



## Higher Ed – Title IX Litigation Update

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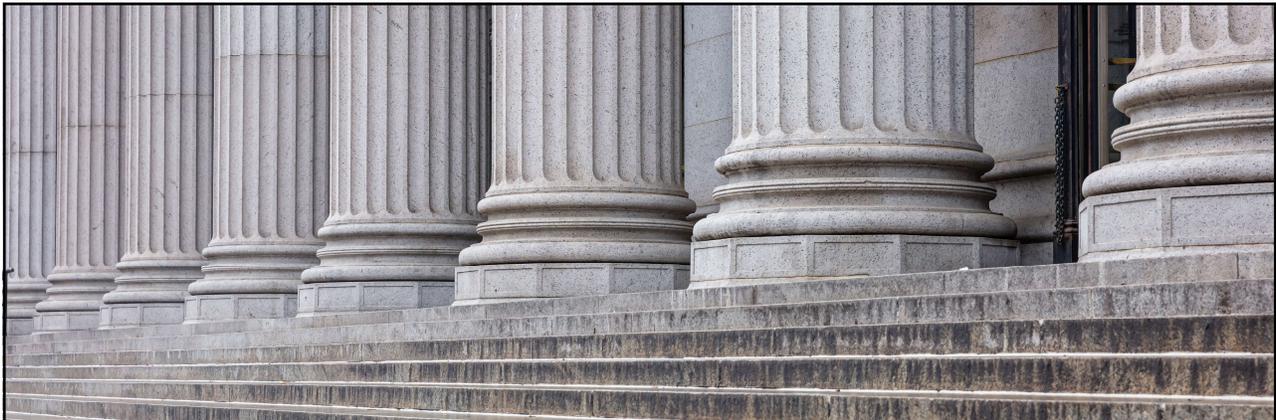
- We are not giving you legal advice
- Many of these cases may still be in appeals – stay tuned
- The impact of the Final Regulations on Title IX litigation is developing
- Consult with your legal counsel regarding how best to address a specific situation
- Use the chat function to ask general questions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

# Agenda



## *Complainants, Respondents, Employees, and Other Title IX Issues*

- Cases brought by Complainants
- Cases brought by Respondents
- Cases brought by Employees
- U.S. Supreme Court
- Title IX Athletics
- Title IX and Religious Institutions



## **Cases Brought by Student Complainants**

***Theme: Defining the confines of deliberate indifference***



**Shared elements with different interpretations**

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

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

***Hall v. Millersville University, 22 F.4th 397 (3<sup>rd</sup> Cir., Jan. 11, 2022)***



**Deliberate indifference and “substantial control” and “adequate notice” over non-University guests**

- Motion for summary judgment denied for University – 3<sup>rd</sup> Circuit agreed because of issues of material fact, and under deliberate indifference analysis that found **substantial control** over Respondent, a non-community member but guest
- Student murdered in her University dorm by her boyfriend, a non-community guest.
- Parents sued under Title IX, alleging university deliberately indifferent to known sexual harassment.
- Reports of abuse in dorm by Respondent prior to murder and previously escorted off campus twice

***Brown v. State of Arizona*, 23 F.4th 1173 (9<sup>th</sup> Cir., Jan. 25, 2022)**



**Deliberate indifference and off-campus conduct**

- Affirming a motion for summary judgment in favor of University
- Complainant was physically assaulted by Respondent, her boyfriend, a University football player, at Respondent's off-campus residence.
- Complainant alleged University's deliberate indifference to earlier reports that Respondent abused two other students gave Respondent an opportunity to physically abuse her.
- Ninth Circuit – University did not have control over the context of the abuse off campus based upon prior **substantial control** over abuse towards other parties and did not have **substantial control** over Respondent's off-campus housing where the abuse took place

***Wamer v. University of Toledo*, 27 F.4th 461 (6<sup>th</sup> Cir., March 2, 2022) (1 of 2)**



**Sixth Circuit deliberate indifference standard for teacher-student harassment**

- In a motion to dismiss, UT argued that Complainant-Plaintiff failed to state a claim because she failed to allege that UT's post-notice action was detrimental in that it resulted in harassment or that UT's insufficient action made her more vulnerable to further harassment
- Relied upon a prior Sixth Circuit case, *Kollaritsch v. MSU Bd. Of Trustees* in which the standard to survive a motion to dismiss required Plaintiff plead a post-notice action that resulted in further harassment or made complainant vulnerable to further harassment
- Sixth Circuit: *Kollaritsch* was a student-student harassment case and its "heightened" standard does not apply in teacher-student harassment - "requiring an additional post-notice incident of harassment in teacher-student deliberate-indifference cases would undermine the purpose of Title IX."

***Wamer v. University of Toledo*, 27 F.4th 461 (6<sup>th</sup> Cir., March 2, 2022) (2 of 2)**



**Sixth Circuit deliberate indifference standard for teacher-student harassment**

- Used test articulated by 10<sup>th</sup> and 11<sup>th</sup> Circuits for causation (*Gebser* Plus):
  - *Gebser*: must allege: (1) was sexually harassed by a teacher or professor, (2) an official with authority to take corrective action had actual notice of the harassment, (3) the school's response was clearly unreasonable, and (4) the school's deliberate indifference caused her to suffer discrimination or exclusion from an educational activity or program
  - (4) above can be shown by:
    - After showing the school's unreasonable response in (3),
    - (a) the plaintiff experienced an additional instance of harassment **OR**
    - (b) an objectively reasonable fear of further harassment caused the plaintiff to take specific reasonable actions to avoid harassment, which deprived the plaintiff of the educational opportunities available to other students.

***Arocho v. Ohio University*, 2022 WL 819734 (6<sup>th</sup> Cir., March 18, 2022)**



**Deliberate indifference and exclusion from education program or activity**

- Complainant, a high school student, claimed university police officer assaulted her after a career-day event co-sponsored by high school and university – during work hours, in work-related locations, and in his OU police cruiser (motion to dismiss level at district court)
- Complainant alleged university was deliberately indifferent to the assault.
- Issue for court: Whether Complainant had sufficiently alleged exclusion from or discrimination under an OU **education program or activity** – finding she did not and affirmed dismissal

***O'Shea v. Augustana College*, 2022 WL 884255 (C.D. Ill.,  
March 24, 2022)**



### **Deliberate indifference, off-campus conduct, by prospective student**

- District court decision on a motion to dismiss
- Complainant alleged she was sexually assaulted at off-campus bar by Respondent, a prospective student. After Respondent was admitted to the College, Complainant filed a complaint.
  - Deliberate indifference claim dismissed – College did not exercise **substantial control** over Respondent at the time of the incident, and Complainant did not allege any further harassing interactions with Respondent.



### **Cases Brought by Student Respondents**

***Doe v. Samford University*, 29 F.4th 675 (11<sup>th</sup> Cir., March 24, 2022)**

**(1 of 3)**



**Student failed to show sex-based discrimination**

- University suspended Respondent for five years after finding him responsible for sexual assault.
- Respondent alleged University's determination was based on gender bias in violation of Title IX.
- Parties disagreed about the framework to be applied. The Court sided with the University but ultimately analyzed the facts under both theories and reached the same conclusion: The alleged facts, if true, do not permit a reasonable inference that the university discriminated against Doe on the basis of sex.

***Doe v. Samford University*, 29 F.4th 675 (11<sup>th</sup> Cir., March 24, 2022)**

**(2 of 3)**



**Student failed to show sex-based discrimination**

- Eleventh Circuit agreed with lower court's dismissal for failure to state a claim. Respondent did not plead sufficient facts to permit a reasonable inference of sex discrimination.
  - **Procedural irregularities** – Bare assertion that procedural irregularities were attributable to Respondent's sex does not make his speculation plausible. Irregularities could have been due to inexperience and newness of policy. Pro-complainant, anti-respondent bias is not discrimination based on sex.
  - **Public pressure** assertion not supported by facts. 2011 DCL was rescinded before Respondent's hearing, new regulations were promulgated, and University updated its Title IX policy to comply with new regulations. Statement that "the well-being of the complainant is paramount" and University's promotion of the "It's on Us Initiative" at most **support reasonable inference of pro-complainant bias**, not pro-female bias.

***Doe v. Samford University*, 29 F.4th 675 (11<sup>th</sup> Cir., March 24, 2022)**

**(3 of 3)**



**Student failed to show sex-based discrimination**

- **Respondent cited Clery report**, but report does not contain sufficient information to identify a comparator and determine whether penalty or initiation of proceeding was affected by student's sex.
- Inexplicable outcome – Duration of investigation irrelevant, investigator did uncover and disclose potentially exculpatory evidence, and uncertainty about cause of Complainant's incapacitation had little bearing on whether she was in fact incapacitated.

***Doe v. Regents of University of California*, 23 F.4th 930 (9<sup>th</sup> Cir., Jan. 11, 2022)**

**(1 of 2)**



**Erroneous outcome and selective enforcement**

- University suspended Respondent, a graduate student, for two years after finding Respondent responsible for placing Complainant "in reasonable fear of serious bodily injury." Respondent filed complaint alleging discrimination in violation of Title IX.
- District court dismissed for failure to state a claim – Ninth Circuit reversed.
  - External pressures – when evaluated in conjunction with other allegations, reasonable to infer DCL and 2013 UCLA audit regarding University's lack of response to sexual harassment claims would affect how University treated respondents.

***Doe v. Regents of University of California*, 23 F.4th 930  
(9<sup>th</sup> Cir., Jan. 11, 2022)**

**(2 of 2)**



**Erroneous outcome and selective enforcement**

- Allegations of an internal pattern and practice of bias – At pleading stage, allegations of asymmetrical enforcement, including that respondents were overwhelmingly male and that University never suspended a female for two years based on these circumstances, lead to plausible inference of sex-based discrimination.
- Specific instances of bias in Respondent’s case – Respondent was told “no female has ever fabricated allegations against an ex-boyfriend in a Title IX setting.” If true, this statement suggests Title IX officials held biased assumptions against male respondents. This and other allegations of irregularities during proceedings support inference of gender bias.

***Doe v. Princeton University*, 30 F.4th 335 (3<sup>rd</sup> Cir., March 31, 2022)**

**(1 of 2)**



**Anti-male bias claims can proceed**

- Respondent plausibly alleged university discriminated on the basis of sex while investigating Title IX claims against him.
  - After Complainant ended relationship with Respondent, Complainant threatened Respondent to “take a year off and nothing will happen to you.”
  - Respondent complained to university that his ex-girlfriend (Complainant) was harassing him and spreading false information, and that he did not feel safe. He was advised to seek mental health services, but was not advised to file Title IX complaint.
  - Complainant alleged she was victim of intimate relationship violence, and university started inquiry. Respondent was ultimately expelled.

***Doe v. Princeton University*, 30 F.4th 335 (3<sup>rd</sup> Cir., March 31, 2022)**



(2 of 2)

**Anti-male bias claims can proceed**

- Lower court dismissed case for failure to state a claim – reversed on appeal. Accepting allegations as true:
  - **Sex was a motivating factor** – University treated ex-girlfriend’s misconduct report with greater urgency and seriousness than Respondent’s report. University dismissed ex-girlfriend’s intentional violation of no-contact order as minor, while Respondent’s accidental like of social media post was met with formal disciplinary process.
  - **University yielded to external pressure** – U.S. Ed’s DCL, when coupled with selective handling of misconduct reports and order violations, supports plausible claim of Title IX sex discrimination.

***Doe v. Trustees of Indiana University*, 2022 WL 972792 (S.D. Indiana, March 31, 2022)**



(1 of 2)

**No evidence of anti-male bias**

- Respondent was suspended for dating violence, and then expelled after he misrepresented his disciplinary status when applying to MBA program.
- Respondent had appealed the outcome and the dean was going to allow Respondent to continue with medical school if he satisfied sanctions and completed additional conditions.
- On his application for business school, Respondent disclosed his disciplinary history but said the Dean had “overturned the erroneous findings” of the Title IX panel and permitted reinstatement “without limitation or restriction.” Not true.
- Respondent was then dismissed from the business school for withholding pertinent information and given false or incomplete information.

***Doe v. Trustees of Indiana University*, 2022 WL 972792 (S.D. Indiana, March 31, 2022)**

(2 of 2)



**No evidence of anti-male bias**

- Respondent sued the medical school, alleging discrimination on the basis of sex under Title IX.
- Relocation of Respondent, but not Complainant, to another campus not evidence of sex discrimination – Respondent and Complainant not similarly situated.
- Disparate investigation – University had nondiscriminatory reason, as Complainant wanted to proceed with investigation, and Respondent did not.
- Respondent did not point to similarly situated female respondent who received better treatment, any biased statements, or any shifting justifications.
- “Trauma-informed method” of investigation and adjudication, and use of word “victim,” has no connection to sex as both men and women can be complainants.
- Title IX training slide and presentation – no evidence that panelists who heard this presentation acted on the basis of sex in Respondent’s case.



**Cases brought by Employees**

***Goldblum v. University of Cincinnati*, 2022 WL 900623 (S.D. Ohio, March 28, 2022)**



**Title IX retaliation**

- University asked Title IX Coordinator to resign after she sent letter to University's student newspaper despite being directed not to. The letter addressed a controversy about a student who was a classified sex offender.
- Coordinator alleged that her forced resignation was retaliation in violation of Title IX.
- Court granted university's motion to dismiss. University had legitimate, nondiscriminatory reason for seeking Coordinator's resignation – her insubordination—and coordinator failed to show this reason was pretextual.
- Appealed to Sixth Circuit.

***Lamb v. Liberty Univ.*, 2022 WL 731526 (W.D. Va. Mar. 10, 2022)**



**Criticism of University's response to sexual harassment**

- Former Senior Vice President of Communications and Public Engagement alleged he was fired because of his opposition to the University's mishandling of sexual assault and harassment complaints.
- Court granted motion to dismiss, as complaint did not allege facts necessary to raise plausible claim of protected activity.
  - No allegation that former Employee was opposing a discriminatory activity by asking questions of University leadership;
  - Opposing speech because it lacked "empathy" and transparency" and had patronizing tone could only constitute protected activity if speech as written discriminated on the basis of sex.



## U.S. Supreme Court

***Cummings v. Premier Rehab Keller*, 2022 WL 1243658 (U.S. S.Ct., April 28, 2022)**



### ***Emotional distress damages not recoverable in private action to enforce***

- Physical therapy patient sued provider for disability discrimination when provider declined to provide ASL interpreter at sessions.
- Supreme Court held emotional distress damages are not recoverable in a private action to enforce Rehabilitation Act or ACA.
  - Recipients of federal financial assistance are prohibited from discriminating based on certain protected grounds under Title VI, Title IX, the Rehabilitation Act, and the Affordable Care Act.
  - Court applied contract law analysis, and determined it cannot treat federal funding recipients as having consented to be subject to damages for emotional distress.

## ***Fairfax County School Board v. Doe***



**Supreme Court invited the Solicitor General to brief on behalf of the U.S.**

- Issues:
  - (1) Whether a recipient of federal funding may be liable in damages in a private action under *Davis v. Monroe County Board of Education* in cases alleging student-on-student sexual harassment when the recipient's response to such allegations did not itself cause any harassment under Title IX.
  - (2) Whether the requirement of "actual knowledge" in a private action under *Davis* is met when a funding recipient lacks a subjective belief that any harassment actionable under Title IX occurred.



**TIX Athletics**

***Balow v. Mich. State Univ., 24 F.4th 1051 (6<sup>th</sup> Cir. Feb. 1, 2022)***



**Equality of athletic programs**

- Complaint alleged University's elimination of women's and men's swimming-and-diving teams violated Title IX.
- Test prong at issue: Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.
- Sixth Circuit determined:
  - District court considered the participation gap as a percentage of the size of the athletic program – the correct inquiry focuses on the *number* of participation opportunities, not the gap as a percentage of the athletic program;
  - District court erred when it compared the participation gap to the size of the average team at MSU, rather than the size of a viable team.

***Grandison v. Ala. State Univ. (M.D. Ala. Feb. 10, 2022)***



**Title IX Retaliation**

- Women's golf team coach (male) alleged that his contract nonrenewal and pay disparities were in violation of Title IX
- The district court, in the 11<sup>th</sup> Circuit, noted that circuits are split on whether Title VII preempts Title IX for employment cases, and that the 11<sup>th</sup> Circuit has not weighed in on it. Regardless, applying a Title VII (*McDonnell Douglas*) framework from other circuits, Plaintiff's claims fail:
  - Failed to identify a similarly situated comparator outside his protected class
  - Failed to show his comparators' coaching jobs had similar duties
  - No "convincing mosaic" that over comes legitimate, non-discriminatory reason



## TIX and Religious Institutions

### ***Maxon v. Fuller Theological Seminary*, 2021 WL 5882035 (9<sup>th</sup> Cir., Dec. 13, 2021)**



#### ***Seminary falls within Title IX's religious exemption***

- Plaintiffs were dismissed from the seminary after it was discovered they were in same-sex marriages.
- Plaintiff's argued seminary did not fall within Title IX's religious exemption because the school was controlled by its own board of trustees rather than a distinct, external organization.
- In an unpublished memorandum decision, the Ninth Circuit deferred to the U.S. Department of Education's longstanding interpretation and concluded the religious exemption encompasses educational institutions, including divinity schools like Fuller, that are controlled by their own religiously affiliated boards of trustees.
- Religious exemption applies to shield religiously motivated decisions that would otherwise violate Title IX's prohibition on sex discrimination.

***Stevens v. Brigham Young University-Idaho,***  
**2022 WL 612451 (D. Idaho Mar. 2, 2022)**



**Teacher-on-student *quid pro quo* sexual harassment and deliberate indifference**

- Claims alleging teacher-on-student hostile environment/sexual harassment in violation of Title IX and teacher-on-student *quid pro quo* sexual harassment. Court found there were issues of fact and denied MSJ – Honor Code Violation and Title IX shared same office
- Denied Religious Exemption and First Amendment challenges by BYU-I:
  - TIX does not apply to educational institution which is controlled by a religious organization if the application...would not be consistent with the religious tenets of such organization
  - Argument not that BYU-I cannot have an Honor Code it enforces, but that housing the two offices together created a chilling effect for employees and students to report sexual assault
  - Court: no evidence that combining the two offices a religious tenet and no evidence not giving amnesty to reporters of sexual misconduct would violate a religious tenet