responsibility and establishing faith in outcomes and sanctions. In the context of word-against-word credibility assessments, it is imperative that this aspect of the institution's response be conducted by individuals with appropriate training and experience.

OCR uses the term "investigation" to refer to the process an institution uses to resolve sexual violence complaints, including the fact-finding investigation and any hearing and decision-making process the institution uses to determine whether the conduct occurred by a preponderance of the evidence and if so, the appropriate sanctions and remedies to eliminate the sexual violence/ hostile environment, prevent its recurrence, address its effects.[92] Neither Title IX nor the Dear Colleague Letter, however, specify who should conduct the investigation. Furthermore, while an investigation may include a hearing to determine whether the conduct occurred, Title IX does not require a hearing.[93]

OCR recognizes that each educational institution is unique in its characteristics, including size, student-body composition, institutional values, governance, public versus private status, and culture. Title IX applies to elementary, secondary and post-secondary institutions. As such, OCR has stated, "depending on the circumstances, there may be more than one right way to respond."[94] Further, OCR has noted, "the specific steps in a school's investigation will vary depending on the nature of the allegations, the age of the student or students involved . . ., the size and administrative structure of the school, and other factors."[95]

According to the 2011 Dear Colleague Letter, Title IX requires adequate, reliable and impartial investigations that are conducted by investigators with sufficient experience or training.[96] OCR expanded on this guidance in the 2014 Title IX Q&A, outlining significant training requirements for investigators and noting that "provisions for adequate, reliable, impartial and prompt investigation of complaints require: the opportunity for both parties to present witnesses and evidence; interim measures to be implemented before the final outcome of the investigation; periodic updates on the status of the investigation to be presented to the parties; and the application of the preponderance of the evidence standard."[97] OCR has also noted that "a balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions."[98] Beyond these broad pronouncements, however, OCR's guidance is somewhat limited as to exactly how a school should conduct its investigation, and schools have wide latitude to develop investigative and adjudicative models. While some mandatory guideposts exist, institutions still have flexibility in designing grievance procedures, selecting investigative models, and developing sexual harassment and misconduct policies that fit their institutional framework and meet the unique needs of their community.

In the wake of long overdue attention to the issues of sexual and gender-based harassment and interpersonal violence on campuses and evolving OCR guidance, educational institutions across the nation are seeking benchmarks and best practice models. Best practices, however, remain elusive; in the absence of clearly articulated standards, the range of effective practices can vary greatly. To date, there is no consensus on what constitutes best practice in campus investigation and adjudications. For example, in April 2014, in *Not Alone*, the White House Task Force to Protect Students from Sexual Assault report noted "the Justice Department

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[92] Title IX Q & A at 24-25.
[93] Title IX Q & A at 25.
[94] *2001 Revised Sexual Harassment Guidance*, p. iii.
[95] April 4, 2011 DCL, p. 5.
[96] 2011 DCL at 9-12.
[97] Title IX Q & A at 3, 12-14.
[98] *Id.* at 24-26.

will begin assessing different models for investigating and adjudicating campus sexual assault cases with an eye toward identifying best practices."[99] Since that first report, there has been no further guidance regarding best practices in campus investigative and adjudicative procedures. As a result, educational institutions have struggled to identify consistent standards of care. While campuses across the country have created internal task forces and sought advice from subject matter experts, there remains a strong need for standards of care that serve the needs of complainants, respondents and institutions tasked with providing a safe environment free from harassment and discrimination.

V. The Advent of Respondent-Filed OCR Complaints

A. Understanding the OCR Enforcement Process

Under Title IX, any individual can file a complaint with OCR alleging a violation of Title IX. The OCR Case Processing Manual (CPM) outlines OCR's procedures with respect to the acceptance, evaluation and resolution of a complaint.[100] Upon receipt of a written complaint, OCR evaluates a complaint to determine whether OCR has sufficient information to proceed to investigation; this includes a determination whether OCR has subject matter and personal jurisdiction and whether the complaint was timely filed.[101] If OCR accepts a complaint for investigation, it provides notice to the educational institution of the complaint's allegations (broadly), but OCR does not provide the institution with the specific details of the complaint or, in most instances, the complaint itself..

Complaints accepted for investigation are typically resolved through a resolution agreement between the school and OCR under section 302 or 303 of the CPM. 302 resolutions are considered voluntary; they are resolved prior to the completion of the investigation and accompanied by a statement of the case which does not include findings. 303 resolutions include a letter of findings at the conclusion of the investigation. OCR may also consider a mixed resolution under 302 and 303 in which OCR makes findings on some issues, but defers findings on others. In each case, a resolution agreement is signed outlining remedial measures and setting reporting requirements during a multi-year monitoring period. These resolution agreements, which are generally public, can provide insight into how OCR interprets and implements Title IX. The agreements, however, are specific to the school *and* to the unique set of facts that served as the impetus for the complaint. Thus, while the agreements may be instructive, they are by no means binding legal mandates.

In the 2001 Revised Sexual Harassment Guidance, OCR emphasized the importance of discretion and judgment:

> One of the fundamental aims of both the 1997 guidance and the revised guidance has been to emphasize that, in addressing allegations of sexual harassment, the good judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX.

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[99] https://www.whitehouse.gov/sites/default/files/docs/report_0.pdf.
[100] The CPM can be found at http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html.
[101] *OCR Case Processing Manual*, Article I.

> A critical issue under Title IX is whether the school recognized that sexual harassment has occurred and took prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. If harassment has occurred, doing nothing is always the wrong response. However, depending on the circumstances, there may be more than one right way to respond. The important thing is for school employees or officials to pay attention to the school environment and not to hesitate to respond to sexual harassment in the same reasonable, commonsense manner as they would to other types of serious misconduct.[102]

Under this lens, enforcement efforts since 2001 were long guided by the following principle: "OCR always provides the school with actual notice and the opportunity to take appropriate corrective action before issuing a finding of violation."[103] Moreover, the effectiveness of an institution's response is based on a reasonableness standard.[104]

Following the April 4, 2011 Dear Colleague Letter, however, the enforcement scheme at OCR has evolved. The 2011 DCL styled itself as a call to action, calling upon institutions to review their policies and implement changes as needed. It also served as a catalyst for a significant increase in Title IX complaints. Representatives from OCR have publicly acknowledged a significant increase in sexual harassment and sexual violence complaints in the post-secondary context; indeed from 2012 to 2013, OCR noted an 88% increase in complaints of sexual violence in the post-secondary context. Equally as important, OCR has acknowledged a political priority in responding to sexual violence complaints, noting that any sexual violence complaint received, even if not timely filed, will trigger a broader systemic review involving three years of policies, procedures and investigative files. And, as of April 2014, OCR shifted its long-term practice regarding confirmation of open investigations and now publicizes a weekly list of all active investigations.

The current compliance environment is interpretative at best – the lens being used by OCR goes far beyond the "musts" of the law and implementing regulations and strays into the "shoulds" of the guidance documents. This has the effect of creating heightened expectations by students and communities across the country about what is legally required for Title IX compliance. For example, many institutions comply with the requirements of the implementing regulations: they promulgate a notice of non-discrimination, designate a Title IX coordinator and have prompt and equitable grievance procedures. While the first two requirements are fairly self-evident, what constitutes prompt and equitable has become fodder for significant variations in interpretation across the country. Each of these concepts – prompt and equitable – has been a moving target as OCR has focused on the implementation of the grievance procedures. In some instances, there has been a schism between the enforcement philosophy of regional offices and the national office.[105]

Because of the interpretive elements of the current compliance environment, any experienced outside consultant – or OCR – could review any institution's policies, procedures

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[102] 2001 Guidance at ii-iii.
[103] *Id.* at iv.
[104] *Id.* at vi.
[105] OCR has 12 regional offices across the country and a national office in Washington D.C.

and practices and find that the institution, for one reason or another, was not in compliance with Title IX. One need look no further than recent resolution agreements that have found current non-compliance based on discrete provisions of policies and procedures.

B. Expansion of OCR Enforcement Actions to Respondent-Filed Cases

As noted above, when a complaint is filed with OCR, OCR does not share the actual complaint with the institution. OCR may request the investigative files pertaining to a particular student, or frame the basis for the investigation in broad and conclusory language (e.g., the complainant alleges that the school failed to conduct a prompt and equitable resolution), but OCR does not provide specific notice to the institution. OCR may also inform the school that the complaint is being opened on both an individual and systemic basis, even if the issues raised in the individual complaint are discrete and do not appear to lend themselves to systemic concerns. Finally, OCR complaints are typically not released under FOIA. Accordingly, it is difficult to quantify the types of complaints filed – and to identify for each institution under investigation whether the complaint was filed by the complainant or the respondent in the underlying school investigation.

Recently, however, OCR has begun to accept complainants filed by respondents in campus proceedings. While OCR has not yet publicly resolved such a complaint, several campuses across the country are responding to an OCR investigation in response to a complaint filed by a respondent that the school did not provide an appropriate Title IX response to a respondent. It remains to be seen how OCR will evaluate these cases, as many of the claims advanced to date are not framed through the lens of sex or gender-based discrimination or harassment. Indeed, OCR guidance documents have long stated that a school violates Title IX if it has "notice" of a sexually hostile environment and fails to take immediate and corrective action. In addition, a school's delay, inappropriate response or inaction in response to a report of sexual or gender-based harassment or violence may subject the complainant to a hostile environment and require the institution to remedy the effects of the hostile environment that could reasonably have been prevented had the institution responded promptly and appropriately.[106] When framed through the lens of potential claims by a respondent, none of these grounds seem to apply – with the possible exception of a cross-complaint filed by a respondent in a campus proceeding, claims about process do not raise the specter of a hostile environment for a respondent who has not experienced – or reported experiencing – unwelcome conduct of a sexual nature. As OCR enforcement practices continue to evolve, this will be an area to carefully monitor for new approaches and insights.

[106] Title IX Q & A at 4.

VI. Inventory of Respondent Cases[107]

John Doe v. Ohio State University, No. 15-cv-2830 (S.D. Ohio, Apr. 20, 2016)

John Doe was enrolled in the Ohio State University College of Medicine and the Ohio State Fisher School of Business and was scheduled to graduate with degrees from both schools in 2016. In July 2014, John Doe and another Ohio State University student, Jane Roe were involved in a sexual encounter. Jane Roe filed a claim of sexual misconduct after this sexual encounter. The University Hearing Panel found him to be responsible and dismissed him from both the Medical and Business School.

John Doe filed a claim in the United States District Court for the Southern District of Ohio claiming that the University violated his constitutional right to due process. Doe alleged that the University's Hearing Panel was biased in its decision because it refused him access to Roe's academic records and also refused to allow expert testimony during the hearing. The Court refused Doe's preliminary injunction because the Court concluded that he was not likely to prevail on the merits because the Constitution neither guaranteed Doe a right to cross-examine witnesses nor a right to present expert testimony in a student disciplinary hearing. The Court also concluded that Doe had not produced enough evidence of "irreparable injury" and that the public and private interests did not weight more heavily in favor of one party over the other. *See John Doe v. Ohio State Univ.*, No. 15-cv-2830, 2016 U.S. Dist. LEXIS 21064 (S.D. Ohio, Feb. 22, 2016). Doe moved for reconsideration and reasserted his claim for preliminary injunction and affirmed the Court's previous finding.

John Doe v. Rector and Visitors of George Mason University, No. 15-cv-209 (E.D. Va., Apr. 14, 2016)

Plaintiff John Doe was a former student at George Mason University ("GMU") who was accused of sexual misconduct by a fellow GMU student, Jane Roe. The University's hearing panel found him not responsible of sexual misconduct, but on an appeal from Roe, an appeals' officer reversed the panel's decision and expelled Doe. Doe filed an action in the United States District Court for the Eastern District of Virginia against GMU and three of its officials in their individual and official capacities, alleging violations of various state and federal constitutional rights, state common law duties, and federal law. The defendants filed a motion to dismiss, which was granted in part and denied in part. The remaining claims were (1) deprivation of a constitutionally protected liberty interest without due process of law and (2) violation of plaintiff's right to free speech.

In a memorandum opinion, the Court granted summary judgment for Doe holding that GMU did not give Doe notice of all the charges against him or an adequate opportunity to be heard. Regarding the violation of Doe's right to free speech, the Court found that the expulsion was based in part on a text message that Doe sent to Roe claiming that he would kill himself if she

[107] The authors gratefully acknowledge the contributions of Scott Roberts, Hirsch Roberts Weinstein LLP, for sharing content from the January 2016 NACUA CLE Workshop on Sexual Misconduct on Campus: Prevention, Compliance, Response and Beyond (Nashville, Tennessee).

did not respond. The Court held that the speech was protected because it did not constitute a true threat, fighting words, or other banned speech. *See John Doe v. Rector & Visitors of George Mason Univ.*, No. 15-cv-209, 2016 U.S. Dist. LEXIS 24847 (E.D. Va., Feb. 25, 2016). In the issuance of the appropriate remedy, the Court held that because Defendants wrongfully deprived Plaintiff of "victory" in his student conduct hearing through a defective appeal process, Plaintiff was entitled to have his victory restored, and that restoring Plaintiff to his rightful position would not unduly burden Defendants or do a disservice to the public interest. However, the Court refused to prohibit GMU from pursuing any new disciplinary charges against Plaintiff based on the complainant's allegations surrounding events other than those underlying Plaintiff's expulsion.

***John Doe v. University of Southern California*, No. B262917 (Cal. Ct. App., Apr. 5, 2016)**

John Doe, a student at the University of Southern California (USC) had been suspended based on a finding by USC's Student Behavior Appeals Panel that he had violated the Student Conduct Code as a result of his participation in a group sexual encounter at a fraternity party. The trial court rejected the student's claim that he was not afforded a fair hearing and denied his petition for a writ of mandate challenging his suspension. The California Court of Appeals affirmed in part and reversed in part the judgment and remanded the matter back to the trial court.

The Court of Appeals held that USC failed to provide the student fair notice of the allegations that resulted in suspension, or an adequate hearing on those allegations. Although the University's Office of Student Judicial Affairs and Community Standards (SJACS) gave the student a list of student conduct code sections he allegedly violated, the Court found that SJACS did not provide the student notice of the factual basis for those charges. The SJACS investigation and report focused on alleged sexual assault. However the Student Behavior Appeals Panel suspended the student for: 1) encouraging other students to slap the female student and, 2) endangering the female student after all sexual contact had ended. The Court found that because the student never received notice of the factual basis of the allegations and the SJACS investigation focused solely on the female student's consent to sexual activity, the student was not afforded an adequate opportunity to defend his actions relating to the slap or leaving the bedroom. Moreover, the Court found that because the Student Behavior Appeals Panel's finding that the student endangered the female by leaving her in the bedroom contradicted both the student's and the female student's recollection of relevant events, there was no evidence that the student violated the Student Conduct Code by endangering the female student.

***Doe v. Brandeis University*, No. 15-cv-11557, 2016 U.S. Dist. LEXIS 43499 (D. Mass., Mar. 31, 2016)**

For nearly two years, John Doe and another male student, J.C., were engaged in a romantic and sexual relationship while they both were attending Brandeis University. After their relationship ended, J.C. alleged that Doe had engaged in sexual misconduct during the relationship. The University conducted an investigation and concluded that Doe was responsible for sexual misconduct and made a notation in his permanent educational record. Doe brought a claim in the United States District Court for the District of Massachusetts asserting causes of action for (1) breach of contract; (2) breach of implied covenant of good faith and fair dealing; (3) estoppel and reliance; (4) negligence; (5) defamation; (6) invasion of privacy; (7) intentional infliction of

emotional distress; and (8) negligent infliction of emotional distress. On a motion to dismiss by Brandeis, the Court allowed Doe to proceed on his causes of action for (1) breach of contract; (2) breach of implied covenant of good faith and fair dealing; and (8) negligent infliction of emotional distress.

Importantly, the Court ruled that Doe sufficiently pled the cause of action for breach of contract because, under the facts presented, Brandeis' process was procedurally and substantively unfair. Specifically, the Court found that Brandeis did not provide Doe with the facts underlying the charges against him, deprived him of the right to confront his accuser or the accuser's witness and denied the accused access to evidence, witness statements, and the special examiner's report. Further, the Court concluded that the special examiner failed to scrutinize the delay in filing the complaint and failed to consider the importance of their nearly two year relationship.

***John Doe v. Alger*, No. 15-cv-00035 (W.D. Va., Mar. 31, 2016)**

John Doe was a student at James Madison University (JMU). During his first week on campus he met another freshman, Jane Roe, and the two engaged in sexual intercourse. Months later, Roe filed a charge of sexual misconduct against Doe, accusing Doe of rape. A University hearing board held an evidentiary hearing on the charge. Both Roe and Doe attended and presented evidence, including witness testimony. The hearing board determined that Doe was not responsible for sexual misconduct. Roe appealed the decision. A three-person appeal board met and reversed the hearing board's decision, suspending Doe for five and a half years. The appeal board based its decision on the record of the evidentiary hearing and new evidence submitted by Roe. Doe was not permitted to appear before the appeal board, and his ability to respond to the new evidence was limited. Doe filed a claim in the United States District Court for the Western District of Virginia under 42 U.S.C. § 1983, asserting that the school officials deprived him of his property interest in his continued enrollment and of his liberty interest in his good name without procedural due process, in violation of the Fourteenth Amendment to the Constitution.

JMU school officials filed a motion to dismiss arguing that Doe failed to plead a constitutionally protected property or liberty interest and that they did not deprive him of such interests without procedural due process. The Court ruled that Doe sufficiently plead a procedural due process claim based on property interest, but not on a liberty interest. In doing so, the Court allowed Doe an opportunity to prove the legitimacy of his claim to a property right in education, noting that if one should exist, the University's Appeals Board violated this right by not allowing him to appear before the Board, not showing him new evidence submitted by his accuser on appeal, not giving him the names of the Appeals Board members, and not giving him notice of the Appeals Board's meeting.

***Marshall v. Indiana University*, No. 15-cv-00726, 2016 U. S. Dist. LEXIS 32999 (S.D. Ind., Mar. 15, 2016)**

While a student at Indiana University-Purdue University Indianapolis, Jeremiah Marshall was suspended, expelled and banned from all Indiana University campuses, following accusations of sexual assault by a female student. Marshall filed an action in Superior Court that was removed to the United States District Court for the Southern District of Indiana, alleging that the University's policies and responses to the accusations denied him due process and free speech

rights under the federal Constitution, and violated his rights under Title IX of the Education Amendments of 1972, and the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. The University moved to dismiss all of the claims. The Court dismissed all but the Title IX claim for gender discrimination.

In his Title IX claim for gender discrimination, Marshall alleged that the University failed to investigate a reported sexual assault committed against Marshall by a female student. Holding that the University was in sole possession of all information relating to the allegations made by and against Marshall, the Court found that the University "cannot have it both ways", restricting access to the facts and then arguing that Marshall's pleading must be dismissed for failure to identify particularized facts. The Court ruled that whether the facts alleged sufficiently ultimately support a claim for intentional gender discrimination under Title IX is a question for a later state in the litigation, after fair and robust discovery by both sides.

***Nungesser v. Columbia Univ.*, 2016 U.S. Dist. LEXIS 32080 (S.D.N.Y. Mar. 11, 2016)**

In 2013, Paul Nungesser was accused of rape by fellow Columbia University ("Columbia") student Emma Sulkowicz. Sulkowicz filed a complaint with Columbia's Office of Gender-Based Misconduct, and, after an investigation and hearing, Nungesser was found not responsible for non-consensual sexual intercourse. Notwithstanding the outcome of Columbia's investigation, Sulkowicz maintained that Nungesser had raped her. Over the course of their final year at Columbia, she became well known as an activist campaigning to raise awareness of sexual assault on college campuses, and her senior thesis project, known as the "Mattress Project," received widespread media attention.

Nungesser brought an action in the United States District Court for the Southern District of New York alleging that Columbia, by permitting Sulkowicz's activism and awarding her academic credit for the Mattress Project, violated his rights under Title IX of the Education Amendments of 1972 ("Title IX"); he also brought various related state-law claims against Columbia, Columbia President Lee Bollinger, and Professor Jon Kessler. On a motion to dismiss for failure to state a claim for which relief can be granted, the Court granted the motion to dismiss all claims. The Court found that Nungesser did not adequately plead facts necessary to prove that Columbia was deliberately indifferent to what he asserted was gender-based harassment by Sulkowicz that was condoned by President Bollinger and Professor Kessler.

***Prasad v. Cornell University*, No. 15-cv-322 (N.D. N.Y., Feb. 24, 2016)**

Vito Prasad, a senior at Cornell University, was found to have violated the University's sexual harassment policy after a complaint was made by another student that Mr. Prasad raped her while she was incapacitated. Cornell University conducted an investigation and recommended expulsion. Prasad filed suit against Cornell, alleging that University officials failed to conduct a diligent and impartial investigation, utilized a procedurally deficient investigatory model and imposed a disproportionate penalty. His complaint asserted various claims against Cornell under federal and state law. Cornell moved to dismiss the lawsuit in its entirety. In a written decision issued on February 24, 2016, a federal judge for the United States District Court for the Northern District of New York denied Cornell's motion to dismiss plaintiff's claims under Title IX and the New York Human Rights Law, a state counterpart to the federal Title IX. Based on Prasad's

allegations that the investigation was plagued by evidentiary weaknesses, prejudicial conclusions and procedural flaws, the judge concluded that Prasad had sufficiently alleged that gender bias led to an erroneous outcome in his disciplinary proceeding. The judge dismissed Prasad's various other claims, which included state and federal law claims for negligence, selective enforcement and deceptive trade practices. However, the judge allowed Prasad until April 14, 2016 to amend and re-file his claims for breach of contract and violations of state civil rights law.

***Doe v. Brown University*, No. 15-cv-144 (D. R.I., Feb. 22, 2016)**

John Doe was a student at Brown University. After a party on Brown University's campus, John Doe and Jane Doe went to John Doe's room where they engaged in kissing and sexual touching. One week later, Jane Doe reported to Brown's Department of Public Safety that she was sexually assaulted by John Doe. A Brown University Hearing Panel found him responsible for sexual misconduct and he was sanctioned with a 2.5 year suspension. John Doe filed an internal appeal, which was denied by Brown University's Deputy Provost.

Doe filed suit against Brown, alleging that certain deficiencies and irregularities in the disciplinary proceedings violated his contractual rights—as set forth in the student handbook—and violated his rights under Title IX, a federal law that prohibits discrimination on the basis of gender. Brown moved to dismiss Doe's complaint. On February 22, 2016, a federal judge for the United States District Court for the District of Rhode Island denied in part and granted in part Brown's motion to dismiss. Noting that a plaintiff is only required, at the preliminary stages of litigation, to plead a claim that is plausible on its face, the judge concluded that Doe had pled sufficient facts to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding. In addition, the judge found that Doe had presented at least some evidence that gender bias was a motivating factor behind the erroneous outcome. Accordingly, the judge allowed Doe's Title IX claim to proceed. On Doe's breach of contract claim, the judge found that Doe's complaint contained sufficient allegations to support the conclusion that the actions of certain University officials violated Doe's contractual rights as established by the student handbook's section on "Rights and Responsibilities of Accused Students." In particular, the judge cited Brown's decision to ban plaintiff from campus prior to conducting an investigation, its limitation of his testimony during the hearing, its denial of his request for a continuance and its failure to respond to his requests for information about the evidence against him. However, the judge granted Brown's motion to dismiss Doe's claims for negligence, deliberate indifference and declaratory relief. Discovery is expected to be completed sometime in the fall of 2016.

***Howe v. Pennsylvania. State University – Harrisburg*, No. 16-cv-0102, 2016 U. S. Dist. LEXIS 11981 (M.D. Pa., Feb. 2, 2016)**

Timothy Howe filed an emergency temporary restraining order and/or preliminary injunction in the United States District Court for the Middle District of Pennsylvania after he was suspended for violating a no-contact order that was issued pursuant to a sexual misconduct investigation.

The Court denied the request for a temporary restraining order, concluding that there was no reasonable probability that he would succeed on the merits of his claim. Further, the Court found

that Howe did not suffer irreparable injury to support his request for injunctive relief. In so doing, the Court stated that lost scholarships and wages were not an irreparable harm because Howe could later be compensated with monetary damages. Lastly, the Court ruled that Penn State University has a significant interest in disciplining students who engage in misconduct and protecting the students within its community and that issuance of the injunction would cause greater harm to Penn State University than the benefit which would be realized by Howe if an injunction were issued.

***John Doe v. Ohio State University*, No. 15-cv-2996 (S.D. Ohio, Jan. 22, 2016)**

Joe Doe is a student and student instructor at Ohio State University ("OSU"). Doe filed a motion for temporary restraining order and preliminary injunction in the United States District Court for the Southern District of Ohio seeking to enjoin OSU from commencing disciplinary proceedings against him for sexual misconduct.

The Court denied the request for a temporary restraining order finding that there was no reasonable probability that he would succeed on the merits of his claim that OSU lacks jurisdiction to initiate disciplinary proceedings against him because the complainant is not an OSU student. Moreover, because OSU had not yet initiated a disciplinary process against him, his substantive due process claim was unripe, and enjoining OSU from pursuing its normal disciplinary proceedings would undermine OSU's ability to comply with procedural due process requirements.

***Doe v. Hazard*, No. 15-cv-300, 2016 U.S. Dist. LEXIS 5478 (E.D. Ky., Jan. 15, 2016)**

While enrolled at the University of Kentucky ("UK"), John Doe engaged in sexual activities with a female student who was also enrolled at UK. The female student reported a claim of sexual misconduct against John Doe, and as required under Title IX, UK initiated an investigation to determine whether the allegations were supported by reasonable suspicion. After determining that they were, UK initiated a student disciplinary proceeding against John Doe. The student disciplinary hearing found that John Doe had violated the Student Code of Conduct and he was suspended for one year. John Doe appealed the ruling to the University Appeals Board, which reversed the ruling and ordered a new hearing. The new hearing again found that John Doe had violated the Student Code of Conduct and issued a five-year suspension. Doe again appealed the decision, and the University Appeals Board set aside the ruling and returned the matter to the Office of Student Conduct for further consideration.

Joe Doe filed a motion for preliminary injunction in the United States District Court for the Eastern District of Kentucky. The Defendant moved for a Younger Abstention, which was granted. A Younger Abstention is a legal doctrine that prevents federal courts from interfering with pending state judicial proceedings. The Court held that the Younger Abstention applied when a student sought to stop an on-going Title IX sexual misconduct disciplinary hearing. The Court concluded that the student conduct proceeding at issue was a "state proceeding" under the doctrine and therefore granted the defendant's motion.

***Sanning v. Board of Trustees of Whitman College*, No. 15-cv-05055 (E.D. Wa., Dec. 9, 2015)**

Dr. Lee Sanning filed a complaint in the United States District Court for the Eastern District of Washington against the Board of Trustees of Whitman College, alleging violations of Title VII of the Civil Rights Act of 1964, Title IX and state contract and sex discrimination law. In denying the defendant's motion to dismiss, the Court found that Sanning alleged sufficient facts to allow the Court to draw reasonable inferences that a plausible ground for relief exists.

Sanning alleged that the college treated him improperly throughout an investigation into the relationship between himself and Dr. Heather Hayes. According to Sanning, the college treated him differently because of his sex and the differential treatment lead to a process that violated the Grievance Policy adopted by the college and ultimately led to Sanning's employment being terminated. The Court ruled that the allegations were enough to survive a Rule 12(b)(6) motion for summary judgment.

***Marshall v. Ohio University*, No. 15-cv-775, 2015 U. S. Dist. LEXIS 155291 (S.D. Ohio, Nov. 17, 2015)**

Michael Marshall is a student at Ohio University ("OU"). Marshall met and became friendly with a fellow OH student, A.H., and would often exchange text messages about both academic assignments and social events. Eventually, Marshall began sending text messages in an attempt to engage in a romantic relationship, but these were rebuffed by A.H. After the text messages became of a sexually harassing nature, A.H. filed a complaint with the Office for Institutional Equality. Following an investigation, OU held a hearing on the complaint and suspended Marshall for a semester, but he was allowed to petition for re-admittance after completing certain tasks. Marshall appealed decision, but it was upheld by the hearing panel.

Marshall filed a complaint in the United States District Court for the Southern District of Ohio seeking immediate injunctive relief reinstating him as a student at OU for the current semester. The Court granted the defendant's motion to dismiss finding that Marshall failed to state a claim for relief under the due process clause or Title IX, and without an actionable claim, there is no controversy to be settled.

***Doe v. Pennsylvania State University*, No. 15-cv-02072 (M.D. Penn., Oct. 28, 2015)**

In an ongoing case in the Middle District of Pennsylvania, the Plaintiff, a Pennsylvania State University ("Penn State") student, was granted an Emergency Temporary Restraining Order ("TRO") prohibiting Penn State from enforcing the student's suspension after he was found responsible for sexual misconduct.

The student alleged that Penn State created a process whereby a Title IX Investigator prepares a written investigative packet that is presented to a Title IX Decision Panel ("Panel"), on the basis of which responsibility is adjudicated and sanctions are assigned. The student further alleged that the process did not provide the student a right to be heard in-person before the Panel, and did not provide an opportunity to question adverse witnesses or to present the oral testimony of his own witnesses, thereby claiming that there was no right to be heard in any meaningful sense. The Court granted a TRO because the student had adequately demonstrated that he was reasonably

likely to succeed on the merits of his claim in light of the potential inadequacy of the procedure afforded him by the University during a disciplinary hearing.

***Salau v. Denton*, No. 14-cv-04326, 2015 U. S. Dist. LEXIS 137278 (W.D. Mo., Oct. 8, 2015)**

Ahmed Salau, a student at the University of Missouri, was accused of sexual misconduct by a fellow student. After an investigation, Salau opted not to participate in the disciplinary hearing. He was found responsible for nonconsensual sexual contact and other violations of the University's code of conduct and expelled from the University.

Salau filed a claim in the United States District Court for the Western District of Missouri against the University and various University officials, alleging that they had discriminated against him on the basis of sex in violation of Title IX. The Court dismissed his claim after determining Salau had "unquestionably failed" to allege any facts that suggested gender bias on the part of University officials. "Even if the University treated the female student more favorably than the Plaintiff, during the disciplinary process," the Court asserted, "the mere fact that Plaintiff is male and [the alleged victim] is female does not suggest that the disparate treatment was because of Plaintiff's sex." The Court also dismissed the plaintiff's due process claim, noting that the plaintiff "was afforded adequate procedural rights by Defendants by way of notice of the charges, identification of the violations charged, and an opportunity to present his case even though he refused to participate."

***Tsuruta v. Augustana University*, No. 15-cv-041520, 2015 WL 5838602 (D. S.D., Oct. 7, 2015)**

Jane Roe reported to Augustana University ("AU") that Koh Tsuruta sexually assaulted her. Tsuruta was arrested and charged with sexual assault. While criminal proceedings were pending, AU suspended Tsuruta and commenced its own internal investigation. Tsuruta requested that AU suspend that investigation pending the resolution of the criminal charges against him, but the request was denied.

Tsuruta filed suit in United States Court for the District of South Dakota alleging, among other things, violations of Title IX and breach of contract. He also filed a motion for a preliminary injunction to stay the investigation. In denying the request for injunctive relief, the Court stated that the Title IX claim was likely to fail because Tsuruta pointed to no evidence of discriminatory animus, and AU had yet to hold a hearing, rendering any erroneous outcome claim premature. The Court also determined that Tsuruta's contract claim, based on the student handbook, had a low probability of success. The Court held that there was no indication that the investigation into Roe's allegations was inadequate under the handbook, and that there was no provision in the handbook requiring AU to stay the completion of its investigation pending resolution of Tsuruta's criminal case. Lastly, the Court held that Tsuruta had not shown that he would suffer irreparable harm without a preliminary injunction because (1) a finding in a disciplinary proceeding was not tantamount to a conviction; (2) any resulting harm to him would result from a determination that he, in fact, violated the school's policy; and (3) Tsuruta did not demonstrate that AU's procedures for resolving Roe's complaint would cause it to arrive at its conclusion in an impermissible way.

***Yeasin v. University of Kansas*, 360 P.3d 423 (Kan. App. Ct., Sept. 25, 2015)**

Navid Yeasin, a student at the University of Kansas ("KU"), engaged in conduct the court called "reprehensible, demeaning, and criminal" with W., who is also a KU student. In addition, Yeasin posted a series of sexually harassing tweets on his account. After conducting an investigation into Yeasin's behavior, KU's Office of Institutional Opportunity and Access recommended that KU take disciplinary action against Yeasin. Although the Office's report noted that some of the conduct in the case occurred off-campus, the report concluded that Yeasin's conduct had affected the on-campus environment for W, thus violating the university's sexual harassment policy. After notice and a formal hearing, the KU's Vice Provost expelled Yeasin and banned him from campus. After an unsuccessful appeal of his expulsion to the Judicial Board, Yeasin sought judicial review in Kansas state court. Reviewing Yeasin's expulsion for compliance with Kansas's administrative agency act, the District Court reversed KU's decision and ordered that Yeasin be readmitted. The District Court concluded that the KU policies Yeasin was accused of violating did not extend to off-campus behavior, and that KU had presented no evidence that Yeasin's conduct had occurred on campus or at a university sponsored event.

On appeal, the Court of Appeals of Kansas upheld the District Court's decision holding that the Student Code, the rules by which the University can impose discipline upon its students, deals only with conduct on campus or at University sponsored events. Therefore, the University had no authority to expel Yeasin based on events that occurred off-campus.

***Doe v. Case Western Reserve University*, No. 14-cv-2044 (N.D. Ohio, Sept. 16, 2015)**

John Doe, a student at Lerner College, was expelled for violating Case Western Reserve University's ("CWRU") sexual assault policy by engaging in non-consensual sexual contact with a fellow female CWRU student. Doe filed suit in the United States District Court for the Northern District of Ohio alleging Title IX violations based on erroneous outcome, selective enforcement, and deliberate indifference standards.

The Court concluded that the complaint failed to plead any factual allegations to support the conclusion that CWRU discriminated against the plaintiff due to his sex, and thus granted the defendants' motion to dismiss, without prejudice, the plaintiff's Title IX violation claims based on all three standards.

***Doe v. Middlebury College*, No. 15-cv-192, 2015 WL 5488109 (D. Vt., Sept. 16, 2015)**

In November 2014, John Doe, a Middlebury College student, was studying abroad with the School for International Training ("SIT"), when he was accused of sexual misconduct by Roe, another participant in the SIT program who was not a Middlebury student. Under its policies, SIT investigated the complaint and held a hearing, after which Doe was "exonerated" in December 2014. SIT kept Middlebury informed regarding the complaint, investigation, hearing, and outcome. Middlebury allowed Doe to return to campus and classes in January 2015. Thereafter, Roe and administrators from her college apprised Middlebury that they were dissatisfied with SIT's process, and Roe stated her intention to file a complaint with OCR. Middlebury then conducted a *de novo* investigation of Roe's complaint under its own sexual misconduct policy. Based upon the investigative report, a Middlebury HR officer concluded that

Doe had violated Middlebury's misconduct policy, and Doe was expelled in July 2015. No hearing was held, and Doe's internal appeals were denied.

Doe filed suit in the United States District Court for the District of Vermont alleging breach of contract and violation of Title IX, and he filed an emergency motion for a preliminary injunction barring Middlebury from expelling him and preventing him from attending classes. The Court granted Doe's motion for a preliminary injunction and ordered that the College "shall not expel [Doe] and shall allow him to remain enrolled in his courses for the fall 2015 semester." The Court emphasized that the case "presents a unique situation where Plaintiff [respondent] was exonerated of the charge of sexual assault by one U.S. institution following an investigation and hearing, allowed to continue his studies the next term, and subsequently determined by his college following a second investigation of the same allegation to have committed sexual assault, after which he was expelled." The Court concluded that Doe would suffer irreparable harm if expelled because he had a job offer "contingent on the successful completion of his degree at Middlebury," and because "money damages cannot compensate for the loss of [Doe's] senior year in college with his class, the delay in the completion of his degree, or the opportunity to begin his career … with this particular employment." By contrast, the Court found that it "is unlikely Middlebury will suffer great damage or loss as a result of the issuance of a preliminary injunction preventing the expulsion of [Doe] for the fall semester," noting, among other things, that Doe had returned to campus after the alleged assault without restrictions and participated in the subsequent investigation, all of which indicated that the College did not consider Doe a threat to the community.

***Ludlow v. Northwestern University*, No. 14-cv-4614 (N.D. Ill., Aug. 28, 2015)**

Peter Ludlow is a professor in the Philosophy Department of Northwestern University ("Northwestern"). In February 2012, an undergraduate student at Northwestern made an internal complaint against Ludlow accusing him of inappropriate sexual advances and sexual assault. Northwestern's investigation concluded that the student's claim of sexual assault lacked credibility, but that Ludlow had violated the university's sexual harassment policy. Northwestern issued minor sanctions against Ludlow but did not terminate his employment or bar him from teaching. In February 2014, the undergraduate student filed a federal lawsuit against Northwestern alleging discrimination and retaliation in violation of Title IX related to her complaint against Ludlow and a state lawsuit against Ludlow for violations of the Gender Violence Act. The lawsuits received local and national media coverage, at which point Ludlow felt the University defamed him and damaged his reputation.

Ludlow filed a complaint in the United States District Court for the District of Illinois alleging that Northwestern's investigation of sexual harassment allegations against him violated Title IX and that Defendants' comments associated with the investigation defamed him and placed him in a false light. The Defendants moved to dismiss all claims, and this motion was granted in part. The Court found that Ludlow's claims were preempted by Title VII, and in any event Ludlow had not sufficiently pled that the alleged discrimination had any connection to his gender. The Title IX claim was dismissed with prejudice, and since the Court declined to exercise supplemental jurisdiction over his remaining state law claims, the rest of the claims were dismissed without prejudice.

***Doe v. Salisbury University*, No. 15-cv-517, 2015 WL 5005811 (D. Md., Aug. 21, 2015)**

John Doe and Richard Roe were students at Salisbury University ("SU") who engaged in a group sexual encounter at a fraternity party with Jane Doe. Jane Doe later accused both John Doe and Richard Roe of sexual assault. SU conducted an investigation into the claim, and a hearing board found the male students responsible for engaging in non-consensual contact with Jane Doe. An internal appeal by the male students was denied, and they were suspended by SU.

John Doe and Richard Roe filed a complaint in the United States District Court for the District of Maryland against SU and two SU officials alleging sexual harassment, erroneous outcome, and retaliation under Title IX. Further, John Doe and Richard Roe filed suit against Jane Doe for defamation. The Defendants moved to dismiss all of the claims and the Court granted the motion in part and denied in part. The Court dismissed the defamation claim against Jane Roe and all of the Title IX claims, except for the erroneous outcome claim.

John Doe and Richard Roe alleged upon information and belief that SU possessed communications evidencing SU's "deliberate indifference in imposing wrongful discipline on Plaintiffs on the basis of gender" and its "intent to favor female students alleging sexual assault over male students," and its intent "to demonstrate to the … Department of Education and/or the general public that [it is] aggressively disciplining males students accused of sexual assault." Based on these allegations, the Court denied SU's motion to dismiss the erroneous outcome claim, finding that Doe and Roe "may have a viable case if they are able to uncover discoverable and admissible evidence that [their] gender was a motivating factor behind SU's allegedly flawed disciplinary procedures and wrongful conclusions."

***Zingarelli v. Kenyon College*, No. 13OT12-0484 (Ohio Com. Pl., Aug. 7, 2015)**

Stephen Zingarelli was a student at Kenyon College ("Kenyon") who was accused of rape by a fellow student, Grace Gardner. Zingarelli was arrested and charged with rape. He voluntarily withdrew from Kenyon and indicated he planned on returning in the Fall semester. During the summer, Zingarelli was found not guilty at a trial in the Knox County Court of Common Pleas. Zingarelli was readmitted to Kenyon in the Fall pending the outcome of a hearing on the unresolved disciplinary charges against him. Kenyon scheduled a disciplinary hearing for November 17, but on November 14, Zingarelli withdrew his request for readmission and filed a claim in the Court of Common Pleas on December 5.

Zingarelli filed suit against the College on nine counts, including breach of contract, breach of implied duty of good faith and fair dealing, negligent training and supervision, and violation of Title IX, among others. The Court of Common Pleas granted Defendant Kenyon College's motion for summary judgment and dismissed the College as a party to the case. The Court held that because Zingarelli withdrew before the hearing process took place, he chose to bypass the administrative process altogether, thus negating his claims that the charges were improperly investigated, the hearing process was improperly conducted, or the hearing reached an improper result. After finding no genuine issues of material fact on any of the counts, the Court dismissed each of them and granted summary judgment to the Defendant.

***Doe v. Washington & Lee University*, No. 14-cv-00052, 2015 U.S. Dist. LEXIS 102426 (W.D. Va., Aug. 5, 2015)**

John Doe and Jane Roe were both students at Washington & Lee University ("W&L") and had engaged in sexual intercourse twice over a period of two months. Eight months following their first sexual encounter, Jane Doe informed a friend that she had been sexual assaulted. Jane Doe characterized their first sexual encounter as "grey rape" and their second sexual encounter as consensual. Jane Doe then attended a presentation by the W&L Title IX Coordinator titled, "Is It Possible That There Is Something In Between Consensual Sex and Rape . . . And That It Happens To Almost Every Girl Out There?" The following month, Jane Doe decided she wanted to proceed with a sexual assault claim against John Doe. John Doe was later found responsible for non-consensual sexual intercourse with Jane Doe and was expelled from W&L. John Doe's subsequent appeal was denied.

John Doe filed a claim in the United States Court for the Western District of Virginia under Title IX, asserting, among other things, an erroneous outcome theory of liability. The Court held that, "given the totality of the circumstances," Doe plausibly established a causal connection between his expulsion and gender bias. The facts that the Court relied on to reach this conclusion ranged from the Title IX investigator's alleged bias (as evidenced by her presentation), to procedural infirmities identified by Doe, to allegations that W&L was under pressure from the government to find male students responsible.

***Tanyi v. Appalachian State University*, No. 14-cv-170, 2015 U.S. Dist. LEXIS 95577 (W.D.N.C., July 22, 2015)**

While attending Appalachian State University ("ASU"), two students, Student A and Student B, filed sexual misconduct complaints against Langston Tanyi, a football player at ASU, and his roommate. Tanyi and his roommate had a joint hearing regarding Student A's charge and both Tanyi and his roommate were found responsible and were suspended for eight semesters. Tanyi's appeal was denied, but he was subsequently granted a new hearing based on the fact that he had not received a hearing separate from his roommate. At the new hearing, Tanyi was found not responsible for all charges regarding Student A. ASU then held a separate hearing on Student B's sexual assault allegations, and Tanyi was found not responsible. Student B appealed the panel's decision and, without explanation, was granted a new hearing. At the new hearing, Student B claimed that Tanyi had harassed Student B on campus. Tanyi was not informed of this new allegation of harassment until the night before the hearing. The panel again found Tanyi not responsible for sexual misconduct but found him responsible for the new harassment charge.

Tanyi filed a complaint in the United States District Court for the Western District of North Carolina against ASU and several high ranking administrators alleging violations of Title IX and his constitutional rights of due process and equal protection. On a motion to dismiss, the Court dismissed all but the due process claims. In allowing the due process claim to proceed, the Court cited to the university's failure to offer a legitimate reason to grant Student B a new hearing. Relying on the standard for new trials in civil judicial proceedings, the Court ruled that the university must provide "a clearly articulated substantive basis" for granting a new hearing. The Court also held that Tanyi's claim that the university had failed to provide him with adequate notice of Student B's new harassment charge against him was sufficient to survive a motion to

dismiss, reasoning that Tanyi received notice of the new charge "at the eleventh hour, when it was too late to mount an effective defense."

***Yu v. Vassar College*, 97 F. Supp. 3d 448 (S.D.N.Y., Mar. 31, 2015)**

Xiaolu "Peter" Yu, a student at Vassar College, was accused of sexual misconduct by a female student whose father was also a professor at the University. After an investigation and disciplinary hearing, the University's Interpersonal Violence Panel ("Panel") concluded that Yu had engaged in sexual misconduct and expelled him. Yu was told the Panel's conclusions in person at the hearing and received an email the following day stating that he had been expelled, but he never received a copy of the Panel's written findings.

The United States District Court for the Southern District of New York granted the University's motion for summary judgment on Yu's gender discrimination claims. At the outset, the Court noted that many of Yu's arguments were invalid because he had raised due process concerns against a private institution. Turning to the merits of his claims, the Court first held that Yu offered no evidence that would establish as a material fact issue whether the University's disciplinary proceedings were procedurally flawed, or whether any such flaws were motivated by gender bias. In particular, although the Complainant in the proceedings was the daughter of a University faculty member, the University had employed appropriate procedures to avoid conflicts of interest and there was no evidence that the members of the Panel knew about or were influenced by the relationship. The Court next held that the University's procedures were consistent with its own internal regulations. In particular, the regulations did not require that Yu receive a copy of the Panel's written findings, but required only that he receive notification of the Panel's decision and the resulting sanctions. In addition, the regulations did not require the University to consider Yu's intoxication when deciding whether he knew or should have known that the Complaint was unable to give consent, because the regulation relied on a "sober, reasonable person" standard. While this policy might reflect a bias towards Complainants, there was no evidence that this bias was based on gender. Lastly, the Court dismissed Yu's selective enforcement claim because he had not demonstrated that a "similarly situated" female student had received more favorable treatment. No female student had ever been charged with sexual misconduct at the University, and evidence that similarly situated male students had received more lenient sanctions undermined Yu's argument that he had received a harsher penalty because of gender bias.

***Sterret v. Cowan*, No. 14-cv-11619, 85 F. Supp. 3d 916 (E.D. Mich., Feb. 4, 2015)**

In *Sterret*, a Respondent Plaintiff successfully stated a Due Process claim against an employee of a public university by alleging that the employee had not given him adequate notice of the misconduct charges pending against him before asking him to participate in an investigation, and by further alleging that the employee had not given him the opportunity for a "meaningful hearing" before she issued her final investigative findings.

Drew Sterret, a student at the University of Michigan, was invited to speak with a University employee ("Investigator") about "an undefined complaint" against him. Over the course of the interview, Sterret learned that he had been accused of sexual misconduct. The Investigator gave Sterret the opportunity to review and respond to a summary of his interview, summaries of other

witness interviews, and a draft of the Investigator's findings, but he was instructed not to discuss the investigation with any other witnesses. The Investigator ultimately concluded that Sterret had engaged in sexual misconduct. After Sterret refused to accept certain proposed sanctions as part of a "Resolution Agreement," the University's Vice President of Student Affairs upheld the Investigator's findings and suspended him. Sterret appealed the decision to an internal Appeals Board, which reduced the term of his suspension.

Sterret sued the individuals involved in the disciplinary proceedings, asserting Due Process and First Amendment claims. On a motion to dismiss, the Court held that Sterret had adequately stated a Due Process claim against the Investigator. Specifically, Sterret alleged that the Investigator had denied him adequate notice of the nature of the claims against him before their first conversation, and had denied him the opportunity for a "meaningful hearing" before she issued her final findings. The Court dismissed Sterret's Due Process claims against the remaining defendants on qualified immunity grounds, and dismissed his First Amendment claims because the University's "no discussion" instruction was not grounds for relief.

In the same Opinion, the Court also denied Sterret's motion to amend his Complaint to allege that the University had engaged in gender bias because of a 2011 letter from the Department of Education about the general prevalence of sexual assaults against women in college. Sterret's allegations were "conclusory," and could neither establish that the University had acted with discriminatory animus nor that any similarly situated female student had received more favorable treatment.

***Dempsey v. Bucknell University*, 76 F. Supp. 3d 565 (M.D. Penn., Jan. 5, 2015)**

Reed Dempsey, a student at Bucknell University, was arrested by Bucknell University Police after a physical altercation with a female student—an altercation that the female student alleged had sexual overtones. While criminal charges were pending, Dempsey and the female student initiated student conduct charges against each other. After holding disciplinary hearings, the University found both Dempsey and the female student responsible only for disorderly conduct. The District Attorney later withdrew Dempsey's criminal charges.

Dempsey sued the University, alleging that he was a victim of false arrest and malicious prosecution and that the University had breached the terms of its Student Handbook by not providing him with certain evidence relating to his disciplinary hearing. The Court granted summary judgment in favor of the University on Dempsey's arrest and prosecution claims because the arrest had been supported by probable cause. The Court also granted summary judgment on Dempsey's claims for breach of contract because he had had not presented any evidence of damages. Specifically, any evidence that the University had withheld bore solely on the issue of sexual assault, and would not have changed the outcome of the disciplinary hearing as to Dempsey's disorderly conduct charge—the only charge for which he was found responsible.

***Johnson v. Western State Colorado University*, 71 F. Supp. 3d 1217 (D. Colo., Oct. 24, 2014)**

In *Johnson*, a Respondent Plaintiff successfully stated a First Amendment claim against a public university by alleging that the university's disciplinary proceedings against him were motivated

in part by protected speech. He could not state a claim for gender discrimination because he hadn't identified a "similarly situated" female student who had received more favorable treatment, and he could not state a Due Process claim because he hadn't alleged the deprivation of a protected interest.

Keifer Johnson, a student-athlete at Western State Colorado University, entered into a consensual sado-masochistic relationship with Onna Gould, a student in a class for which Johnson was a teaching assistant ("TA"). Johnson ended the relationship shortly before the fall semester − for unrelated reasons, Gould did not return to campus in the fall. At the beginning of the semester, Gould's mother provided the University with a sexually graphic letter that Johnson had written ("Dear Onna Letter") and lodged a complaint against him for sexual misconduct. Johnson was terminated from his TA position before he became aware of the pending complaint, and he was suspended from the University's track team shortly after the University initiated disciplinary proceedings against him. Johnson was ultimately a Respondent in two disciplinary proceedings—one concerning the contents and distribution of the Dear Onna Letter, and a second alleging rape and sexual assault in connection with his relationship with Gould. At the end of the first disciplinary proceeding, the University concluded that Johnson had engaged in misconduct and sanctioned him with community service and probation. The second disciplinary proceeding ended in Johnson's favor.

Johnson sued the University and several of its employees for violations of Title IX and Section 1983. Johnson also alleged various state law claims, which were dismissed for lack of subject matter jurisdiction. The Court granted the University's motion to dismiss Johnson's Title IX claims because he could not allege that Gould, who had not been subject to disciplinary proceedings, was "similarly situated." Specifically, Johnson was Gould's TA when the two began their sexual relationship, and Gould was not a student at the time of Johnson's disciplinary proceedings. The Court also dismissed Johnson's Due Process claim because he did not have a protected interest in his role on the track team or as a TA. However, the Court held that Johnson had adequately alleged that the Dear Onna Letter did not constitute a "true threat," and that disciplinary proceedings based on its contents were motivated by protected speech. After considering the University's entitlement to Eleventh Amendment immunity, the Court allowed Johnson to proceed with a First Amendment claim for prospective injunctive relief.

***King v. DePauw University*, No. 14-cv-70, 2014 WL 4197507 (S.D. Ind., Aug. 22, 2014)**

Benjamin King, a student at DePauw University, was found responsible for "nonconsensual sexual contact and sexual harassment" by a panel of DePauw University's Sexual Misconduct Hearing Board. In particular, the Board concluded that it was more likely than not that the Complainant had been too intoxicated to consent to sexual activity, and that King should have been aware of the Complainant's condition. The University's Vice President for Student Life affirmed the Board's decision on appeal, but reduced the sanction from expulsion to a two-semester suspension. King sued the University, and moved for a preliminary injunction so that he could attend classes in the fall semester.

King's motion rested on his Title IX claims and his claim for a breach of implied contract. The Court held that King could not point to any evidence of discriminatory animus that would demonstrate a likelihood of success on the merits of his Title IX claims, but found that King had

demonstrated some likelihood of success on his contract claim. In particular, based on the information that was available to King at the time of the incident, the Court held that a reasonable jury could find that the Board had arbitrarily concluded that King knew or should have known that the Complainant was "incapacitated." The Court noted that the Board had relied exclusively on witnesses identified by the Complainant, had failed to clarify each witness's perception of the Complainant's intoxication, and had refused to allow King additional time to prepare his defense. The Court also noted that the Complainant had been advised at the hearing by the wife of the University's Title IX Coordinator, while King had been advised by a faculty member unfamiliar with sexual misconduct proceedings.

The Court granted King's motion for preliminary judgment on a finding that he would be irreparably harmed if he was wrongly prevented from attending class, and that this harm outweighed the harm that the University might experience if King was mistakenly allowed to return to campus. Because the Complainant was no longer a student at the University, the interests of third parties did not weigh against a grant of preliminary injunction.

***Wells v. Xavier University*, 7 F. Supp. 3d 746 (S.D. Ohio, Mar. 11, 2014)**

Dezmine Wells, a student at Xavier University, was accused of sexual assault by his resident advisor. The prosecuting attorney on the case doubted the resident advisor's allegations and asked the University to wait for him to finish his criminal investigation before taking any disciplinary actions. Instead, the University Conduct Board ("UCB") held a disciplinary hearing and expelled Wells for sexual misconduct. The University then announced to the campus community that Wells had been expelled for a "serious violation" of the University's Code of Student Conduct. Wells sued the University, alleging that it had ignored its own policies, had conducted an unfair hearing and had defamed him.

The Court denied the University's motion to dismiss Wells' libel and Title IX claims. Wells alleged that the UCB had reached an erroneous outcome from a flawed proceeding, which supported his claim that the University's announcement about his "serious violation" was false, defamatory, and damaging to his reputation. The Court expressed uncertainty about whether Wells would ultimately be able to demonstrate that any procedural flaws were the result of a gender bias. However, taking all inferences in his favor, the Court held that the University had received adequate notice of Wells' Title IX claims, both on an erroneous outcome theory and on a theory of deliberate indifference.

* * *

Note: These materials are drawn from multiple sources, including a pending article in the Penn State Law Review, *The Regional Center for Investigation and Adjudication: A Proposed Solution to the Challenges of Title IX Investigations in Higher Education*, by Gina Maisto Smith and Leslie M. Gomez; prior written materials by Smith and Gomez for NACUA and a forthcoming book chapter in Campus Sexual Assault Response Teams (2nd edition).

NOBODY LIKES ME, EVERYBODY HATES ME, BUT AT LEAST I'LL WIN IN COURT? WHAT RECENT TITLE IX LAWSUITS TEACH US ABOUT AVOIDING AND LITIGATING CLAIMS

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Since the Department of Education issued its Dear Colleague Letter in 2011, colleges and universities have revamped their sexual misconduct policies, expanded their educational programming, and boosted their enforcement efforts, with an increasing number of investigations, adjudicative hearings, and serious disciplinary sanctions. On campus, intolerance of sexual violence has combined with an increased awareness about an institution's disciplinary policies to lead more students to file internal sexual misconduct complaints. The end result is that institutions have adjudicated far more sexual violence complaints over the past few years than in the more distant past.

"Adjudicated" is a key word here. The sexual misconduct process usually results in a clear "winner" and a clear "loser," with middle ground difficult to find, and the institution decides who wins and loses in its disciplinary proceeding. Regardless of the outcome, an institution is almost guaranteed to leave at least one party dissatisfied. If the accused student is found responsible, that finding may lead to serious disciplinary consequences, including expulsion. If, however, the accused student is found not responsible, that finding may cause significant emotional consequences to the accusing student. In some cases, even the "winning" student may feel dissatisfied by perceived deficiencies in the institution's response or the toll it exacted. And, with increasing frequency, this dissatisfaction is leading to civil lawsuits.

For those who operate in the criminal arena, immunity doctrines provide substantial protection against civil liability to the prosecutors who bring criminal charges, and even greater protection to the judges who adjudicate them. As the Supreme Court has long recognized, "[l]iability to answer to everyone who might feel himself aggrieved by the action of the judge … would destroy that independence without which no judiciary can be either respectable or useful."[1] Yet no similar immunity protects colleges and universities adjudicating sexual misconduct complaints.

For institutions, the threat of litigation has never loomed larger. In the past two years, respondents have filed over fifty lawsuits challenging disciplinary sanctions for sexual

[1] *Bradley v. Fisher*, 80 U.S. 335, 347 (1871).

misconduct, and the number of lawsuits by complainants may well exceed that number.[2] ***Courts have begun to weigh in on institutional misconduct processes, and they appear willing to intervene or permit a lawsuit to go forward when presented with well-founded allegations that an underlying process has been fundamentally unfair, or, even worse, potentially discriminatory.*** The appendix to these materials begins on page 17 and contains summaries of twenty decisions from 2014 and 2015 from lawsuits that challenge an institution's response to sexual misconduct allegations, both by the complainant and the respondent. These materials also overview common claims that institutions face, highlight lessons learned from recent decisions, and analyze critical strategic decisions in the litigation process.

Litigation by Complainants and Respondents – The Numbers

According to a recent study by United Educators, claims by complainants represent the majority of the litigated claims against educational institutions (68%). Notably, a favorable outcome in an underlying disciplinary proceeding does not appear to thwart the prospect of future litigation by complainants. In 48% of litigation brought by complainants, the institution found the accused student ***responsible*** for violating its sexual misconduct policy, with the respondent having been expelled in one-third of those cases.[3]

Complainants assert a range of claims, from statutory causes of action under Title IX and Section 1983, to common law claims for breach of contract, negligence, and emotional distress.

Lawsuits by students accused of sexual misconduct, so-called "reverse Title IX" claims, are on the rise. Just a year ago, roughly a dozen lawsuits had been filed by respondents. Today, that number has quadrupled, with over fifty suits on file.[4] With increasing frequency, accused students are filing pre-emptive lawsuits intended to halt institutions' disciplinary proceedings and prevent them from going forward. An even greater number of claims are filed by accused students after the disciplinary process has concluded and sanctions issued, with the majority of lawsuits filed by students who have been expelled. In recent months, several courts have offered some significant victories to respondents, with courts criticizing the institutional disciplinary processes that have been used to expel accused students.

Title IX Claims

By Complainants

Title IX claims are the most frequently filed claims by complainants, with nearly 75% of complainant-initiated lawsuits alleging violations of Title IX.[5] To prevail in a Title IX lawsuit, a

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[2] The authors of this article understand that the terms "victim," "survivor," and "complainant" may carry with them different judgments and preconceptions, and the same is true for "accused," "perpetrator," and "respondent." These materials generally use the terms "complainant" and "respondent" to refer to the parties involved in an allegation of sexual misconduct.

[3] Alyssa Keehan et al., Confronting Campus Sexual Assault: An Examination of Higher Education Claims, 14-15, United Educators (Oct. 2015).

[4] Tovia Smith, "For Students Accused of Campus Rape, Legal Victories Win Back Rights," National Public Radio (Nov. 14, 2015), available at http://www.npr.org/2015/10/15/446083439/for-students-accused-of-campus-rape-legal-victories-win-back-rights.

[5] Keehan, *supra* at 17.

complainant must ultimately prove four elements: (1) that the defendant was a Title IX funding recipient; (2) that an "appropriate person" had actual knowledge of the discrimination or harassment the plaintiff alleges occurred; (3) that the defendant acted with deliberate indifference to known acts of harassment in its programs or activities; and (4) that the discrimination was so severe, pervasive, and objectively offensive that it effectively barred the plaintiff from accessing an educational opportunity or benefit.

Litigation often turns on the last two prongs, *i.e.* whether the institution's response to the allegation was clearly inadequate and whether the response resulted in misconduct that was so severe as to deprive the plaintiff of access to educational benefits and opportunities. Most commonly, complainants allege the institution:

- discouraged the student from pursuing a disciplinary complaint;
- delayed initiating the disciplinary process;
- engaged in conduct intended to cover up the respondent's actions;
- failed to conduct a prompt and thorough investigation; or
- imposed inadequate sanctions.

Courts have made clear that a complainant is not entitled to demand a certain disciplinary outcome, and courts will generally decline to second-guess the institution's decision. Rather, the ultimate inquiry remains whether the institution responded in a reasonable manner under the circumstances, which often turns on the institution's efforts to alleviate any negative effects of a complaint of sexual assault. In *Roe v. Saint Louis University*, 746 F.3d 874 (8th Cir. 2014), for example, the Court granted summary judgment on a complainant's Title IX claim, holding that providing the complainant with certain services – such as referring her to a counselor, encouraging her to inform her parents about the situation and contact the police, and emailing her academic advisor – was a sufficient response under the circumstances. The Court reached this conclusion even though the institution could have done more, including notifying its Title IX coordinator.

❖ **Practice Tip:** ***Institutions should keep detailed records of its contact with the complainant, all records of its investigations, and any accommodations (educational or otherwise) that it provides to the complainant.***

Although each case is different and the reasonableness of the institution's response ultimately turns on the specific facts of each case, courts have begun to clarify the contours of Title IX liability. Although several questions remain, there are several key takeaways from these recent cases.

First, courts have made clear that the Department of Education's administrative guidance – namely, the 2011 Dear Colleague Letter ("DCL") – does not provide a roadmap for Title IX liability in private lawsuits. In *Karasek v. Regents of the University of California*, No. 15-cv-03717, 2015 WL 8527338, *13-14 (N.D. Cal. Dec. 11, 2015) (summarized *infra*), the Court addressed this issue directly, ruling that the DCL sets forth "the standard for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief, not the standard in private lawsuits for monetary damages." The Court therefore concluded that "the

DCL does not define what amounts to deliberate indifference for the purposes of this case," though noting that "there are undoubtedly situations in which a school's conduct in violation of the DCL also amounts to a clearly unreasonable response."

Second, a growing number of courts have rejected the "No Further Harassment" defense. Relying on language from *Davis v. Monroe County Board of Education*, 526 U.S. 629, 644-45 (1999), which stated that a college or university is only liable if its response "cause[s] students to undergo harassment or make them liable or vulnerable to it[,]" several courts have held that a school is not liable under Title IX when the alleged victim is not "subjected" to further harassment.[6] Increasingly, however, courts have expressly rejected this defense, ruling that requiring a plaintiff to prove additional harassment runs counter to the inherent purpose of Title IX and may penalize a plaintiff who actively takes steps to avoid further harassment, e.g., by refraining from returning to the campus where her harasser is still present.[7]

Third, courts have also rejected complainants' efforts to plead new theories under Title IX based on an institution's overall response to sexual violence. The students in *Karasek*, for example, pled that the university's general response to sexual assault on campus created an environment that "substantially increased the risk" of sexual assault, highlighting both the number of OCR complaints against the university and a recent state audit into the university's inadequate response to sexual assault. The *Karasek* court rejected this theory – reasoning that allegations that a university was aware of the "general problem of sexual violence" on its campus are insufficient to meet the "actual knowledge" standard under Title IX – and its ruling may well prevent complainants from successfully pleading similar theories in the future.[8]

Fourth, the courts will ultimately have to decide whether the sanction itself can support a claim of deliberate indifference under Title IX. In *Butters v. James Madison University*, No. 15-cv-00015, 2015 WL 6825420 (W.D. Va. Nov. 6, 2015) (summarized *infra*), the complainant alleged that the sanction imposed against her alleged assailants showed that the university was deliberately indifferent to known acts of sexual assault. After finding three students responsible for sexual assault, the university imposed a punishment of "expulsion after graduation" (meaning that the men were not permitted to return to campus after graduation), barred the men from having any contact with the plaintiff, and required them to create a thirty-minute presentation on sexual assault. The complainant alleged that this sanction was materially deficient and evidenced the university's deliberate indifference to the assault. Although the Court declined to decide whether the discipline itself constituted deliberate indifference – as it found that her Title IX claim could continue based on another theory – this remains an open question in the case law.

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6 *See, e.g.*, *Yoona Ha v. Nw. Univ.*, No. 14-cv-00895, 2014 WL 5893292, *2 (N.D. Ill. Nov. 13, 2014); *Moore v. Murray State Univ.*, 2013 WL 960320, *4-5 (W.D. Ky. Mar. 12, 2013); *Dececco v. Univ. of S. Carolina,* 918 F. Supp. 2d 471, 495 (D.S.C. 2013); *Lopez v. Regents of the Univ. of California*, 2013 WL 6492395, *13-14 (N.D. Cal. Dec. 10, 2013).

7 *See, e.g.*, *Karasek*, *supra* at *13-14 (collecting cases). *See also Takla v. Regents of the Univ. of California*, No. 15-cv-04418, 2015 WL 6755190, *4-5 (C.D. Cal. June 11, 2015); *Kelly v. Yale Univ.*, No. 01-cv-01591, 2003 WL 1563424, *4-5 (D. Conn. Mar. 26, 2003).

8 *See also Doherty v. Emerson Coll.*, No. 14-cv-13281 (D. Mass. May 14, 2015) (ruling that the plaintiff "failed to allege, plausibly, that Emerson College's [in]actions regarding prior sexual assaults were causally related to [her] rape").

By Respondents

According to the United Educators' study, 99% of respondents who make claims against institutions are male.[9] As Title IX's prohibition against sex discrimination is a two-way street, one that applies equally to male and female students, a respondent may assert what is commonly known as a "reverse Title IX claim" against an institution. ***To prevail on such a claim, an accused student must establish that gender was a motivating factor in the decision to discipline.*** A reverse Title IX claim by a respondent thus differs from a Title IX claim by a complainant, which typically focuses on whether an institution took sufficient steps to remedy the alleged sexual harassment.

The courts have recognized four theories by which a respondent may state a reverse Title IX claim, namely:

- ***Erroneous Outcome.*** Under this theory, an accused student claims that the institution erred in finding him responsible and, further, that gender bias was the motivating factor behind this erroneous outcome.

- ***Selective Enforcement.*** An accused student asserting this theory does not necessarily contend that the disciplinary proceeding was wrongly decided. Rather, independent of his guilt or innocence, the accused student claims that the institution treated a similarly-situated female student differently, either in deciding to initiate a proceeding or imposing a sanction.[10]

- ***Archaic Assumptions.*** An accused student asserting this theory claims that an institution relied on "classifications based upon archaic assumptions" about gender during the disciplinary process.[11] This theory derives from case law interpreting Title IX in the athletic context, and not all courts have extended it to Title IX claims by accused students.[12] Respondents assert this theory with less frequency than the erroneous outcome and selective enforcement theories.

- ***Deliberate Indifference.*** Like the archaic assumptions theory, the deliberate indifference theory is infrequently asserted by respondents and, in reverse Title IX cases, is analytically awkward. Respondents asserting this theory typically contend that an institution acted with deliberate indifference in administering a disciplinary process that was infected with gender bias.[13]

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[9] Keehan, *supra* at 3. For this reason, the authors generally use male pronouns to refer to the claims brought by respondents.

[10] For an in-depth analysis of these first two theories, see *Doe v. Columbia University*, 101 F. Supp. 3d 356 (S.D.N.Y. 2015) (summarized *infra*) or *Yusaf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994), a seminal Title IX decision.

[11] *Sterrett v. Cowan*, 85 F. Supp. 3d 916, 937 (E.D. Mich. 2015); *Bleiler v. Coll. of Holy Cross*, No. 11-cv-11541, 2013 WL 4714340, *5 (D. Mass. Aug. 26, 2013).

[12] *Marshall v. Ohio Univ.*, No. 15-cv-775, 2015 WL 7254213, *8 (S.D. Ohio Nov. 17, 2015).

[13] *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 752 (S.D. Ohio 2014) (summarized *infra*); *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744, 758 (E.D. Tenn. 2009).

Regardless of what theory applies, a respondent asserting a Title IX claim must establish that impermissible gender bias motivated the institution's conduct. If an accused student fails to establish gender bias, neither establishing his innocence nor the existence of a flawed process is sufficient to establish liability under Title IX.

At the motion to dismiss stage, applying the heightened pleading standard set forth by the Supreme Court in *Bell Atlantic Corporation v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009), a line of recent cases have dismissed reverse Title IX claims for failing to plead gender bias with sufficient particularity.[14] As these cases make clear, to survive a motion to dismiss, an accused student cannot rely on a subjective belief that an institution acted with gender bias, that the institution capitulated to "anti-male" bias on campus, or that the institution acted out of fear of a lawsuit by an accusing student or a government enforcement action. Although a few cases have allowed more generalized allegations to state a Title IX claim,[15] most courts require an accused student to identify statements by decision-makers evidencing gender bias or a valid comparator who received disparate treatment. Absent smoking-gun type evidence that an administrator harbored a gender bias, many courts will not delve deeply into procedural infirmities in a particular proceeding or second-guess its outcome. By contrast, if a respondent's complaint contains allegations that suggest gender bias by the administrators involved in a disciplinary proceeding, the reverse Title IX claim may survive. For example, in *Doe v. Washington & Lee University*, No. 14-cv-00052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015) (summarized *infra*), an expelled student's claims survived a motion to dismiss in part because a Title IX officer's presentation materials and a hearing panelist's publications both suggested gender bias.

❖ **Practice Tip:** ***Because words can come back to haunt institutions in reverse Title IX cases, an institution should be sure its administrators address the entire disciplinary process in gender-neutral terms.***

Breach of Contract

Another frequently filed claim is breach of contract, which is premised on the contention that the disciplinary process set forth in a student handbook constitutes a contract between the institution and student. Most jurisdictions afford colleges and universities deference in interpreting their own policies, and some jurisdictions even require a showing by the student that the institution acted in bad faith, as opposed to simply contravening the terms of the handbook.

Breach of contract claims by complainants frequently include alleging that the institution:

- failed to follow its written process for investigating and adjudicating reports of sexual assault;
- granted extensions for appeals beyond the institution's deadlines; or
- altered or eliminated sanctions issued against a respondent, without notifying the complainant, in connection with the respondent's withdrawal.

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[14] *Marshall*, *supra* at *8; *Doe v. Case W. Reserve Univ.*, No. 14-cv-2044, 2015 WL 5522001, *4 (N.D. Ohio Sept. 16, 2015); *Doe v. Univ. of Massachusetts-Amherst*, No. 14-cv-30143, 2015 WL 4306521, *8 (D. Mass. July 14, 2015); *Columbia Univ.*, 101 F. Supp. 3d at 368; *Sterrett*, 85 F. Supp. 3d at 937.

[15] *See Doe v. Salisbury Univ.*, No. 15-cv-517, 2015 WL 5005811, *14-15 (D. Md. Aug. 21, 2015) (summarized *infra*); *Wells*, 7 F. Supp. 3d at 751-52.

Claims by respondents also focus on deviations from an institution's established policies, and may also include allegations that an institution:

- failed to provide the respondent with procedural guarantees, including advanced notice of the charges, an opportunity to present evidence, and an opportunity to cross-examine witnesses;
- conducted an inadequate investigation or an unfair disciplinary hearing even though the policy guarantees a thorough, fair disciplinary process; or
- found the respondent responsible without sufficient evidence.

❖ **Practice Tip:** ***When preparing sexual misconduct policies, institutions should be careful to include appropriate caveats to help provide necessary flexibility and avoid future contract claims.*** To assist in negating or avoiding claims that a student handbook creates a contract, institutions should:

- avoid including language in the handbook which would support a claim of promises, guarantees or entitlements (e.g., due process, rights, permanent, guarantee, promise, ensure);

- avoid promises that the process will be the same in each and every case (e.g., "the institution *will endeavor to* complete an investigation in 60 days," not the "institution *will* complete an investigation in 60 days");

- build in flexibility where needed and provide that timetables will "generally" be followed unless the institution determines, in its discretion, that changes are appropriate in particular circumstances;

- make clear that the institution is entitled to unilaterally change, update and revise the handbook at any time for any reason; and/or

- disclaim the existence of a contract or the intent to create any contractual rights within the handbook.[16]

Negligence

40% of complainants assert negligence claims and 79% of respondents assert such claims.[17] These claims typically include allegations that the institution or its employees:

- negligently conducted the investigation;
- failed to adequately train staff to handle claims of sexual assault; or
- incorrectly described the institution's processes.

[16] While drafting tactics may assist in limiting or preventing a finding of an implied contract, contract law differs from state to state, and institutions should carefully review the law applicable to them.

[17] Keehan, *supra* at 16, 18.

Students asserting that an institution negligently conducted a sexual misconduct proceeding must establish that the institution owed the student a duty of care in administering its sexual misconduct policy. In a recent case, *Faiaz v. Colgate University*, 64 F. Supp. 3d 336 (N.D.N.Y. 2014), the Court dismissed a negligence claim brought by a respondent premised on allegations that that the university "supervised and controlled a biased and flawed investigation" and was required to act with "reasonable care," concluding that facts alleged largely echoed the respondent's breach of contract claim and did not create a duty of care.[18] Courts have also rejected claims of negligence *per se* based on violations of the Department of Education's administrative guidance.[19]

Emotional Distress

Given the strain of sexual misconduct proceedings on all parties, it is not surprising that respondents and complainants frequently assert common law claims seeking to recover for the infliction of emotional distress, alleging that an institution negligently inflicted distress, intentionally inflicted distress, or both. Depending on the jurisdiction, these claims may face a variety of hurdles, including requirements that the students establish the institution's conduct was extreme and outrageous (a high threshold for intentional infliction claims), that the emotional distress was manifested by physical harm, or that physical impact caused the emotional distress.

Defamation

Respondents often assert defamation claims against institutions and the complainants who filed the sexual misconduct charges, with 72% of respondents who file suit against an institution also suing the complainant for defamation.[20] In asserting a defamation claim against an institution, respondents typically point to campus-wide notifications or comments by administrators concerning the investigation. An institution may respond with a variety of defenses, from truth to the common interest privilege, with the precise defenses available to a university dependent on the jurisdiction.

❖ **Practice Tip:** One potential defamation defense is based on the common interest privilege, which generally protects statements to recipients with a shared, organizational relationship that are made in furtherance of a legitimate, organizational purpose. Courts have applied this privilege to statements made by administrators in responding to a sexual misconduct complaint, as well as statements to the campus community.[21] The common interest privilege is conditional, meaning that it may be overcome by a showing of actual malice. ***To provide a foundation for the defense of common interest privilege, an institution issuing a campus-wide notification concerning a hearing's outcome should frame the notification in terms of community***

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[18] *See also Harris v. Saint Joseph's Univ.*, No. 13-cv-3937, 2014 WL 1910242, *6 (E.D. Pa. May 13, 2014).

[19] *Ross v. Univ. of Tulsa*, No. 14-cv-484, 2015 WL 4064754, *4 (N.D. Okla. July 2, 2015); *Doe v. Univ. of S.*, No. 09-cv-62, 2011 WL 1258104, *2 (E.D. Tenn. Mar. 31, 2011).

[20] Keehan, *supra* at 18.

[21] *Doe v. Salisbury Univ.*, No. 15-cv-517, 2015 WL 5005811, *8 (D. Md. Aug. 21, 2015) (summarized *infra*); *Harris*, *supra* at *8; *Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 44 (D. Me. 2005).

standards. It is also advisable not to identify the respondent by name in such notifications, to avoid arguments that the notification exceeded the privilege's limited scope.

Due Process

Respondents challenging disciplinary sanctions from public institutions may also assert due process claims under the Fourteenth Amendment. Due process claims typically allow for a more wide-ranging review of a disciplinary decision, including whether a respondent had notice and opportunity to be heard and whether sufficient evidence existed for the institution to punish the student.[22] As the case summaries for *Tanyi v. Appalachian State University*, No. 14-cv-170, 2015 WL 4478853 (W.D.N.C. July 22, 2015), *Yeasin v. University of Kansas*, 360 P.3d 423 (Kan. App. Ct. Sept. 25, 2015), and *Mock v. University of Tennessee at Chattanooga*, No. 14-cv-1687 (Tenn. Chancery Ct. Aug. 4, 2015) illustrate below, respondents have enjoyed some recent success in asserting these claims against public universities.

Parallel Investigations with OCR

With increasing frequency, institutions must fight a multi-front battle, as complainants file complaints with the Department of Education's Office of Civil Rights ("OCR") before or during their private lawsuits. When OCR receives a complaint, OCR will often conduct a compliance review spanning several years. In some circumstances, OCR may continue its investigation, even after a private lawsuit is filed.[23]

"John Doe" and "Jane Doe" Litigation

A disciplinary sanction for sexual misconduct bears a societal stigma that may significantly impact a respondent's opportunities in the future. The reasons a respondent left an institution come up again and again – from job interviews to graduate school admissions to professional licensing applications. A respondent sanctioned with expulsion may be unable to obtain a college degree altogether.

Respondents increasingly turn to the courts to prevent these types of long-lasting, reputational harms. In many cases, a respondent's end-goal is typically injunctive relief that leaves him positioned as if the disciplinary proceeding never happened. This relief may take the form of an order expunging a disciplinary finding, compelling immediate reinstatement, or requiring the institution to redo the proceeding. Aside from negotiating a private resolution, the only avenue for a respondent to obtain this relief is through the courts, to which the public enjoys a presumptive, constitutionally-embedded right to access.[24] The tension between the purpose of a reverse-Title IX lawsuit – to prevent reputational harm – and the mechanism for achieving that purpose – a public lawsuit – thus places respondents in a bind. Even if a respondent ultimately

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22 *Gomes*, 365 F. Supp. 2d at 15.

23 *See* OCR Compliance Manual at §110(a), (b) (Feb. 2015) (V1.1), available at http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf (explaining (1) that OCR will only close its investigation if a complainant files a private lawsuit that concerns the ***same*** allegations, and (2) that OCR need not close an investigation in response to a private lawsuit if it has obtained sufficient information to make a finding concerning certain allegations).

24 *Doe v. Pub. Citizen*, 749 F.3d 246, 265-66 (4th Cir. 2014).

succeeds in obtaining injunctive relief, the reputational harm incurred in the process may exact significant damage.

Up until a respondent files a lawsuit, a sexual misconduct proceeding's outcome may remain relatively private, at least beyond the parties' immediate circles and the campus community. In a world of online media outlets and court dockets, however, that privacy may evaporate once a respondent files suit in court. As just one example, a Google search for "Lewis McLeod," who sued Duke University in 2014 to reverse his expulsion for sexual misconduct, reveals coverage concerning the lawsuit in numerous publications, from campus newspapers to national media outlets to blog postings. Though a respondent who believes he has a sympathetic case may appreciate that press coverage can exert settlement pressure on an institution, it is difficult, if not impossible, to eliminate that coverage from a respondent's online identity down the road.

Against this backdrop, many respondents have elected to proceed under a pseudonym, usually as "John Doe." While pseudonymous litigation is becoming increasingly common, there is no foundation for anonymous litigation under the Federal Rules of Civil Procedure. To the contrary, Rule 10(a) requires a complaint to "name all the parties," a requirement that "serves the vital purpose of facilitating public scrutiny of judicial proceedings."[25] Courts also widely recognize a presumption – grounded in the common law and also the First Amendment – that the public has a right to access judicial proceedings, including the parties' names – and thus generally require that a litigant point to "exceptional circumstances" to overcome this presumption.

Several circuits have developed discretionary, balancing tests for determining whether a party has established exceptional circumstances that permit the party to proceed with litigation under a pseudonym. The tests vary slightly between circuits, but generally consider factors such as:

- whether the litigation concerns highly sensitive and personal matters;
- whether identifying the plaintiff could result in retaliatory harm;
- whether proceeding pseudonymously will prejudice the defendant;
- whether the plaintiff's identity is known elsewhere;
- whether the public interest is furthered by requiring disclosure;
- whether the litigation presents purely legal issues that reduce the public's interest in knowing the litigants' identities; and
- whether the court may protect the party's confidentiality through other means.[26]

Respondents seeking to proceed pseudonymously have been met with mixed responses, both from the courts and the defendant institutions. After a respondent files a motion to proceed pseudonymously, some institutions have raised no objection, leading the courts to grant the motion as unopposed. In other cases, institutions have opposed an accused student's motion to proceed pseudonymously. Faced with the institution's opposition, some courts have granted the motion nonetheless, typically reasoning that requiring a respondent to litigate without anonymity could exact significant reputational harm or foreclose the respondent from moving forward with

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25 *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190 (2d Cir. 2008).

26 *Id.*

a lawsuit.[27] Other courts have denied the respondent's motion to proceed with litigation under a false name, usually relying on the general rule that embarrassment or economic harm is not enough to justify pseudonymous pleading.[28] One court has gone so far as to deny a respondent's motion to proceed pseudonymously even *before* the institution had filed an opposition.[29]

❖ **Strategic Considerations:** Whether to oppose a pseudonym motion presents a complex, strategic decision for an institution – and one that can set the tone for the entire lawsuit. The following factors may support an institution's decision to file an opposition:

- An opposition may exert substantial pressure on the respondent to settle the matter.
- If the respondent's motion is denied and his identity becomes known, the respondent may be less inclined to cultivate media attention concerning the lawsuit.
- The respondent often sues not just the institution but individual administrators by their names, which may make defendants more inclined to insist that the respondent proceed under his name as well.
- Revealing the respondent's name may ease the institution's ability to obtain relevant evidence, particularly where the respondent has asserted a defamation claim and his reputation is at issue.

On the other hand, the following factors weigh against opposing a motion to proceed under a pseudonym:

- Because a judge enjoys discretion in deciding a pseudonym motion, the court could grant the motion over the institution's opposition. This result may embolden the respondent, creating the belief that he may receive additional favorable rulings down the road.
- If permitted to proceed under a pseudonym, a respondent may be more willing to agree that he will not publicly identify his accuser, and even enter a protective order to that effect. If the pseudonym motion is denied, a respondent may have little incentive to protect the identity of his accuser.
- Both to the court and the public, opposing the motion may create the perception that the institution is taking unfair punitive action against a student for asserting his rights.

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[27] *See, e.g.*, *Doe v. Brandeis*, No. 15-cv-11557 (D. Mass. Jun. 16, 2015) (text order).

[28] *See, e.g.*, *Doe v. Colgate Univ.*, No. 15-cv-1069, 2015 WL 5177736, *2 (N.D.N.Y. Sept. 4, 2015); *Levine v. Temple Univ.*, No. 14-cv-04729, 2014 WL 4375613, *2 (E.D. Pa. Sept. 3, 2014).

[29] *Prasard v. Cornell Univ.*, No. 15-cv-00322 (N.D.N.Y. March 25, 2015).

Preliminary Injunction Practice

More than a third of respondents seek injunctive relief at the outset of a case, typically in the form of a preliminary injunction.[30] Respondents usually seek to enjoin the institution from enforcing a disciplinary sanction against them, though some seek to stop the adjudicative process from proceeding forward altogether.[31] For some respondents, the main objective in filing suit is to remain in school, meaning that the lawsuit will be essentially "won or lost" at the preliminary injunction stage.

A motion for injunctive relief is a critical stage in the litigation. On average, a federal court case takes just over two years to go to trial.[32] If a respondent succeeds in staying his disciplinary sanction during the pendency of the action, he may well have completed his degree requirements by the time the case is resolved.

Whether to issue a preliminary injunction falls within the courts' discretion. In deciding preliminary injunction motions, the courts weigh a variety of factors, including whether the respondent is likely to succeed on the merits, whether he will suffer irreparable harm, whether the injunction could cause substantial harm to others, and whether an injunction serves the public interest.[33] To prevail on a preliminary injunction motion, the respondent must make some showing that his claims have merit. No matter how strongly he establishes the other factors, a court cannot grant a preliminary injunction if a claim lacks any merit.[34]

As a general rule, if monetary damages may make a plaintiff whole, the courts will decline to issue a preliminary injunction for failure to show irreparable harm.[35] Although several courts have relied on this principal in denying preliminary injunctions sought by respondents,[36] an increasing number have concluded that a suspension or expulsion may constitute irreparable harm. These courts typically point to the impact that a delay in earning a college degree may have on a respondent's career prospects, including the permanent gap in his educational record that created by a suspension or expulsion.[37] Even in instances where a respondent establishes irreparable harm, some courts have nevertheless denied preliminary injunctions, typically because the respondent has not shown a likelihood of success on the merits.[38]

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30 Keehan, *supra* at 19. This study counted both temporary restraining orders and preliminary injunctions. A temporary restraining order lasts for a brief time period, until the parties have an opportunity to be heard. A preliminary injunction, by contrast, lasts until the case is concluded.

31 In *Tsuruta v. Augustana Univ.*, No. 15-cv-041520, 2015 WL 5838602 (D.S.D. Oct. 7, 2015) (summarized *infra*), for example, the respondent sought to enjoin a sexual misconduct hearing from going forward. Notwithstanding pending, criminal charges against the respondent, the Court declined to enjoin the hearing.

32 Joe Palazzolo, "In Federal Courts, the Civil Cases Pile Up," TheWall Street Journal (April 6, 2015), available at http://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746.

33 Federal Rule of Civil Procedure 65.

34 Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2948.3 (3d ed. 2015). *See also Pierre v. Univ. of Dayton*, No. 3:15-cv-362, 2015 WL 8567693, *3 (S.D. Ohio Dec. 11, 2015).

35 11A Fed. Prac. & Proc. Civ. at § 2948.1.

36 *B.P.C. v. Temple Univ.*, No. 13-cv-7595, 2014 WL 4632462, *5 (E.D. Pa. Sept. 16, 2014); *Caiola v. Saddlemire*, No. 12-cv-00624, 2013 WL 1310002, *2 (D. Conn. Mar. 27, 2013).

37 *Doe v. Middlebury Coll.*, No. 15-cv-192, 2015 WL 5488109, *3 (D. Vt. Sept. 16, 2015) (summarized *infra*); *King v. DePauw Univ.*, No. 14-cv-70, 2014 WL 4197507, *13 (S.D. Ind. Aug. 22, 2014) (summarized *infra*).

38 *Marshall v. Ohio Univ.*, No. 15-cv-775, 2015 WL 1179955, *9 (S.D. Ohio Mar. 13, 2015).

In opposing a preliminary injunction motion, an institution may point to the harm that the respondent's presence on campus could cause the complainant, an institution's interest in maintaining campus safety, and its need to consistently enforce its disciplinary rules. In *Doe v. University of Cincinnati*, No. 15-cv-600, 2015 WL 5729328 (S.D. Ohio Sept. 30, 2015), for example, the Court found that the respondent had showed irreparable harm, but nevertheless denied the preliminary injunction, reasoning that "allowing Plaintiff back on … campus may place him in proximity to Jane Roe and interfere with her rights." This ruling contrasts with *Doe v. Middlebury College*, where the Court enjoined a respondent's expulsion, in part because the respondent remained on campus during Middlebury's semester-long investigation, undercutting its claim that his presence impacted campus safety, and also because the complainant attended a different college.

❖ **Practice Tips:** To best position itself to defend against a preliminary injunction, an institution should bear in mind the following:

- As a respondent must show at least some likelihood of success on the merits, an institution sets itself up for a favorable ruling by conducting its disciplinary proceeding in compliance with its sexual misconduct policies – and documenting that it has done so.

- Preliminary injunction practice can move fast and expand into a mini-trial on the merits. Even before suit is filed, an institution should begin to prepare to defend itself, including gathering documents from key administrators and transcribing any hearings for submission to court. Be sure to copy inside or outside counsel on fact-gathering communications to provide a foundation for the assertion of the attorney-client privilege.

- A court may test claims that a respondent represents a safety threat against any interim measures taken and/or disciplinary sanctions imposed by the institution. If a preliminary injunction opposition is the first time an institution raises safety concerns, for example, those claims may ring hollow. If, by contrast, an institution raised safety concerns in crafting a no contact order or immediately barring an expelled respondent from campus, a court may give them more weight.

- A judge's decision on a preliminary injunction is ultimately discretionary. As much as possible during the disciplinary process, an institution should position itself to grab the "white hat" at the hearing. Documentation that demonstrates that the institution takes sexual misconduct allegations seriously, that it afforded the respondent a fair process (which included notification of the charges and an opportunity to respond), and that it acted reasonably can help make a judge more favorably inclined to the institution's point of view.

Key Takeaways from Recent Decisions

The appendix for these materials contains summaries of twenty recent cases filed by complainants and respondents. These cases highlight the following takeaways:

- For both complainant and respondent cases, the courts at times seem to apply a "smell test," more willingly intervening if the facts alleged seem unfair or unreasonable on their face. *See Butters*, *supra* at *8-9 (ruling that complainant alleged deliberate indifference even though she initially declined to participate in the disciplinary process because she had described sexual assault by three males to college administrator in graphic detail and even provided a copy of a videotape of the encounter); *Middlebury Coll.*, *supra* at *4 (enjoining expulsion where college elected to conduct a second, *de novo* investigation of a sexual misconduct proceeding, creating the appearance of "double jeopardy" and unfairness).

- Institutions should be careful about providing an accused student with timely notification of the charges and a fair opportunity to respond. *See Tanyi, supra* at *6 (finding that respondent had stated a due process claim where he received notice of a new charge "at the eleventh hour, when it was too late to mount an effective defense").

- Accepting students with a documented history of sexual assault continues to pose a significant risk to institutions. *See Doe v. University of Oregon*, No. 15-cv-00042 (D. Or. Jan. 8, 2015) (settling Title IX claim for $800,000 where plaintiff alleged university should have know about student's prior history of sexual assault); *Williams v. Bd. of Regents of Univ. Sys. of Georgia*, 477 F.3d 1282, 1296 (11th Cir. 2007) (claim premised on similar theory survived motion to dismiss).

- An institution is in perilous territory – both from a regulatory and civil liability perspective – when an accuser declines to participate in the sexual misconduct process after reporting a sexual violence incident. *See Butters*, *supra* at *8 (institution's failure to take action after plaintiff provided detailed report of sexual assault, including video evidence, could state Title IX claim, even though she initially declined to participate in any disciplinary proceedings).

  ❖ **Practice Tip:** Under these circumstances, institutions should carefully assess whether they can proceed with an investigation, even without the accusing student's participation.

- Failure to follow the Department of Education's administrative guidance does not necessarily translate into a Title IX claim for civil liability. *See Karasek*, *supra* at *13 (rejecting reliance on 2011 Dear Colleague letter to establish deliberate indifference).

- Not only may an institution's failure to act in accordance with its policies provide a tailor-made claim for breach of contract, it may also support a Title IX claim, both for complainants and respondents. *See Middlebury Coll.*, *supra* at *3 (enjoining expulsion where college's policies did not allow for a second investigation of sexual assault allegations); *Takla*, *supra* at *6 (ruling that complainant plausibly alleged deliberate indifference based on procedural deficiencies); *Salisbury Univ.*, *supra* at *13 (ruling that procedural deficiencies supported erroneous outcome claim).

- Absent some smoking-gun type statement from a decision-maker or fairly strong comparator evidence, respondents struggle to allege gender-based animus. *See Columbia Univ.*, 101 F. Supp. 3d at 371 (rejecting respondent's "wholly conclusory" allegations of gender bias); *Johnson v. W. State Colorado Univ.*, 71 F. Supp. 3d 1217, 1225 (D. Colo. 2014) (determining that respondent and complainant not similarly-situated for Title IX purposes based on careful review of their relationships to university).

  ❖ **Practice Tips:** To assist in negating or avoiding Title IX claims by respondents, institutions should bear in mind the following:

  - It is critical that administrators remain gender-neutral throughout a disciplinary proceeding.

  - An institution should carefully vet all materials concerning Title IX outreach and efforts to publicize sexual misconduct policies and procedures to ensure that they are gender neutral. *See Washington & Lee Univ.*, *supra* at *10 (refusing to dismiss Title IX claim where materials cited at sexual violence presentation by Title IX investigator suggested, at least vaguely, gender bias).

  - As respondents may challenge the backgrounds of hearing board panelists in search of gender bias, an institution should carefully consider who will sit on a hearing panel in the sexual misconduct disciplinary proceedings. *See id.* at *6 n.2 (noting that hearing panelist had published works on date rape and jury nullification of rape charges). *But see Columbia Univ.*, 101 F. Supp. 3d at 371 (rejecting argument that Title IX investigator's work for women's resource center rendered her biased).

- Courts will likely be receptive to the argument that any perception that a complainant was treated more favorably than an accused was not the product of gender bias, but rather the institution's commitment to "tak[ing] allegations of rape on campus seriously and to treat[ing] complainants with a high degree of sensitivity," which does not provide the foundation for a claim of gender bias under Title IX. *Columbia Univ.*, 101 F. Supp. 3d at 371.

- Where an institution intends to embrace Department of Education guidance, it should make sure that there is no conflict between that guidance and the language contained in the institution's policies. *See Yeasin v. Univ. of Kansas*, 360 P.3d 423 (Kan. App. Ct. Sept. 25, 2015) (overturning expulsion for off-campus conduct – though consistent with OCR's administrative guidance to respond to off-campus conduct that creates hostile environment on-campus – because nothing in institution's policies authorized such discipline).

- As affirmative consent polices become increasingly popular, with some states now mandating them, schools (particularly public institutions) should be careful not to shift the burden of proof to the respondent to prove that the complainant in fact consented.

Mock v. Univ. of Tenn. at Chattanooga, No. 14-cv-1687 (Tenn. Chancery Ct. Aug. 4, 2015).

- An institution should have a clear rationale for its actions, whether it is the initial finding of responsibility or a decision to grant an appeal. *Tanyi v. Appalachian State Univ.*, No. 14-cv-170, 2015 WL 4478853, *6 (W.D.N.C. July 22, 2015) (concluding that a university's failure to provide a basis for reopening a disciplinary process may have violated due process).

- Failure to provide fair notice of charges may provide traction for subsequent legal claims. *Tanyi*, *supra* at *6 (ruling that adding new harassment charge less than 24-hours before hearing may have violated due process).

- With respect to misconduct proceedings at public institutions, the courts appear more willing to delve into the sufficiency or insufficiency of evidence supporting a finding of misconduct. *See Mock*, *supra* at 16 (determining that record did not support finding against respondent where an administrative law judge had initially concluded that there was no clear evidence that the complainant was incapacitated); *Doe v. Regents of the Univ. of California San Diego*, No. 37-2015-00010549 (San Diego Ct. Super. July 10, 2015) (scrutinizing the complainant's hearing testimony, including her description of the assault and subsequent sexual activity, to conclude that hearing panel's responsibility finding was not supported by substantial evidence).

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COMPLAINANT CASES

Karasek v. Regents of the University of California, No. 15-cv-03717, 2015 WL 8527338 (N.D. Cal. Dec. 11, 2015)

Sofie Karasek, Nicoletta Commins, and Arlye Butler, three female students, filed a lawsuit against the University of California ("UC") alleging violations of Title IX for UC's response to their individual reports of sexual assault. The students also alleged that UC's response to the general problem of sexual assault created an environment that "substantially increased the risk" of sexual assault. Specifically, the students alleged that UC underreported incidents of sexual assault on campus, that a state audit report found that UC fell short in handling reports of sexual assault, and that UC had over thirty Title IX complaints filed against it with OCR in 2014 alone, each alleging that the UC failed to adequately respond to reports of sexual assault. UC moved to dismiss.

The Court rejected the students' theory that UC's general response to sexual assault on campus supported the plaintiffs' individual Title IX claims. Although the Court recognized that "a school's generally inadequate response to a known institutional problem of sexual violence can support a student-on-student harassment claim," the Court held that the plaintiffs' allegations were too attenuated to support Title IX liability for their individual reports of sexual assault. In particular, ***the Court ruled that, although UC was aware of a general problem of sexual assault on campus and that its efforts were lacking in certain respects, knowledge of general deficiencies failed to constitute actual knowledge of acts of sexual assault to support liability under Title IX.***

The Court also rejected students' efforts to rely on the Department of Education's Dear Colleague Letter ("DCL") to show that the university's response was inadequate. ***The Court concluded that the DCL sets forth the standard for administrative enforcement of Title IX, not the standard in private lawsuits for money damages.*** As a result, the Court held that the DCL did not "define what amounts to deliberate indifference."

The Court rejected UC's general defense that the plaintiffs' failure to allege subsequent harassment was fatal to their claims. Although the Court acknowledged that several cases appeared to endorse the view that Title IX required "further harassment," the Court declined to follow that line of cases. Rather, the Court concluded that to require the student to show that she was harassed or assaulted a second time "runs counter to the goals of Title IX and is not convincing."

The Court then dismissed two of the three plaintiffs' claims. The Court first dismissed Karasek's claim for failure to allege sufficient causation. Karasek's complaint identified numerous inadequacies in UC's response, including that UC failed to adequately apprise her of its investigation's progress, that she was not allowed to participate in the disciplinary hearing, and that UC allowed her assailant to remain on campus during a nearly yearlong investigation. Because none of these allegations showed that she experienced some distress due to her alleged assailant's presence on campus or that she was forced to take action to avoid him, the Court dismissed her Title IX claim.

The Court also dismissed Commins's claim. Commins alleged that she was sexually assaulted at her off-campus apartment by a fellow student. Although the school ultimately disciplined her alleged assailant, Commins alleged that UC's response was too slow and constituted deliberate indifference. The Court, however, dismissed her claim for failing to allege "even in general terms" the amount of time that passed between when she spoke with UC officials and when UC completed the investigation. ***While recognizing that delay can form the basis of a Title IX claim, the Court reasoned that Commins must allege sufficient facts to show that a delay was more than just "negligent, lazy, or careless."*** Her failure to allege a coherent timeline prevented the Court from determining the length of and the reasons for UC's alleged delay.

The Court declined to dismiss Butlers' claim. While working at an off-campus research center over the summer, Butler alleged that she was sexually assaulted by a board member of the research center, who was also a guest lecturer on campus. When Butler returned to school that fall, she reported the assault to the Title IX coordinator, who, according to Butler, never investigated her complaint or took any action against her assailant. The Court rejected UC's argument that it lacked sufficient control over the assailant, ruling that the assailant's position as guest lecturer at UC was sufficient to state a plausible claim at the motion to dismiss stage.

***Kinsman v. Florida State University*, No. 4:15-cv-00235 (N.D. Fla. August 12, 2015)**[39]

Erica Kinsman, a former student at Florida State University ("FSU"), filed suit against FSU, claiming that FSU failed to properly investigate or respond to her allegation that she was raped by Jameis Winston, a student athlete, at his off-campus apartment.

FSU moved to dismiss Kinsman's Title IX claim. FSU first argued that no "appropriate person" had knowledge of Kinsman's allegation until a news story broke with the allegations over a year later. FSU also contended that athletic department officials who allegedly knew about the allegations lacked sufficient authority to take corrective action to end the discrimination. ***The Court, however, held that this inquiry into the appropriate official was fact-based, and not appropriate for resolution on a motion to dismiss.***

FSU also argued that Kinsman herself prevented the school from going forward, as she did not reveal her assailant's identity and, when his identity became public, Kinsman refused to speak with university officials. As a result, FSU argued, the University was limited to providing academic and emotional support – which it did – and that its response was more than reasonable under the facts. While recognizing that FSU might ultimately have a valid defense, the Court concluded that FSU simply "offers a different take on some of the facts in the complaint" and alleges "additional facts that are not in the complaint in an attempt to show its efforts to respond were diligent and genuine, or at least not 'clearly unreasonable' under Title IX, but that the complaint itself plausibly alleges deliberate indifference during this period that effectively denied her the ability to attend FSU."

[39] This decision is available at http://www.nacua.org/documents/Kinsman_v_FloridaStateUniversity.pdf.

***Takla v. Regents of the University of California*, No. 2:15-cv-04418, 2015 WL 6755190 (C.D. Cal. June 11, 2015)**

Nefertiti Takla, a female graduate student at the University of California Los Angeles ("UCLA"), filed suit against UCLA for allegedly failing to respond adequately to her report of sexual harassment by her history professor.

In June 2013, Takla reported the harassment to UCLA's Title IX Coordinator. That same month, Takla met with the Chair of the History Department, who granted Takla's request to receive a new graduate student advisor. After Takla made her complaint, the Title IX coordinator informed Takla that the school would handle the case through UCLA's "Early Resolution" process in lieu of a formal hearing before the academic senate.

Nine months after she filed her complaint, UCLA concluded its investigation without making any formal findings. When Takla requested a copy of the investigative report, UCLA's Title IX coordinator informed Takla that there was no formal documentation or reports. Talka never learned the outcome of the proceedings or whether the professor was disciplined in any way.

Takla's complaint alleged that UCLA's actions amounted to deliberate indifference under Title IX. UCLA moved to dismiss, arguing that Takla was not subject to any further harassment after she had complained about the professor and therefore that she failed to satisfy the deliberate indifference element of the claim.

The Court rejected UCLA's argument, ruling that ***a plaintiff can state a Title IX claim when the institution's response makes the victim vulnerable to harassment, even if no further harassment actually occurs.*** Specifically, the Court reasoned that "placing undue emphasis on whether further harassment actually occurred to gauge the responsiveness of an educational institution would penalize a sexual harassment victim who takes steps to avoid the offending environment in which she may again encounter the harasser." Thus, the fact that Talka "took it upon herself to avoid her alleged harasser by not setting foot on UCLA campus should not absolve UCLA of its responsibility to take reasonable measures to end harassment."

UCLA also argued that the school's response – which included an investigation and hearing – was sufficient under Title IX. The Court, however, disagreed. The Court highlighted five facts that could give rise to a Title IX claim: (1) UCLA opted for the Early Resolution process rather than a full, formal hearing before the Academic Senate; (2) the Title IX coordinator discouraged Takla from filing a written request for a formal investigation; (3) UCLA did not draft a formal investigation report; (4) Takla was not provided notice of the outcome of the investigation; and (5) UCLA took nine months to complete the process – *all in violation of UCLA's written policie*s.

Although the Court recognized that the plaintiff's allegations – "taken individually" – might not be sufficient to constitute deliberate indifference, the allegations as a whole presented factual issues better decided at summary judgment rather than at the motion to dismiss stage.

***Butters v. James Madison University*, No. 15-cv-00015, 2015 WL 6825420 (W.D. Va. Mar. 3, 2015)**

Sarah Butters, a female student at James Madison University ("JMU"), filed a Title IX claim against JMU arising from an off-campus sexual assault during spring break. In her complaint, Butters alleged that she was assaulted by three male students who filmed the encounter and distributed the video to other students.

One month later, in April 2013, Butters reported the alleged assault to JMU's Associate Director of Judicial Affairs. During that meeting, Butters described the incident in "graphic detail" and provided a copy of the video. Although Butters asked JMU to investigate the assault, Butters declined to make a formal complaint at that time and asked that JMU proceed without her involvement. JMU declined to investigate or otherwise pursue the allegations without a formal complaint.

In November 2013, six months after her meeting with the Associate Director, Butters' father sent an email to JMU's Vice President of Student Affairs inquiring about the investigation. According to the complaint, JMU reiterated its position that Butters would need to make a formal complaint before the school would address the allegations. In January 2014, Butters submitted a complaint against the three men pursuant to JMU's sexual misconduct policies.

Once Butters made a formal complaint, JMU investigated the incident, reaching a finding within 90 days. JMU ultimately found the three students responsible for sexual assault and sexual harassment and imposed a sanction of "expulsion after graduation," which meant that the men were not permitted to return to campus for any reason after graduation. The men were also barred from having any contact with Butters and were required to create a 30-minute presentation on sexual assault.

Butters's complaint alleged that JMU's response (or lack thereof) to her report of sexual assault was inadequate under Title IX. Specifically, Butters alleged that JMU's decision not to investigate the incident until she made a formal complaint constituted deliberate indifference under Title IX and that the sanction imposed was "grossly disproportionate," further exhibiting a deliberate indifference to known acts of sexual assault.

JMU moved to dismiss on the grounds that it could not be found deliberately indifferent for failing to take action during the ten-month period between her initial report to JMU and her filing of a formal misconduct complaint because JMU informed Butters that she could make a complaint but Butters chose not to do so. ***The Court, however, rejected JMU's argument that Butters's decision to not pursue a formal misconduct complaint insulated JMU from liability under Title IX***, reasoning that Butters asked JMU to investigate and address the allegations, just without her involvement. JMU's decision not to investigate the matter or address the continued dissemination of the video (which JMU might have been able to do without her involvement) stated a plausible foundation for a claim for deliberate indifference. Because the Title IX claim survived on that basis, the Court declined to decide whether Butters's second argument, namely that the discipline imposed reflected JMU's deliberate indifference, stated a viable Title IX claim. The Court did suggest, however, that Butters's challenge to the *sufficiency* of JMU's

disciplinary remedy – as opposed to *inaction* in the face of known harassment – may not state a viable claim.

***Doe v. University of Oregon*, No. 15-cv-00042 (D. Or. Jan. 8, 2015)**

Jane Doe alleged that she was gang raped by three University of Oregon ("UO") basketball players at an off-campus party. Doe alleged that UO delayed investigating the allegations until after the basketball season ended (to the benefit of both the school and the players), that UO knew about the risk that these players could commit sexual assaults on campus (one of the players had been suspended from another school based on similar allegations), and that the university failed to inform or otherwise warn students.

In an unusual twist, UO filed a counterclaim to award attorney's fees under 42 U.S.C. § 1988 against the accusing student, alleging that, "Plaintiff's attorneys filed a lawsuit with unfounded allegations in an attempt to damage a good man's reputation [basketball coach Dana Altman], curry favor and gain traction in the media, and coerce a public university to pay a hefty sum to plaintiff even though it has done nothing wrong." UO's decision to file a counterclaim against the alleged victim received significant – and some very negative –media attention.

The matter was settled for $800,000. As part of the settlement, UO agreed to pursue a change to its admissions policy that would require transfer applicants to disclose whether they had a disciplinary history at any current or prior institutions and, if they did, to sign a FERPA waiver allowing UO to access their prior disciplinary records.

***Frazer v. Temple University*, 25 F. Supp. 3d 598 (E.D. Pa. June 5, 2014)**

Emily Frazer, a female student at Temple University, filed a lawsuit against Temple stemming from an altercation with her ex-boyfriend, a Temple football player. According to the Complaint, Frazer's ex-boyfriend, Andrew Cerett, forced his way into her dorm room, demanding to speak with Frazer and threatening her that "if I can't have you no one can have you." Frazer called the police, and Cerett was arrested.

Within a month of the incident, Temple held a student conduct hearing, found Cerett responsible for violating several provisions of the student code of conduct, and suspended him for the rest of the semester. Following the disciplinary hearing, Frazer sued both Cerett and Temple. She alleged that failing to remove Cerett between the incident and the hearing violated her rights under Title IX. Frazer claimed that Temple knew that Cerett had been involved in previous violent altercations *with teammates on the football team* and that the University's failure to remove him earlier constituted "deliberate indifference" under Title IX.

The Court rejected Frazer's Title IX claims. Regarding Cerett's prior altercations with his teammates, the Court stated that those incidents involved his *male* teammates, and were not directed at females or sexual in nature. The Court concluded that Cerett's incidents with his teammates were not relevant and were too far removed from what happened to Frazer to support Title IX liability.

The Court also found that Temple did not act with deliberate indifference during the time between the incident and the student conduct hearing. The Court noted that Temple acted swiftly, holding the hearing within one month of being notified of the incident. ***Moreover, the Court stated that simply allowing an alleged assailant to remain on campus with his accuser cannot – in and of itself – support a Title IX claim.*** As a result, the Court held that Temple's response was not clearly unreasonable.

RESPONDENT CASES

Doe v. Pennsylvania State University, No. 15-cv-02072 (M.D. Penn. Oct. 28, 2015)[40]

A Syrian national, John Doe, sued Pennsylvania State University to invalidate a two-semester suspension based on its finding that Doe had received oral sex from a female student who later claimed she was too incapacitated to consent to the encounter. Penn State had sanctioned Doe based on its newly-implemented investigative model for addressing sexual misconduct complaints, where an investigator interviews the parties and then presents findings to an adjudicative panel. Neither party has an opportunity to testify before this panel, which ultimately makes a responsibility finding and imposes a sanction.

Doe's complaint asserted a procedural due process claim against Penn State based on its sexual misconduct process. He alleged that Penn State denied him an opportunity to present testimony in his own defense before the adjudicative panel, as well as to cross-examine his accuser. On the same day that Doe filed his complaint, he also moved for a temporary restraining order, enjoining Penn State from suspending him and reporting his suspension to federal immigration authorities. As the principal grounds for the restraining order, Doe alleged that, if suspended, he would lose his eligibility for a student visa, potentially resulting in his deportation to Syria. Citing to a State Department travel advisory describing Syria as a violent, war-torn country, Doe alleged that deportation could subject him to serious bodily harm.

The Court granted Doe's motion for a temporary restraining order, concluding that he had shown that his suspension could result in his deportation to Syria, where he could suffer irreparable, physical harm. The Court explained that "there is a presently existing actual threat" that his suspension could "result in the initiation of federal immigration proceedings" against him, especially in light of the media coverage generated by this action. Although its order focused on Doe's immigration status, the Court also noted that he will "suffer from the deprivation of his right to continue his education in an ordinary and timely manner" if the suspension is enforced.

A hearing on a preliminary injunction in this case is scheduled for January 2016. Following the hearing, the Court, with the benefit of more evidence, will determine whether the restraining order remains in effect.

Tsuruta v. Augustana University, No. 15-cv-041520, 2015 WL 5838602 (D. S.D. Oct. 7, 2015)

Jane Roe reported to Augustana University ("AU") that Koh Tsuruta sexually assaulted her. Tsuruta was arrested and charged with sexual assault. While criminal proceedings were pending, AU suspended Tsuruta and commenced its own internal investigation. Tsuruta requested that AU suspend that investigation pending the resolution of the criminal charges against him, and AU denied that request. Tsuruta filed suit in federal court alleging, among other things, claims for violations of Title IX and breach of contract. He also filed a motion for a preliminary injunction to stay the investigation, which the Court denied.

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[40] This decision is available at http://www.nacua.org/documents/Doe_v_PennState_October2015.pdf

In denying the request for injunctive relief, the Court reasoned that Tsuruta's Title IX claim was likely to fail because Tsuruta pointed to no evidence of discriminatory animus, and AU had yet to hold a hearing, rendering any erroneous outcome claim premature.

The Court also determined that Tsuruta's contract claim, based on the student handbook, had a low probability of success. The Court held that there was no indication that the investigation into Roe's allegations was inadequate under the handbook, and that there was no provision in the handbook requiring AU to stay the completion of its investigation pending resolution of Tsuruta's criminal case. The court further concluded that AU did not act in bad faith by not recognizing and respecting Tsuruta's 5th Amendment right against self-incrimination – the decision to testify, though difficult, did not run afoul of any contract law principle.

The Court also held that Tsuruta had not shown that he would suffer irreparable harm without a preliminary injunction because (1) a finding in a disciplinary proceeding was not tantamount to a conviction; (2) any resulting harm to him would result from a determination that he, in fact, violated the school's policy; and (3) Tsuruta did not demonstrate that AU's procedures for resolving Roe's complaint would cause it to arrive at its conclusion in an impermissible way.

Yeasin v. University of Kansas, 360 P.3d 423 (Kan. App. Ct. Sept. 25, 2015)

Navid Yeasin, a student at the University of Kansas ("KU"), was expelled from the university after engaging in conduct against "W" that the court called "reprehensible, demeaning, and criminal." This behavior included holding W against her will in a car in an off-campus parking lot while verbally abusing her and subsequently posting sexually explicit and demeaning messages about W on Twitter. KU officials intervened several times with Yeasin, including issuing a no-contact order and clarifying by email and in a follow-up meeting that Yeasin's continuing Twitter messages violated the no-contact order.

After conducting an investigation into Yeasin's behavior, KU's Office of Institutional Opportunity and Access recommended that KU take disciplinary action against Yeasin. Although the Office's report noted that some of the conduct in the case occurred off-campus, the report concluded that Yeasin's conduct had affected the on-campus environment for W, thus violating the university's sexual harassment policy.

After notice and a formal hearing, the KU's Vice Provost expelled Yeasin and banned him from campus. After an unsuccessful appeal of his expulsion to the Judicial Board, Yeasin sought judicial review in Kansas state court.

Reviewing Yeasin's expulsion for compliance with Kansas's administrative agency act, the District Court reversed KU's decision and ordered that Yeasin be readmitted. The District Court concluded that the KU policies Yeasin was accused of violating did not extend to off-campus behavior, and that KU had presented no evidence that Yeasin's conduct had occurred on campus or at a university sponsored event.

On appeal, the Court of Appeals of Kansas upheld the District Court's decision. ***The Appeals Court closely parsed the policies on which the university had relied in disciplining Yeasin and concluded that those policies did not authorize the university to expel Yeasin for his off-***

campus activities or his tweets. As to the tweets, the Appeals Court noted that the university had not presented any evidence that Yeasin had sent those messages while on campus. The Appeals Court acknowledged KU's argument that it was required by the Department of Education's "Dear Colleague Letter" to respond to student-on-student sexual harassment that initially occurs off school grounds but creates a hostile campus environment, but held that, to do so, KU needed to include language in its student disciplinary policies granting itself the necessary authority.

***Doe v. Middlebury College*, No. 15-cv-192, 2015 WL 5488109 (D. Vt. Sept. 16, 2015)**

In November 2014, John Doe, a Middlebury College student, was studying abroad with the School for International Training ("SIT"), when he was accused of sexual misconduct by Roe, another participant in the SIT program who was not a Middlebury student. Under its policies, SIT investigated the complaint and held a hearing, after which Doe was "exonerated" in December 2014. SIT kept Middlebury informed regarding the complaint, investigation, hearing, and outcome. Middlebury allowed Doe to return to campus and classes in January 2015.

Thereafter, Roe and administrators from her college apprised Middlebury that they were dissatisfied with SIT's process, and Roe stated her intention to file a complaint with OCR. Middlebury then conducted a *de novo* investigation of Roe's complaint under its own sexual misconduct policy. Doe argued that the investigation contravened Middlebury's policies, which provided that he would be subject to SIT's policies and discipline while abroad. Middlebury's investigation took approximately five months to complete, over three months longer than the period provided by the College's policies (absent "extenuating circumstances"). Based upon the investigative report, a Middlebury HR officer concluded that Doe had violated Middlebury's misconduct policy, and Doe was expelled in July 2015. No hearing was held, and Doe's internal appeals were denied.

In August 2015, Doe filed suit alleging breach of contract and violation of Title IX, and he filed an emergency motion for a preliminary injunction barring Middlebury from expelling him and preventing him from attending classes. Thereafter, Doe received an invoice for his tuition payment for the fall semester, and his student record continued to list his course enrollment as "active." During the hearing on Doe's motion, Middlebury argued that it was a "computer glitch" that Doe remained listed as an enrolled student.

In September 2015, the Court granted Doe's motion for a preliminary injunction and ordered that the College "shall not expel [Doe] and shall allow him to remain enrolled in his courses for the fall 2015 semester." The Court emphasized that ***the case "presents a unique situation where Plaintiff [respondent] was exonerated of the charge of sexual assault by one U.S. institution following an investigation and hearing, allowed to continue his studies the next term, and subsequently determined by his college following a second investigation of the same allegation to have committed sexual assault, after which he was expelled."*** The Court found that Doe "demonstrated a sufficiently serious question regarding whether Middlebury violated its policies in conducting a second investigation of the charge of sexual assault against [him]" after he was exonerated following an investigation and hearing by SIT. The Court concluded that Doe would suffer irreparable harm if expelled because he had a job offer "contingent on the successful completion of his degree at Middlebury," and because "money damages cannot compensate for

the loss of [Doe's] senior year in college with his class, the delay in the completion of his degree, or the opportunity to begin his career … with this particular employment." The Court also noted that Doe would have to "explain, for the remainder of his professional life, why his education either ceased prior to completion or contains a gap." By contrast, the Court found that it "is unlikely Middlebury will suffer great damage or loss as a result of the issuance of a preliminary injunction preventing the expulsion of [Doe] for the fall semester," noting, among other things, that Doe had returned to campus after the alleged assault without restrictions and participated in the subsequent investigation, all of which indicated that the College did not consider Doe a threat to the community.

Middlebury initially appealed the Court's decision and filed a motion for partial summary judgment. Soon thereafter, however, the parties filed a stipulation of dismissal of the claims against Middlebury, and Middlebury dismissed its appeal.

***King v. DePauw University*, No. 14-cv-70, 2014 WL 4197507 (S.D. Ind. Aug. 22, 2014)**

J.B., a student at DePauw University, filed a sexual misconduct complaint against another student, Benjamin King. DePauw conducted an investigation, and a hearing board found King responsible for non-consensual sexual contact and sexual harassment. The Board initially expelled King. He then appealed the Board's decision, and DePauw's president upheld the Board's responsibility finding but reduced its sanction to a two-semester suspension.

After filing suit against DePauw, King moved for a preliminary injunction to permit him to resume his studies. Even though it concluded that King had not a likelihood of success with respect to his Title IX claims, the Court granted King's request for a preliminary injunction, finding that he had demonstrated a reasonable likelihood of success with respect to his contract claim. The Court's order enjoined DePauw from enforcing King's suspension and required the private university to reenroll him as a student.

Erroneous Outcome and Deliberate Indifference

King claimed that DePauw erroneously disciplined him, that his gender was a motivating factor in the discipline, and that the official who decided his appeal was deliberately indifferent to the Board's gender bias. ***King argued that the last twelve DePauw students charged with sexual misconduct were male, ten of whom were found responsible.*** The Court concluded that these facts did not support a Title IX claim because they related to the gender make up of students accused of sexual misconduct ***by other students***, over which DePauw is not responsible. ***Although the fact that DePauw found the majority of those accused responsible might suggest bias against those accused of sexual misconduct, it said nothing about bias on the basis of gender.***

Breach of Implied Contract

King alleged that DePauw breached at least two contractual "Rights of the Respondent" provisions contained within its sexual misconduct policy, namely: (1) the right to "have adequate notice and time to prepare for [the] hearing"; and (2) the right to "have complaints responded to

properly and sensitively, investigated appropriately, and addressed competently." Noting that disciplinary decisions fall within DePauw's professional judgment, the Court stated that its review was limited to whether King was likely to succeed in demonstrating that DePauw's decision was illegal, arbitrary, capricious, or made in bad faith. The Court found that he was likely to succeed in this regard.

The Board had found that King knew or should have known that J.B.'s intoxication rendered her incapacitated and incapable of consenting to sexual activity. The Board based its findings on testimony describing J.B. as extremely intoxicated throughout the night of the alleged assault. The Court, however, concluded while that there was substantial evidence to support that J.B. was intoxicated there was no evidence that King had any knowledge of her incapacitation or that he knew or should have known she was intoxicated to the point of incapacitation.

The Court emphasized that King's responsibility had to be based upon information he had at the time and his observations in the relatively brief time he and J.B. spent together before engaging in sexual activity. King testified that in the short time he and J.B. spent together she did not appear extremely intoxicated and expressed consent to sexual activity through her words and actions. No witnesses saw them together. The only direct evidence of how J.B. was acting when she and King were together came from him. Moreover, much of the evidence of intoxication and incapacitation consisted of J.B.'s friends' description of her uninhibited behavior as deviating from her normal more reserved personality. King, however, did not know her well and would not have known the extent to which she was normally uninhibited or reserved.

The Court also concluded that certain deficiencies in the investigation and hearing process bolstered King's likelihood of success. These included that there was a substantial delay in the investigation that may have rendered witness accounts less accurate; that the Board denied King a one-week extension to prepare for the hearing but then postponed it for its own scheduling reasons; that the investigation consisted almost exclusively of witnesses suggested by J.B.; that the Board asked vague questions at the hearing (such as asking witnesses to rate J.B.'s level of intoxication on a scale of 1-10 with no frame of reference); that J.B.'s advisor at the hearing was married to DePauw's Title IX coordinator; and that King's own faculty advisor was ill-equipped to be of any real assistance.

***Doe v. Salisbury University*, No. 15-cv-517, 2015 WL 5005811 (D. Md. Aug. 21, 2015)**

John Doe and Richard Roe were accused of sexually assaulting Jane Doe. Salisbury University ("SU") conducted an investigation into the claim, and a hearing board found the male students responsible for engaging in non-consensual contact with Jane. An internal appeal by Doe and Roe was denied, and SU suspended them. Upon denial of their appeal, the students were also made to complete "reflection" papers.

Doe and Roe filed suit against SU and two SU officials alleging, among other claims, sexual harassment, erroneous outcome, and retaliation under Title IX. Doe and Roe also sued Jane Doe for several common law torts, including defamation. The defendants moved to dismiss. The

Court dismissed the Title IX claims, except for the erroneous outcome claim, and the defamation claim against Jane Roe.

Sexual Harassment and Retaliation Claims

Doe and Roe claimed hostile environment sexual harassment in violation of Title IX, alleging that SU employees investigated and disciplined them without proper jurisdiction, that the employees lacked proper training, and that SU's policies were inadequate and biased against men. The Court found that these allegations did not involve sex-specific language or conduct designed to humiliate, ridicule, intimidate, or insult, necessary to state a claim for harassment. Doe and Roe claimed that SU retaliated against them for filing their appeal by making them complete a reflection paper. The Court found that the additional sanction requiring Doe and Roe to complete a reflection was a "minor inconvenience" that did not constitute a materially adverse action to support a retaliation claim.

Erroneous Outcome

In support of their erroneous outcome claim, Doe and Roe alleged twenty-four procedural defects in the disciplinary process, which they claimed were motivated by anti-male bias. The Court concluded that they had adequately pled the first two elements of an erroneous outcome claim – (1) the existence of a procedurally or otherwise flawed proceeding (2) that led to an adverse and erroneous outcome – based on the following allegations:

- SU prohibited Doe and Roe from asking many critical questions of witnesses, including the investigator and the complainant;
- SU barred them from reviewing witness statements and witness lists prior to the hearing and failed to provide them with all evidence that was to be presented to the Board;
- SU told them that they were not entitled to have an attorney present, even though SU's conduct code states permits students who are likely to face federal criminal charges to have an attorney present;
- Prior to the hearing, SU officials made "findings and conclusions" that were presented to the Board and may have improperly influenced it; and
- SU officials presented "false information" to the Board.

The third element of this claim – particular circumstances suggesting that the board's finding was motivated by gender bias – presented a closer call. Plaintiffs alleged that "SU has created an environment in which male students accused of sexual assault … are fundamentally denied due process as to be virtually assured of a finding of guilt." In support of this allegation, Plaintiffs presented public notices and articles published by SU informing the student body about the risk of sexual assault on college campuses. One of the articles was directed at men and stated that men commit the great majority of sexually violent crimes. The Court found that the article, although not gender-neutral, did not evidence gender bias but rather broad awareness that most perpetrators are men. The remaining publications were gender neutral, and the Court found that they did not sustain Doe and Roe's contention that gender bias was a motivating factor behind the board's finding.

In addition to these exhibits, however, Doe and Roe alleged *upon information and belief* that SU possessed communications evidencing SU's "deliberate indifference in imposing wrongful discipline on Plaintiffs on the basis of gender" and its "intent to favor female students alleging sexual assault over male students," and its intent "to demonstrate to the … Department of Education and/or the general public that [it is] aggressively disciplining males students accused of sexual assault." Based on these allegations, the Court denied SU's motion to dismiss the erroneous outcome claim, finding that Doe and Roe "may have a viable case *if they are able to uncover discoverable and admissible evidence* that [their] gender was a motivating factor behind SU's allegedly flawed disciplinary procedures and wrongful conclusions." Surprisingly, the Court characterized these allegations "upon information and belief" as "specific" and sufficient to allege gender bias under the *Iqbal/Twombly* pleading standard, reasoning that the facts pled were peculiarly within the possession or control of the defendant. The Court noted that if plaintiffs had pled upon information and belief that "procedural defects were motivated by gender bias," such a broad assertion would not have sufficed.

***Doe v. Washington & Lee University*, No. 14-cv-00052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015)**

John Doe alleged in his complaint that Jane Roe reported that Doe had sexually assaulted her after attending a presentation on sexual violence where Washington & Lee University ("W&L")'s Title IX Officer endorsed an article entitled, "Is It Possible That There Is Something Between Consensual Sex And Rape…And That It Happens to Almost Every Girl Out There?". Doe alleged that during W&L's investigation of Roe's complaint the Title IX investigator refused to let Doe have counsel present and threatened to complete the investigation without his side of the story if Doe insisted on waiting for counsel. He alleged that the Title IX investigator's final report also inaccurately summarized Doe's version of events.

Doe further alleged that a W&L dean repeatedly asked Doe to transfer rather than proceed with the disciplinary proceeding, which Doe refused to do. During the final meeting in which Doe declined the dean's transfer offer, the dean provided Doe a list of potential panel members, including Professor X, who had authored works titled "The Gender Conundrum and Date Rape: The Potential Significance of Dimensions of Power" and "Rape Nullification in the United States: A Cultural Conspiracy." The nature of Professor X's work was not disclosed to Doe, and the dean demanded that Doe object to the proposed panel members on the spot.

A disciplinary hearing was convened. According to Doe's allegations, although his advocates made requests to create a record of the hearing, the dean, who served as the chairperson of the panel, refused to do so. His complaint alleged that the panel relied entirely on the summaries of witness statements gathered by the Title XI investigator and another university employee. Doe alleged that he was not permitted to question Roe directly; rather, each of his questions had to be approved by the panel and even then the panel often altered Doe's questions for Roe. Doe alleged that there were several critical inconsistencies in Roe's testimony, but the panel, for the most part, did not ask her about those inconsistencies.

A day after the hearing, Doe received a letter informing him that, by a vote of 3-1, the panel found him responsible for a non-consensual sexual encounter and that he would be expelled.

According to Doe, there was no explanation for the decision. Doe appealed, but his appeal was denied, again with no explanation.

Doe sued under Title IX, asserting, among other things, an erroneous outcome theory of liability. ***The Court held that, "given the totality of the circumstances," Doe plausibly established a causal connection between his expulsion and gender bias. The facts that the Court relied on to reach this conclusion ranged from the Title IX investigator's alleged bias (as evidenced by her presentation materials), to procedural infirmities identified by Doe, to allegations that W&L was under pressure from the government to find male students responsible.***

***Mock v. University of Tennessee at Chattanooga*, No. 14-cv-1687 (Tenn. Chancery Ct. Aug. 4, 2015)**[41]

Molly Morris accused Corey Mock of sexual assault. Morris claimed that she did not consent to having sex with Mock and that alcohol impairment left her incapable of consent. An administrative law judge ("ALJ") conducted a hearing and initially held that the University of Tennessee at Chattanooga ("UTC") had not carried its burden to prove lack of consent or that Mock knew Morris was incapable of consenting. Upon reconsideration, however, the ALJ reversed her initial order and held that UTC had proven that Morris did not consent to sexual activity. The ALJ ordered Mock's dismissal from UTC for violation of the UTC Code of Conduct. Mock sought judicial review of his expulsion in Tennessee state court. The Court reversed Mock's expulsion on due process grounds.

The Court's decision turned heavily on UTC's use of an affirmative consent standard that required the presence of a "yes" or other clear verbal or non-verbal assent. ***UTC interpreted its affirmative consent policy to require Mock to affirmatively prove that he secured consent from Morris and argued that it met its burden because Mock could not prove such consent. The Court held that such a procedure "erroneously shifted the burden of proof onto Mock, when the ultimate burden of proving a sexual assault remained on the charging party, UTC."*** Under UTC's interpretation, a person accused of assault was effectively presumed to have committed the assault, and the accused had to overcome that presumption and affirmatively prove that an assault did not occur." This interpretation improperly shifted the burden upon Mock to disprove the accusations against him, thereby denying him due process. The Court further noted that the difficulty of affirmatively proving consent under the circumstances contributed to the deprivation of due process.

> [The accused] must come forward with proof of an affirmative verbal response that is credible in an environment in which there are seldom, if any, witnesses to an activity which requires exposing each party's most private body parts. Absent the tape recording of a verbal consent or other independent means to demonstrate that consent was given, the ability of an accused to prove the complaining party's consent strains credulity and is illusory.

The Court also found that the record did not support UTC's findings and that those findings were not entitled to due deference. In her initial order, the ALJ had concluded that there was no clear

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41 This decision is available at http://chronicle.com/items/biz/pdf/memorandum-mock.pdf

evidence that Morris was intoxicated and that she was not incapable of consenting. Moreover, there was no finding that Morris did not consent. The Court found that UTC's decision to expel Mock despite these facts because he could not affirmatively prove consent was arbitrary and capricious.

***Tanyi v. Appalachian State University*, No. 14-cv-170, 2015 WL 4478853 (W.D.N.C. July 22, 2015)**

While attending Appalachian State University ("ASU"), two students, Student A and Student B, filed sexual misconduct complaints against Langston Tanyi, a football player at ASU. Although he was ultimately found not responsible for the sexual assault charges, Tanyi served multiple suspensions and alleged that his invitation to an NFL training camp was rescinded due to the allegations against him.

Student A claimed that an encounter in the fall of 2011 among Tanyi, his roommate, and Student A was non-consensual. Tanyi subsequently was informed that another student, Student B, claimed to have been raped by Tanyi, his roommate, and three athletes the previous spring. Student A and Student B both brought charges against Tanyi and his roommate for violations of the student code of conduct, including sexual misconduct, harassment, and hostile communications.

Tanyi and his roommate had a joint hearing regarding Student A's charge, at which ASU's administrators allegedly prevented Tanyi from presenting several witnesses who would testify primarily about Student A's past sexual conduct. During the hearing, Tanyi learned for the first time that his roommate had prior disciplinary violations and later discovered that one of the members of the hearing panel had decided an earlier case against his roommate. The hearing panel found Tanyi and his roommate responsible, and Tanyi was suspended for eight semesters. Tanyi's appeal was denied, but he subsequently received a new hearing based on the fact that he had not received a hearing separate from his roommate. At the new hearing, Tanyi was found not responsible for all charges regarding Student A.

The university held a separate hearing on Student B's allegations, and Tanyi was found not responsible. Thereafter, Student A posted a message on Facebook asserting that Tanyi and his roommates were rapists and that the university was protecting them because they were football players.

Student B appealed the panel's decision and ASU granted a new hearing, *without explanation*. At the new hearing, Student B claimed that Tanyi had harassed her on campus, and *Tanyi was not informed of this new allegation until the night before the hearing*. The panel again cleared Tanyi of Student B's allegations of sexual misconduct allegations but found him responsible for the new harassment charge.

Tanyi brought suit against the university and several high ranking administrators in federal court, alleging violations of Title IX and his constitutional rights of due process and equal protection. On the university's motion to dismiss, the court dismissed the bulk of Tanyi's claims but allowed Tanyi's due process claims to go forward.

The court's analysis of Tanyi's due process claims is notable. Tanyi set forth seven grounds in support of this claim, five of which the court rejected. Specifically, the Court concluded that Tanyi's rights were not violated by the following:

- Tanyi's advisor was a philosophy graduate student while Student A was assisted by a licensed attorney (the court stated that "no intricate knowledge of the law or extensive legal training" was required to advise Tanyi through the conduct process);
- The conduct of a joint hearing with his roommate;
- The fact that one of the members of Tanyi's hearing panel had previously found against his roommate;
- The university's alleged failure to disclose potential exculpatory witnesses; and
- The exclusion of two witnesses who would have testified about Student A's past sexual activity.

The court did conclude, however, that several of the allegations regarding the university's actions were sufficient to survive the motion to dismiss. Specifically, the court pointed to the university's failure to offer a legitimate reason to re-open Student B's case. ***Relying on the standard for new trials in civil judicial proceedings, the Court ruled that the university must provide "a clearly articulated substantive basis" for granting a new hearing.***

The Court also ruled that Tanyi's claim that the university had failed to provide him with adequate notice of Student B's new harassment charge against him was sufficient to survive the motion to dismiss. ***The Court concluded that Tanyi received notice of the new charge "at the eleventh hour, when it was too late to mount an effective defense."***

***Doe v. Regents of the University of California San Diego*, No. 37-2015-00010549 (San Diego Ct. Super. July 10, 2015)**[42]

Joe Doe was accused of digitally penetrating Jane Roe during a morning sexual encounter, an accusation he denied. Later on the same day, Doe and Roe engaged in consensual sexual activity. Roe later charged Doe with sexual misconduct. A hearing panel found Doe responsible for engaging in non-consensual sexual activity and suspended him for one quarter. Doe appealed the panel's findings, and the University of California, San Diego ("UCSD") not only denied his appeal but *increased* his suspension to one year without explanation. Doe sued.

On judicial review of UCSD's administrative decision, the Court concluded that Doe's hearing was unfair and the hearing panel's findings were not supported by substantial evidence. The Court noted that UCSD's unexplained increase in the sanctions imposed against Doe appeared to be a "punitive" reaction to Doe's decision to appeal the hearing panel's decision towards [Doe] for appealing the decision of the Panel." The Court ordered UCSD to set aside its findings and sanctions.

[42] This decision is available at http://www.nacua.org/documents/Doe_v_RegentsUCASanDiego.pdf.

Unfair Hearing

The Court identified four reasons in support of its conclusion that Doe's hearing was unfair. First, the court found that ***the hearing panel had restricted Doe's "fundamental" and "essential" right of cross-examination of his accuser***, which was "especially important" in assessing her credibility. Of the thirty-two (32) questions Doe requested that the hearing panel ask Roe, the panel asked only nine. While expressing understanding of "the need to prevent additional trauma to potential victims of sexual abuse," the Court concluded that limited questioning of Roe had "curtailed the right of confrontation crucial to any definition of a fair hearing" and prejudiced Doe.

Second, the Court concluded ***there was no justification for placing a barrier between Doe and Roe during the hearing,*** particularly where there was no indication that Doe had been hostile towards her. The Court stated that Doe had a "right to confront adverse witnesses" and noted "the importance [of] demeanor and non-verbal communication in order to properly evaluate credibility."

Third, the Court concluded that ***the panel's reliance on an investigator's report was "problematic"*** for three reasons: (1) the report was not presented at the hearing, and the investigator did not testify, thus depriving Doe of the opportunity to cross-examine her; (2) Doe was not provided information that formed the basis for the investigator's report and conclusions; and (3) the hearing panel "improperly delegate[d]" its duty to make the determination whether Doe was responsible by referencing and "defer[ring]" to the investigator's conclusion on the issue.

Fourth, the Court concluded that ***the hearing panel "appear[ed]" to give "improper weight" to Doe's exercise of his Fifth Amendment right against self-incrimination***, because the panel stated in its findings that while Doe stated that he did not digitally penetrate Roe, he abstained from providing additional information regarding the incident, which "*the panel would have liked to hear*." (original italics)

Panel's Finding Not Supported by Substantial Evidence

With respect to its conclusion that the hearing panel's finding was not supported by substantial evidence, the Court noted that Doe stated that he had not digitally penetrated Roe, and that Roe testified that Doe kept "*trying* to finger [her] and touch [her] down there." (original emphasis). The Court went on to state:

> Also, Ms. Roe *did not object to sexual contact per se*, and only explained that it was not pleasurable for her at that time.
>
> Additionally, Ms. Roe admitted that she *voluntarily continued consensual sexual activity with Mr. Doe later that very same day*. The Court is not weighing Ms. Roe's credibility. But the incident on the morning of February 1, cannot be viewed in a vacuum. When viewed *as part of the entire narrative*, the sequence of events do[es] not demonstrate non-consensual behavior. What the evidence

> does show is Ms. Roe's personal regret for engaging in sexual activity beyond her boundaries. The panel's finding … illustrates the lack of evidence: "Jane stated that she physically wanted to have sex with Ryan but mentally wouldn't." The record reflects this ambivalence on the part of Ms. Roe. But Ms. Roe's own mental reservations alone cannot be imputed to petitioner, particularly if she is indicating physically she wants to have sex. (Emphasis added).

***Doe v. Columbia University*, 101 F. Supp. 3d 356 (S.D.N.Y. April 21, 2015)**

Jane Roe accused John Doe of sexually assaulting her. Doe maintained that the encounter was consensual. Columbia University charged Doe with having engaged in non-consensual intercourse.

Doe alleged that, during the investigation, Columbia's Title IX investigator failed to investigate crucial evidence that would have cleared Doe of any wrongdoing, and instead adopted Roe's version of events. After a disciplinary hearing – consisting primarily of Roe's and Doe's conflicting testimony – a panel concluded that it was more likely than not that Doe had "directed unreasonable pressure for sexual activity toward [Roe] over a period of weeks" and that Doe had engaged in non-consensual sex with Roe. As a result, Doe was suspended for approximately six months. Doe appealed the panel's finding, which was affirmed.

Doe sued, alleging, among other things, two theories of liability under Title IX: (1) erroneous outcome and (2) selective enforcement. The Court subsequently granted Columbia's motion to dismiss his complaint. The Court's decision is presently on appeal with the Second Circuit.

Erroneous Outcome

The Court found that Doe had not alleged sufficient facts that he was wrongly found to have committed an offense. First, despite a slew of allegations concerning the adequacy of the Title IX investigation – many of which undermined the credibility and integrity of the investigation – the investigator was not the ultimate decision-maker. Second, any errors concerning the investigation of the particular night in question were "arguably harmless" since the panel found that Doe had pressured Roe into sexual activity "over a period of weeks." Third, the complaint was devoid of non-conclusory facts suggesting that gender bias resulted in a flawed outcome. The fact that the investigator once worked at a women's resource center did not demonstrate that the investigator's actions – let alone the University's disciplinary measures – were motivated by gender bias. ***Moreover, the court noted that even if the University treated Roe more favorably than Doe during the disciplinary process, such favorable treatment was entirely consistent with lawful, gender-neutral goals, i.e. "to take allegations of rape on campus seriously and to treat complainants with a high degree of sensitivity."***

Selective Enforcement

Doe's selective enforcement claim also failed because the complaint contained no allegations plausibly suggesting that gender was a motivating factor in the investigation or ultimate punishment. The complaint contained no facts indicating that female students were treated more

favorably in similar circumstances. ***The fact that Columbia's policies may have had the effect of burdening more men than women was not enough to state a claim because Title IX does not provide a private right of action to challenge disciplinary policies based on disparate impact.***

Yu v. Vassar College, 97 F. Supp. 3d 448 (S.D.N.Y. Mar. 31, 2015)

While attending Vassar College, Peter Yu was accused of sexual assault by a female student (the "complainant"). Yu and the complainant's accounts of the events of the night in question differed greatly. Yu claimed the encounter was consensual and the complainant was the initiator, whereas the complainant claimed that Yu forced her to have sex with him and that she was too intoxicated to consent. Yu relied heavily on Facebook messages sent from the complainant to him after the incident which Yu claimed showed her consent and were exculpatory. Yu also claimed that he too was intoxicated during their encounter.

After the complainant filed a misconduct complaint, Vassar conducted an investigation, and a hearing panel found Yu responsible for sexual assault and expelled him. The panel found that the complainant was intoxicated to the point of being incapable of consenting to sexual activity and that Yu knew or should have known that she was incapacitated. An internal appeal by Yu was denied and his expulsion was upheld.

Yu filed suit against Vassar alleging erroneous outcome and selective enforcement claims under Title IX and various state law claims. The Court dismissed all of Yu's claims at summary judgment.

Erroneous Outcome

Yu argued that he was wrongly found to have committed the offense due to gender bias. ***The Court noted repeatedly in its decision that its role was limited to determining whether Vassar's determinations and actions were motivated by gender bias, and that it was not the Court's role to second-guess the hearing panel's factual conclusions and credibility determinations.***

The Court found that there was no material factual issue to support a finding that the disciplinary hearing was flawed and resulted in an erroneous outcome. With respect to Yu' allegations of numerous flaws, the Court's findings included that:

- a private college is not subject to constitutional due process requirements;
- Yu's claim that the hearing panel was not impartial because the complainant's father was a professor was rebutted by the fact that the hearing panel engaged in conflict checks;
- a student need only be given a few days to prepare for a hearing;
- it is not a procedural flaw to require that cross-examination of witnesses be directed through a member of the hearing panel;
- witnesses in a disciplinary hearing are not required to be placed under oath;
- lay witnesses may testify about their observations regarding a person's level of intoxication; and
- a detailed written finding is not required to be provided to the accused.

The Court further found that, even if the proceeding was flawed, there was no evidence of gender bias. The Court noted that Yu pointed to no statements made by Vassar showing gender bias and no statistical evidence to show a pattern where "males invariably lose" under Vassar's sexual misconduct procedures. Yu relied heavily on Facebook messages the Complainant sent after the night in question which he claimed were exculpatory and showed evidence of consent by the Complainant. At the hearing, the Complainant had testified that she was in a state of shock when sending these messages and that they did not reflect the truth of how she felt. Despite the Complainant's Facebook messages, the hearing panel credited her testimony that they did not reflect her true feelings as well as her version events. Absent some evidence that gender bias affected this credibility determination, the Court would not second-guess it.

Yu argued that Vassar's policy with respect to incapacitation due to alcohol impairment operated on a double standard. Under Vassar's policy, if a reasonable person in the accused's shoes should have known that the accuser was too intoxicated to consent, then he is responsible for sexual misconduct. The policy rendered Yu's level of intoxication irrelevant as to whether he should have known that the Complainant was too intoxicated to consent. ***The Court acknowledged that there may well be a double standard regarding how the school considers the intoxication levels of a complainant and a respondent, but that this double standard is not based on gender. The Court noted that any disparate effect of the policy on males results from the fact that males are more often accused of sexual harassment, not any gender bias in the policy.***

Selective Enforcement

Yu argued that, regardless of guilt, his gender affected the severity of his penalty. The Court found that Yu could not show Vassar's actions against him were motivated by gender and that a similarly-situated woman would not have been subjected to the same discipline. Yu argued that no female had ever been charged with sexual misconduct at Vassar. The Court found that this fact undermined his claim because he could not show that a female accused of sexual misconduct would have received a lesser penalty.

***Johnson v. Western State Colorado University*, 71 F. Supp. 3d 1217 (D. Colo. October 24, 2014)**

Keifer Johnson, a student on partial athletic scholarship and a teaching assistant for an English course, was accused of engaging in a sado-masochistic sexual relationship with Gould, a student in his class. The complaint against Johnson arose after Gould's mother contacted a professor at Western State Colorado University ("WSCU") and provided her a copy of a sexually explicit letter Johnson wrote to the student. Prior to the disciplinary proceedings, Gould left the university for reasons unrelated to her relationship with Johnson and did not participate in the disciplinary proceedings.

After a hearing, WSCU sanctioned Johnson to one year of probation and 48 hours of community service for inappropriate behavior, as well as misuse of an identification card, and required him to attend counselling sessions. As a result of the sanctions, Johnson was temporarily suspended from the track team and lost his position as a teaching assistant. Johnson filed suit against the

university and several of its employees under 42 U.S.C. § 1983 and Title IX. . The university filed a motion to dismiss, which the Court granted in part and denied in part.

Title IX Claims

Johnson's Title IX claim was based on erroneous outcome and selective enforcement theories. The court rejected both grounds, concluding that Johnson had not pled sufficient facts to show that gender bias was a source of the deprivation of his rights. In particular, the court found that Johnson and Gould were not similarly situated, a prerequisite to establish bias, because (1) Gould was no longer enrolled at the university at the time of the disciplinary proceedings; and (2) at the time of their relationship, Johnson was a teaching assistant and Gould was his student. ***Accordingly, "[g]iven their disparate relationships to the university . . . [Johnson] was not similarly situated to [Gould] in all material respects."***

Section 1983 Claims

Johnson brought five claims pursuant to 42 U.S.C. § 1983, four based on alleged violations of his due process rights, and one based on an alleged violation of his First Amendment rights. The court dismissed Johnson's due process claims because he was not suspended or expelled from WSCU and could not show that he had a due process right to his teaching assistant position or participation on the track team.

The Court, however, denied WSCU's motion to dismiss Johnson's First Amendment claim. Johnson claimed that the university had violated his First Amendment rights by punishing him for the contents of the sexually explicit letter he wrote to Gould. The Court determined that Johnson had sufficiently pled that the letter was not a "true threat" and therefore constituted protected speech for purposes of the First Amendment. In particular, the Court noted Johnson's allegations that the letter was part of a mutually-agreed upon sexual fantasy relationship between him and Gould and found that a jury could conclude that the contents of the letter were protected speech.

***Wells v. Xavier University*, 7 F. Supp. 3d 746 (S.D. Ohio Mar. 11, 2014)**

Dezmine Wells, a student athlete at Xavier University, was accused of sexual assault by his resident advisor. Wells claimed that the resident advisor willingly engaged in a sexual encounter with him after playing a game of "truth or dare" with him and several other students. After a hearing, the University Conduct Board ("UCB") determined that Wells should be expelled for sexual misconduct. Xavier then issued an announcement to the campus community that Wells was found responsible for a "serious violation" of its Code of Student Conduct.

Of particular relevance to the Court, the county prosecutor also investigated the alleged assault, doubted the accusations against Wells, and warned the university's president that the allegations were "unfounded." The prosecutor requested that the president hold off on any campus proceedings pending the outcome of his official investigation, but the university declined to do so.

Wells sued, seeking to have the UCB decision vacated. Wells alleged that Xavier and its president made him into a scapegoat in response to investigations by the U.S. Department of Education into Xavier's handling of previous complaints of sexual assault. Wells further alleged that the UCB failed to follow university policies for disciplinary proceedings and conducted an unfair hearing.

Wells asserted various claims against Xavier, including a defamation claim and a Title IX claim, under both erroneous outcome and deliberate indifference theories. The Court denied Xavier's motion to dismiss both of these claims, and the parties subsequently reached a settlement.

Title IX Claims

On Wells's erroneous outcome claim, the Court held that Wells had adequately alleged facts that the university had engaged in a pattern of decision-making that ultimately resulted in the alleged false outcome that he was responsible for rape. Specifically, the Court pointed to Wells's allegations that the university rushed to judgment against him, failed to train UCB members, ignored the prosecutor's warnings that the allegations were unfounded, denied Wells counsel, and denied Wells the opportunity to present witnesses. Wells alleged that these actions were rooted in the university's bias against him because he was a male accused of sexual assault.

On Wells's deliberate indifference claim, the Court concluded that Wells adequately had alleged facts showing that a university official with authority to institute corrective measures had actual notice of and failed to correct the allegedly defective hearing. In doing so, the Court distinguished the matter from *Doe v. University of the South*, 687 F. Supp. 2d 744 (E.D. Tenn. 2009), in which a previous court had rejected a similar deliberate indifference claim. The Court pointed specifically to Wells's allegations that the university president knew of the allegations against Wells and ignored warnings from the state prosecutor that such allegations were unfounded, instead allowing the defective disciplinary proceeding to go forward to demonstrate to the Department of Education that Xavier was taking assault allegations seriously.

Defamation Claim

Wells claimed that Xavier's statement that it had expelled him for a "serious violation" was inherently false and libelous because he did not commit a violation of the Code of Student Conduct. Acknowledging that the sufficiency of Wells's defamation allegations was a "close call," the Court nonetheless concluded that it was "plausible" that the statement in context amounts to an untruth, should Wells's allegations about the deficiencies of the disciplinary hearing be taken as true. The Court specifically noted that its conclusion was bolstered by the fact that the county prosecutor allegedly investigated the alleged assault, found no wrongdoing, and encouraged the university president to drop the matter.