Higher Ed – Title IX Litigation Update

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Bricker Graydon

Disclaimers

Bricker Graydon

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

- We are not giving you legal advice
- Many of these cases may still be in appeals – stay tuned
- 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
- Yes, you will get the slides! If you registered to attend, you'll get an email after the presentation, and it will have a link to download the slides.

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Agenda

Complainants, Respondents, Employees, and Other Title IX Issues

- Cases brought by Complainants
- Cases brought by Respondents
- Cases brought by Employees
- U.S. Supreme Court
- Title IX Athletics
- Other Title IX Cases

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Quick Reminder

Some Decisions Matter To You More Than Others.

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

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Another Quick Reminder

Consider the Procedural Posture of the Case

- The information considered by the Court will depend on how far along the case is at the time of the decision
  - Motion to Dismiss (take the allegations as true – is it enough?)
  - Motion for Summary Judgment (facts have been established – decision comes down to the application of law)
  - Jury Verdict (jury established facts and decided the law)
  - Appeal (what questions are before the court?)

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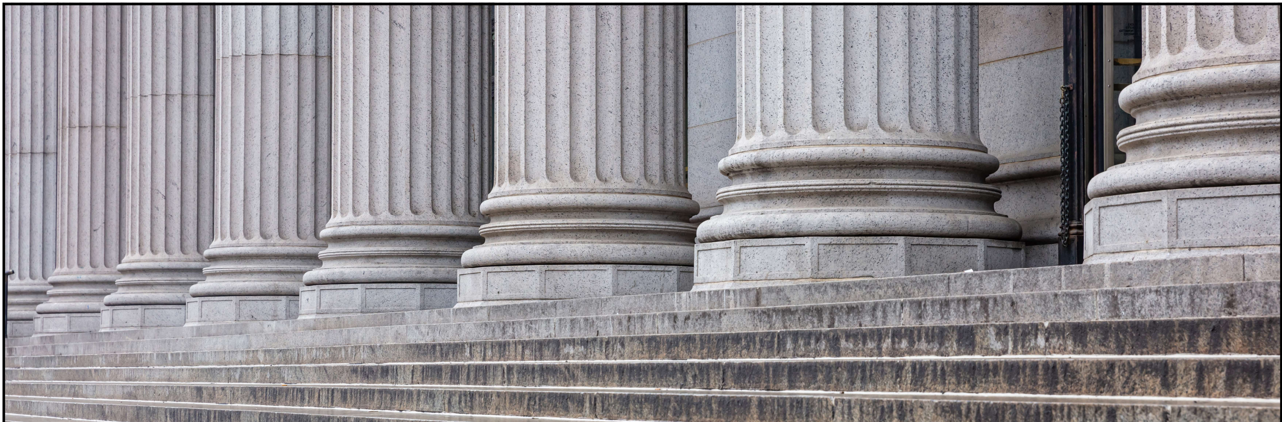

Cases Brought by Student Complainants

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**

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Lozano v. Baylor University,

Case No. 6:16-cv-00403 (W.D. Texas, Oct. 24, 2023) (slide 1 of 3)

Title IX deliberate indifference: $0 Negligence: $270,000

- Plaintiff-Complainant alleged she was violently assaulted by a University football player on three separate occasions in 2014.
- Further alleged that Baylor failed to promptly and appropriate investigate, and took steps to actively conceal violence by members of the football team.
  - Allegation that the complainant reached out to a coach at Baylor for help
  - Allegation that the complainant disclosed the violence to another employee, who contacted the Associate Athletic Director
- Respondent was reportedly told to stay away from the complainant, and was given extra weightlifting work.

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Lozano v. Baylor University,
Case No. 6:16-cv-00403 (W.D. Texas, Oct. 24, 2023) (slide 2 of 3)

Title IX deliberate indifference: $0 Negligence: $270,000

- Jury determined Complainant proved that University maintained policy of deliberate indifference to reports of sexual harassment that created a heightened risk that Complainant would be injured, and that University's negligence resulted in Complainant's injuries.
- When asked, "What sum of money, if any, if paid now in cash, would fairly and reasonably compensate [Complainant] for her damages under Title IX, if any, that resulted from Baylor University's discriminatory policy?"
  - The jury awarded $0 in Title IX damages for loss of educational opportunities and benefits.
- However…

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Lozano v. Baylor University,
Case No. 6:16-cv-00403 (W.D. Texas, Oct. 24, 2023) (slide 3 of 3)

Title IX deliberate indifference: $0 Negligence: $270,000

- When asked, "Did the negligence of Baylor University proximately cause one or more of the occurrences that resulted in [Complainant's] injuries, if any?"
  - The jury awarded $270,000 for past and present physical pain, mental anguish, and health care expenses.

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Brown v. Arizona,
82 F.4th 863 (9th Cir., Sept. 25, 2023) (slide 1 of 4)

University had substantial control over context of assault

- 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.
  - "Neither [the softball coach nor the Senior Title IX investigator] in the Title IX office, nor anyone in the Dean of Students office, contacted the University Athletic Director or anyone on the football coaching staff about [Respondent's] assaults on [two other students]."

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Brown v. Arizona,
82 F.4th 863 (9th Cir., Sept. 25, 2023) (slide 2 of 4)

University had substantial control over context of assault

- Plaintiff-complainant reported her abuse to the police and Respondent was arrested, and was initially suspended on an interim basis. A few months later, he was expelled from the University. He eventually pled guilty and was sentenced to 5 years in prison.
- Three-judge Ninth Circuit panel affirmed motion for summary judgment in favor of University – found University did not have control over the context of the abuse because assaults took place off-campus.
- Sitting en banc, Ninth Circuit reversed and said the case should go to trial.

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Brown v. Arizona,
82 F.4th 863 (9th Cir., Sept. 25, 2023) (slide 3 of 4)

- Court looked at: “Substantial Control” over the “Context”:
  - University had control over the off-campus housing - players were only allowed to live off-campus with permission of coaches conditioned on good behavior.
    - Relies on cases from the 10th Cir., the 4th Cir., Kansas, and California
    - “Location is only one factor in determining the control over context.”
  - Student code of conduct applied to conduct both on and off campus.
  - University had enough control to issue a No Contact Order involving a different Complainant that applied to both on- and off-campus spaces.
  - Reasonable fact-finder could infer if head football coach knew of earlier assaults, assault on Complainant at Respondent’s off-campus house would never have occurred.

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Brown v. Arizona,
82 F.4th 863 (9th Cir., Sept. 25, 2023) (slide 4 of 4)

- Court looked at: “Actual Knowledge” and “Deliberate Indifference”
  - Court identifies the various university officials with knowledge of Respondent’s behavior towards 3 female students: an RA, a softball coach, a Senior Associate Athletics Director & Deputy Title IX Coordinator, a Title IX investigator, the Associate Dean of Students, and a University police officer.
    - Most of these individuals knew some, but not all of the information about the behavior.
  - A reasonable factfinder (a jury or judge) could conclude that failing to report Respondent’s behavior to a responsible party in the Athletic Department amounts to “deliberate indifference.”

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Doe v. The Bd. of Trustees of the Nebraska State Colleges, 78 F.4th 419 (8th Cir., Aug. 15, 2023) (Slide 1 of 3)

Title IX deliberate indifference

- Complainant reported that she was sexually assaulted by Respondent on 2 occasions while a student at Chadron State College.
  - Did not report the 1st incident, but reported the 2nd
- Title IX Coordinator concluded that the Respondent failed to obtain consent for the sexual activity at issue.
  - Imposed the following sanctions: a permanent No Contact Order, required weekly counseling, behavioral probation, and required reading of a book titled, "The Macho Paradox: Why Some Men Hurt Women and How All Men Can Help"

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Doe v. The Bd. of Trustees of the Nebraska State Colleges, 78 F.4th 419 (8th Cir., Aug. 15, 2023) (Slide 2 of 3)

Title IX deliberate indifference

- Plaintiff-Complainant objected to sanctions issued against Respondent in response to Title IX investigation (wanted Respondent banned from campus) – sued under Title IX.
- Jury sided with Complainant and ordered damages of $300,000.
- Court of Appeals reversed, finding University was not deliberately indifferent after Complainant reported being sexually assaulted:
  - University acted nearly immediately when it learned of assault, issuing no-contact order, verifying the Complainant and Respondent did not share same classes, and promptly initiating an investigation.
  - It accommodated Complainant academically and placed her in more secure employment location.

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Doe v. The Bd. of Trustees of the Nebraska State Colleges, 78 F.4th 419 (8th Cir., Aug. 15, 2023) (Slide 3 of 3)

Title IX deliberate indifference

- Court of Appeals reversed, finding University was not deliberately indifferent after Complainant reported being sexually assaulted (cont.):
  - It placed Respondent on behavioral probation, required him to attend weekly counseling sessions, and compelled him to complete consent and alcohol class.
  - It approved Complainant's request to complete coursework off-campus, offered plain-clothes escort on campus, and solicited Complainant's input on any additional assistance needed.
- "The evidence falls short on causation."
  - No causal nexus between the University's actions and the sexual assaults.

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Abdulsalam v. The Bd. of Regents of the Univ. of Neb., 2023 WL 4266378 (D. Neb., June 29, 2023) (slide 1 of 2)

Emotional distress damages not recoverable under Title IX

- Complainant alleges that after she experienced harassment by a co-fellow in the cardiology fellowship program.
- Further alleges that when she reported the harassment, she was subjected to retaliatory harassment, to which the University was deliberately indifferent.
- Sought to recover damages for humiliation, mental anguish, suffering, anxiety, and inconvenience.
- University moved for Judgment on the Pleadings:
  - Identified the wrong party
  - Sought unavailable damages
  - Has not identified any actual, recoverable damages

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Abdulsalam v. The Bd. of Regents of the Univ. of Neb.,
2023 WL 4266378 (D. Neb., June 29, 2023) (slide 2 of 2)

Emotional distress damages not recoverable under Title IX

- The Court granted the University's motion for judgment on the pleadings because:
  - The U.S. Supreme Court decided in *Cummings* that emotional distress damages are not recoverable under Spending Clause antidiscrimination statutes.
  - Based on other federal court decisions issued since *Cummings* was decided, a majority rule has emerged: "Title IX claims for non-contractual damages (including emotional distress and reputational harm damages) are no longer valid."
  - "This Court therefore concludes that Title IX was adopted pursuant to Congress's authority under the Spending Clause and is controlled by *Cummings*."
  - Because Complainant did not claim any damages other than emotional distress, judgement on the pleadings in the University's favor is appropriate

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Doe v. The Trs. of Columbia Univ.,
2023 WL 4211031 (S.D. N.Y., June 27, 2023) (slide 1 of 3)

Title IX deliberate indifference: Complainant not deprived of access to educational opportunities

- Plaintiff-Complainant alleges University was deliberately indifferent to her Title IX complaint because if did not conduct an adequate investigation.
  - Conduct occurred in 2019 – initial report concluded there was insufficient evidence (POE) to conclude that consent was absent.
  - Complainant requested a hearing but did not attend – "mere formality" and her participation would have "no material effect."
  - Complainant alleges the 2019 policy was ambiguous and prevented Complainant from proving her case

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Doe v. The Trs. of Columbia Univ.,
2023 WL 4211031 (S.D. N.Y., June 27, 2023) **(slide 2 of 3)**

Title IX deliberate indifference: Complainant not deprived of access to educational opportunities

- In 2022, the Court dismissed Complainant's complaint with limited leave to amend; in this opinion, the Court again granted the University's motion to dismiss with prejudice (so no more opportunities to correct the complaint)
  - Complainant failed to plausibly plead she was denied access to educational opportunities - Complainant's reduced use of main library pre-dated the filing of her formal report, she did not contend University knew of incident before her formal complaint, and she had access to nearly two dozen other libraries
  - Complainant did not show University's response to her complaint was "clearly unreasonable" – the University acted immediately after complaint was filed; it complied with its 2019 policy; the report detailed the evidence considered, investigation timeline, and witnesses interviewed; and Complainant declined an opportunity to appeal

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Doe v. The Trs. of Columbia Univ.,
2023 WL 4211031 (S.D. N.Y., June 27, 2023) **(slide 3 of 3)**

Title IX deliberate indifference: Complainant not deprived of access to educational opportunities

- "Even if Doe would have preferred 'a different type of investigation, or a more expansive one,' schools are 'not required [under Title IX] to proceed in any particular manner,' and students 'do not have a [Title IX] right to specific remedial measures.'"
  - Columbia's obligation to respond – at this point in time – was in a manner that was not clearly unreasonable.

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Grabowski v. Arizona Bd. of Regents,

69 F.4th 1110 (9th Cir., June 13, 2023) (slide 1 of 3)

Title IX deliberate indifference and retaliation

- Complainant alleged University was deliberately indifferent to his complaints of sexual and homophobic bullying by teammates because they perceived him to gay.
- 2 bases for the claims: Retaliation and Title IX sexual harassment
- Lower court dismissed lawsuit – failure to state a Title IX claim
  - Ninth Circuit affirmed in part, vacated in part, reversed in part, and remanded in part.
- Relies on *Bostock:* "The [*Bostock*] Court held that discrimination 'because of' sexual orientation is a form of sex discrimination under Title VII. **We conclude that the same result applies to Title IX."**

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Grabowski v. Arizona Bd. of Regents,

69 F.4th 1110 (9th Cir., June 13, 2023) (slide 2 of 3)

- In this case, the harassment was on the basis of *perceived* sexual orientation
  - Court says this is also covered by Title IX – discussion of failure to confirm to sex stereotypes
- Dismissal of retaliation claim reversed.
  - Complainant engaged in protected activity when he reported sex-based bullying to coaches.
  - He suffered an adverse action based on claim that his scholarship was cancelled and he was kicked off track team.
  - Sufficient alleged causal link – short time between his final complaint and dismissal from team supported plausible inference of retaliation, as did allegation that coaches engaged in a "concerted effort … to demoralize him."

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Grabowski v. Arizona Bd. of Regents,

69 F.4th 1110 (9th Cir., June 13, 2023) (slide 3 of 3)

- Upheld dismissal of Title IX harassment claim
  - Frequency of harassment, based on Complainant's allegation that bullying occurred almost daily, sufficient to meet severity standard
  - Complainant sufficiently alleged coaches had actual knowledge of harassment
  - Sufficiently alleged deliberate indifference based on his allegations coaches ignored his complaints
  - However, Complainant did not allege deprivation of educational opportunity – his grades did not decline because of the harassment, and he did not stop attending practices or team events
- Section 1983 claim – upheld dismissal based on qualified immunity
- Conclusion – case will return to the lower court for discovery, possibly trial, on the retaliation allegation

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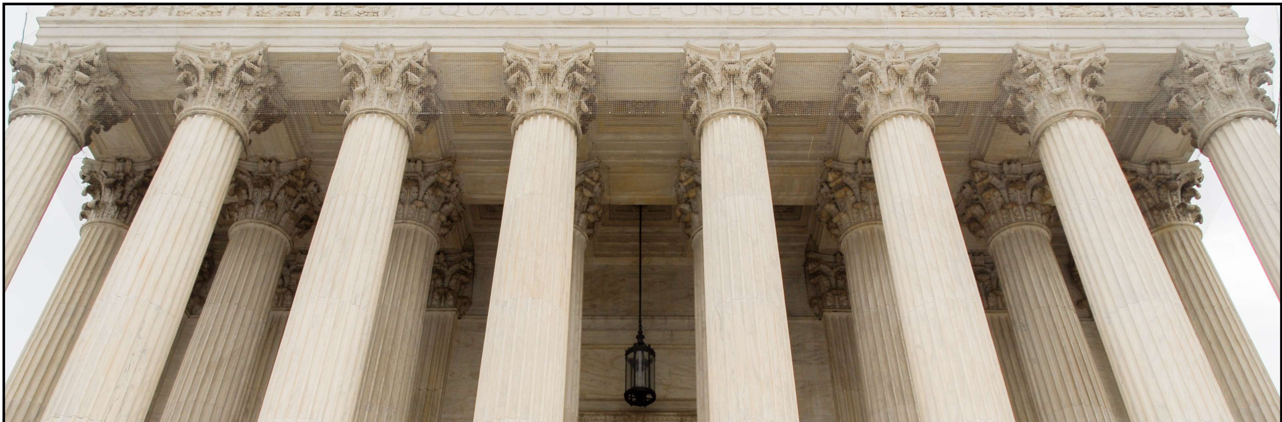

Cases Brought by Student Respondents

Doe v. Univ. of Iowa, 80 F. 4th 891
(8th Cir., Sept. 14, 2023) (slide 1 of 1)

Procedural irregularities and external pressures (pre-2020 regs)

- Graduate student expelled after he was found responsible for sexual assault and harassment of two different complainants
- 8th Circuit upheld lower court ruling on qualified immunity, dismissal of due process claims, and summary judgment for University on remaining claims
  - Disagreement with adjudicator's fact finding and credibility determination did not support conclusion that decision was against the substantial weight of evidence
  - Anti-male bias – could not infer bias by single use of term "fantasy" in lengthy decision with exhaustive credibility determinations;
  - Appellate reviewer's consideration of age disparity and power differential, statement that every case he reviewed involved female alleging assault by male not sufficient to infer anti-male bias;
  - Respondent did not explain how 5 lawsuits (3 of which were employment discrimination) amounted to outside pressure; institutional efforts to prevent sexual misconduct on campus not evidence of external pressure
  - Procedural due process – Adjudicator's failure to ask all questions Respondent submitted did not establish material procedural flaw in hearing

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Doe v. The Citadel, 2023 WL 3944370
(4th Cir., June 12, 2023) (slide 1 of 2)

Procedural irregularities and external pressures (pre-2020 regs)

- Respondent found responsible for one of three incidents of sexual misconduct and was expelled with leave to apply for readmission after one year
- Lower court granted motions to dismiss filed by administrative defendants and The Citadel
- Procedural Due Process claim against administrative deft's – Respondent was afforded adequate due process
  - Respondent did not allege inadequate notice of charges, and he was allowed to present a statement and testimony, call witness, and be accompanied by a representative – safeguards the Court has consistently held satisfy due process
  - Respondent cited fact that Board stopped cross-examination of Complainant by his Representative, but there is no right to cross-examine in academic context

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Doe v. The Citadel, 2023 WL 3944370
(4th Cir., June 12, 2023) (slide 2 of 2)

- Title IX sex discrimination claim
  - Even if Respondent demonstrated procedural irregularities, he did not allege any facts showing his sex was the but-for cause
  - Fact that most Complainants were female and most Respondents were male, standing alone, do not establish anti-male bias
  - Respondent did not point to any facts that would connect the April 2011 DCL to any sex discrimination in his case

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Doe v. Rollins College, 77 F. 4th 1340
(11th Cir., Aug. 14, 2023) (slide 1 of 4)

Selective enforcement; erroneous outcome (pre-2020 regs)

Respondent, found to have violated University's sexual misconduct with sanction of dismissal, filed suit alleging Title IX violation

- Erroneous outcome – must plausibly allege "both that he was innocent and wrongly found to have committed an offense and that there is a causal connection between the flawed outcome and [sex] bias."
  - Respondent's version of events, if believed, sufficient to create issue of fact on first prong
  - However, there was not sufficient evidence for jury to find a causal connection

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Doe v. Rollins College, 77 F. 4th 1340 (11th Cir., Aug. 14, 2023) (slide 2 of 4)

Respondent's gender bias evidence:

- **Stereotyped views of gender** - Respondent pointed to emails sent by Title IX Coordinator that included statement that "consent could not be implied by 'a few too many drinks or a short skirt,'"; "Men act in a hyper-masculine and sexually aggressive manner to gain approval from their male peers ...."; as well as training materials that "included the false claim that '99% of people who rape are men."
  - Court noted while one email included "short skirt" comment, the rest of its content was gender neutral
  - While one set of training materials included the 99% statistic, Respondent did not cite any evidence in the record indicating it was questionable or false
  - Some of the cited material was years removed from investigation of Respondent
  - The investigator did not see these materials

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Doe v. Rollins College, 77 F. 4th 1340 (11th Cir., Aug. 14, 2023) (slide 3 of 4)

- **Procedural flaws** were not evidence of sex discrimination
  - Investigation was not opened at time of initial report because of lack of information or Respondent's decision not to proceed
  - Delay in finishing report was due in part to hospitalization
  - Decision to investigate Respondent's sexual history but not Complainant's not supportive of gender bias given the anonymous allegation that Respondent sexually assaulted three other students, and no similar allegation was made about Complainant
- **External Pressure**
  - Generalized allegations about Dear Colleague letter does not show anti-male bias
- **Patterns of decision-making**
  - Statistics presented misleading given that none of the cited cases concerned complaints against females, and 5 of 12 accused males found not to have engaged in sexual misconduct

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Doe v. Rollins College, 77 F. 4th 1340 (11th Cir., Aug. 14, 2023) (slide 4 of 4)

Selective enforcement framework (for summary judgment): "requires a plaintiff to present sufficient evidence for a jury to find that the institution's treatment of similarly-situated male and female students was inconsistent."

- Respondent alleged Complainant treated more favorably even though his conduct was nearly identical –
  - "(i) they both engaged in the exact same sexual conduct; (ii) they both admitted to drinking; and (iii) they both claimed the other initiated sexual activity"
- Fourth Circuit agreed with lower court that they were not similarly situated –
  - Respondent did not make a complaint against Complainant, there was insufficient evidence that College was aware Respondent was incapacitated and unable to consent but chose not to investigate, and Respondent never claimed he was incapacitated in the statements he submitted

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Khan v. Yale Univ., 295 A.3d 855 (S. Ct. Connecticut, June 27, 2023) (slide 1 of 3)

Complainant not entitled to absolute immunity for statements made during University's disciplinary proceedings (pre-2020 regs)

- University sexual misconduct committee conducted disciplinary proceedings, during which Complainant accused Respondent of sexual assault
- Respondent filed suit in federal court accusing Complainant of defamation and tortious interference with business relationships
- If Complainant's statements had been made during a criminal trial, Complainant would have been entitled to absolute immunity in any civil suit accusing her of defamation
- Federal court certified question of law to the Connecticut Supreme Court: Whether Complainant should be afforded absolute immunity from suit for statements she made during the disciplinary proceedings

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Khan v. Yale Univ., 295 A.3d 855
(S. Ct. Connecticut, June 27, 2023) **(slide 2 of 3)**

- In its ruling, the Connecticut Supreme Court set forth requirements that proceedings must satisfy to be considered quasi-judicial under Connecticut law:
  - "A quasi-judicial proceeding is an adjudicative one, in which the proceeding is specifically authorized by law, the entity conducting the proceeding applies the law to the facts within a framework that contains procedural safeguards, and there is a sound public policy justification for affording proceeding participants absolute immunity."
- As applied to the university's disciplinary proceeding, the Court held it was not quasi-judicial because it lacked important procedural safeguards. Therefore, Complainant not entitled to absolute immunity.
- Qualified immunity:
  - As matter of first impression, Court held "public policy supports a qualified privilege for participants in certain sexual misconduct proceedings."
  - However, matter is at motion to dismiss stage and Respondent's allegations of malice suffice to defeat qualified immunity as a matter of law

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Khan v. Yale Univ., 295 A.3d 855
(S. Ct. Connecticut, June 27, 2023) **(slide 3 of 3)**

- Concerning the lack of procedural safeguards, the Court cited:
  - Witnesses did not testify under oath
  - Proceeding did not permit live cross-examination of witnesses or reasonable opportunity to confront witnesses
  - Parties did not have reasonable opportunity to call witnesses
  - Assistance of counsel was materially limited throughout hearing
  - No transcript or record of proceedings, limiting ability to seek review of panel's decision

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Khan v. Yale Univ., __F.4th__, 2023 WL 7006760 (2nd Cir., Oct. 25, 2023) (slide 1 of 1)

Defamation lawsuit brought by Respondent accused of sexual assault can proceed

- Complainant accused Respondent of rape in 2015, and repeated the accusation during a 2018 University disciplinary hearing
- Respondent filed suit in federal court accusing Respondent of defamation and tortious interference with business relationships
- Lower court dismissed defamation and tortious interference claims based on finding absolute immunity shielded Complainant from liability for 2018 statements, and claims based on 2015 accusation untimely
- In light of Connecticut Supreme Court's holding on absolute immunity and qualified immunity, as well as sufficiency of Respondent's allegations of malice at MTD stage to overcome qualified immunity, Second Circuit Court of Appeals vacated lower court's judgment as related to 2018 statements;
- Affirmed dismissal of tortious interference claims based on 2015 statements, but claim based on 2018 statements could proceed

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Gonzales v. Hushen, 2023 WL 6301610 (Colorado Ct. App., Sept. 28, 2023) (slide 1 of 1)

Defamation, IIED, and Colorado anti-SLAPP statute

- Student expelled for sexually harassing two classmates; following acquittal on criminal charges, school rescinded Title IX findings
- Parents of Complainants emailed school officials expressing concerns about Respondent returning to school; school re-opened Title IX investigation
- Respondent filed complaint for defamation and intentional infliction of emotional distress against Complainants and their mothers (Defendants)
- Colorado Court of Appeals ruled the Title IX proceedings were not quasi-judicial for purposes of applying absolute immunity to party and witness statements because they lacked sufficient procedural safeguards
- Per School's Title IX procedures, there was no right to a hearing or meaningful opportunity to cross-examine witnesses; questions submitted by parties may be screened out with no opportunity to submit argument about why question is relevant; investigators not required to interview witnesses and there is no mechanism for party to call witnesses before decision-making panel; statements not required to be made under oath; representation by counsel limited

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Doe v. Marshall Univ. Bd. of Governors, 2023 WL 4618689 (S.D. W.V., July 19, 2023) (slide 1 of 3)

Selective enforcement and retaliation

- Respondent filed suit alleging Title IX retaliation, Title IX selective enforcement sex discrimination, and other claims
- Ruling on motion to dismiss, the Court determined Respondent's allegations of Title IX retaliation were sufficient to survive dismissal
  - Respondent alleged Title IX Coordinator personally solicited new Title IX complaints from students and convinced Complainant Roe to file complaint after Respondent was successful in getting other Title IX complaints dismissed
  - These allegations sufficient to allege retaliation cause of action: Respondent engaged in protected activity, and University then retaliated against him

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Doe v. Marshall Univ. Bd. of Governors, 2023 WL 4618689 (S.D. W.V., July 19, 2023) (slide 2 of 3)

- Selective enforcement – Respondent's allegations of numerous procedural errors and instances of selective enforcement of Title IX policies against him sufficient to state claim; allegations include:
  - Allowing Investigator to resolve disputed facts
  - Investigation Report presented to hearing panel concluded Respondent was responsible before panel received any evidence
  - Denying motion to continue even though Complainant did not provide required witness list
  - Allowing Title IX Coordinator to preside over complaint after being identified as a fact witness
  - Ignoring testimony of only non-party eye-witness because of her relationship with Respondent, but deeming testimony of Complainant's boyfriend credible
  - Relying on evidence of Respondent's "prior conduct"
  - Recommending finding of no responsibility in Respondent's cross-complaint despite Complainant's admission that the only reason she filed belated complaint was her knowledge of Respondent's prior Title IX activity
  - Permitting Complainant to attend classes in person while Respondent was not despite mutual no-contact order
- Court found allegations "indicates numerous, lopsided, and often significant procedural defects" that raise an inference that University selectively enforced its policies because of Respondent's sex.

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Doe v. Marshall Univ. Bd. of Governors, 2023 WL 4618689 (S.D. W.V., July 19, 2023) (slide 3 of 3)

- Due process allegations insufficient to state plausible due process claim
- Respondent stated plausible equal protection claim based on allegation that he and Complainant were similarly situated because they both filed Title IX complaints against one another, but that Complainant was treated more favorably than Respondent because of his sex
- Respondent alleged that Title IX Coordinator's actions were fraudulent, malicious, or otherwise oppressive, so Coordinator not entitled to qualified immunity

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Olson v. Macalester Coll, 2023 WL ____ (D. Minn., July 5, 2023)

Selective enforcement; procedural irregularities

- Respondent-Complainant refused to engage in the process to file his own complaint for months, then alleged he was treated differently from Complainant-Respondent (who had fully participated)
- Once 2020 regulations were released in the middle of the process, College could continue to use pre-2020 procedure
- When Respondent-Complainant began taking photos of evidence without permission, College had the right to end the process (given that both parties were no longer affiliated with the institution by that point)
- Advisor refused to sign a behavioral agreement…

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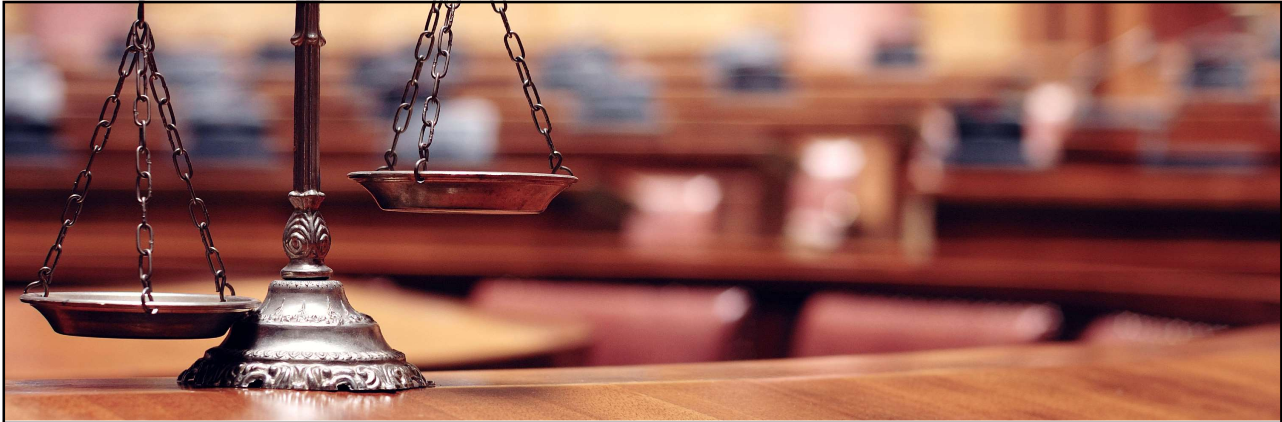

Cases brought by Employees

Kashdan v. George Mason Univ., 70 F. 4th 694 (4th Cir., June 13, 2023) (Slide 1 of 2)

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

Plaintiff- Respondent Professor disciplined for creating hostile environment after four graduate students accused him of sexual harassment. Lower court granted University's and University officials' motions to dismiss. Fourth Circuit affirmed. Addressing his Title IX claims, court concluded:

- **Erroneous outcome**
  - Prior public statements by Title IX Coordinator and official who denied appeal did not show anti-male bias
  - External pressure from Department of Education or general campus climate not enough, on its own, to support plausible inference of anti-male bias
- **Selective enforcement** – Allegations that female professors not investigated with same frequency as males, and that females sanctioned less severely, are too speculative and not supported by any well-pled facts

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Kashdan v. George Mason Univ., 70 F. 4th 694 (4th Cir., June 13, 2023) (Slide 2 of 2)

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

Addressing his Title IX claims, court concluded (cont.):

- **Procedural due process** – sanction University imposed did not effectively exclude Professor from his trade or calling and were not a significant demotion – he remained a tenured professor, was allowed to teach general psychology courses, and sanctions were temporary
- **First Amendment** – Professor's speech did not address a matter of public concern – "It is simply implausible that the public is 'truly concerned with or interested in" [Professor's] personal sexual exploits or the intimate and private details of his students' sex lives'."

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OCR investigation – Arcadia Univ. (Oct. 31, 2023) (slide 1 of 3)

Univ. violated Title IX when it failed to investigate possible sexual harassment by professor

- University received multiple reports over several years from faculty and students that professor harassed students.
- Students also reported harassment in professor's course evaluations, including comments such as "[t]he professor made many sexual inappropriate comments on a regular basis. Everyone felt uncomfortable . . ." and "[t]here was a lot of strange comments of [a] sexual nature."
- Former HR chief mistakenly believed she could not investigate b/c professor was tenured, and there was no allegation of inappropriate touching.
- Former HR chief also believed professor retaliated by accusing students of cheating, but did not address these concerns.

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OCR investigation – Arcadia Univ.
(Oct. 31, 2023) **(slide 2 of 3)**

- When University finally began an investigation in response to a formal complaint, it did not proceed with hearing or determine outcome of the complaint once professor resigned.
- "OCR determined that the University violated Title IX when it failed to complete its investigation and make a determination regarding the allegations because the Professor tendered his resignation."
- OCR determined University violated Title IX:
  - Failed to investigate possible sexual harassment University had knowledge of prior to April 2021 (as early as Fall 2018)
  - Failed to determine whether sex discrimination occurred
  - Failed to satisfy obligation to redress any effects of sexual harassment on students

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OCR investigation – Arcadia Univ.
(Oct. 31, 2023) **(slide 3 of 3)**

- Resolution Agreement: University will:
  - Complete its investigation of the formal complaints and offer to reimburse Complainants' counseling costs if complaint substantiated
  - Review all Title IX complaints for 2018-19 through 2020-21 school years
  - Review all complaints against Professor from 2018-2021, and if hostile environment created, will assess whether students are entitled to appropriate remedies
  - Survey students to determine if it needs to take additional steps to address sexual harassment on campus
  - Review its Title IX Policy and Procedures and revise if necessary
  - Provide Title IX training to faculty and staff and post training materials on its website

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Title IX and Athletics

Niblock v. University of Kentucky, **2023 WL 4997678 (E.D. Kentucky, Aug. 4, 2023) (slide 1 of 2)**

Court explains why it would apply U.S. Department of Education's 1979 Policy Interpretation to this case

- This class action lawsuit, filed in 2019, alleges that the University's current varsity sports offerings do not fully and effectively accommodate the interests and abilities of female students.
- Preceding trial, the University defendants (University) filed a pretrial memorandum arguing the U.S. Department of Education's 1979 policy interpretation of Title IX and Title IX regulations should not be applied in this case.
- University cited the U.S. Supreme Court's 2019 holding in *Kisor v. Wilkie* that reinforced limits of *Auer* deference: the regulation must be genuinely ambiguous, the agency's interpretation must be reasonable, and a court must inquire into whether the character and context of the interpretation entitles it to controlling weight.
- On July 31, 2023, the Court ordered it would apply the 1979 policy interpretation, and issued an opinion on August 4 explaining its reasoning.

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Niblock v. University of Kentucky, 2023 WL 4997678 (E.D. Kentucky, Aug. 4, 2023) (slide 2 of 2)

- 2002 Sixth Circuit opinion explicitly holding the 1979 policy interpretation and the three-part test are entitled to deference; post-*Kisor*, the Sixth Circuit has not directly addressed the issue; so for now, Court following applicable precedent
- The three-part test still deserves deference under the *Kisor* framework
  - The Title IX regulation is ambiguous, the term "equal athletic opportunity" is inherently ambiguous, and the term "effectively accommodate the interests and abilities" adds additional ambiguity
  - The 1979 interpretation is not unreasonable – The interpretation offers three ways "effectively accommodates" can be adjudged effective; while the University argued the test is unfair and encourages discrimination against overrepresented sex, it did not explain how the interpretation falls outside the bounds of reason
  - The character and context of the interpretation entitles it to controlling weight – it is longstanding official department policy; and Congress delegated authority to the Department to prescribe standards for athletic programs under Title IX
  - The interpretation reflects "fair and considered judgment" – fact that clarifications have been issued over the years does not show otherwise, and the interpretation is not a post hoc rationalization and does not create "unfair surprise"
- Three-day bench trial held August 7-9, 2023. Stay tuned…

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S.A. v. Sioux Falls School District, 2023 WL 6794207 (D. South Dakota, Oct. 13, 2023) (slide 1 of 3)

Injunction granted to prevent elimination of gymnastics program

- Students in the gymnastics program, along with students with an interest and intent to participate in the program, filed a motion for a temporary restraining order and preliminary injunction to prevent the school from eliminating the gymnastics program.
- The court granted the injunction after finding the balance of equities favored the students, and the students had a substantial probability of success on merits.
- Probability of success on the merits: Court considered the three-part test to determine compliance with effective accommodation of both sexes as set forth in the U.S. Department of Education's (DOE's) 1979 guidance on compliance requirements.

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S.A. v. Sioux Falls School District, 2023 WL 6794207 (D. South Dakota, Oct. 13, 2023) (slide 2 of 3)

- Whether participation opportunities for male and female students are substantially proportionate to their respective enrollments
  - The district did not meet the DOE's guidelines for substantial proportionality – there was a 7.6% deviation, cited case law does not support finding 7.6% is substantially proportionate, and district's justification for deviation relies on stereotype that males are more interested in sports than girls.
- History of program expansion
  - District showed history of expanding participation opportunities for females, but did not show they are continuously expanding participation opportunities for females in line with their interests and abilities, and plaintiffs presented evidence showing a strong interest in the gymnastics program
  - While district added girls wrestling and softball, the goal is to expand opportunities, not "for a two-steps-up, one-step-back approach to gender equality."

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S.A. v. Sioux Falls School District, 2023 WL 6794207 (D. South Dakota, Oct. 13, 2023) (slide 3 of 3)

- Whether interests and abilities of members of underrepresented sex have been fully and effectively accommodated
  - Per 2010 Dear Colleague Letter, this prong allows institutions with disproportionate participation opportunities to show compliance by demonstrating the underrepresented sex is not being denied opportunities, i.e. that their interests and abilities are fully and effectively accommodated
  - District did not plead any arguments showing compliance with this prong, so did not overcome presumption they are noncompliant
- Because district did not show compliance with any of these prongs, plaintiffs established they have a good change of succeeding on the merits
- Court also noted that "District's argument that they only have enough funding to provide potentially discriminatory opportunities is a direct violation of Title IX."
- Note: This decision was appealed to the Eight Circuit on Oct. 30, 2023.

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U.S. Supreme Court

***Health and Hospital Corporation of Marion County v. Talevski*, 143 S.Ct. 1444 (U.S. Supreme Court, June 8, 2023)**

Bricker Graydon

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

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

- On June 8, 2023, the U.S. Supreme Court held the Federal Nursing Home Reform Act "provisions at issue unambiguously create § 1983-enforceable rights, and the Court discerns no incompatibility between private enforcement under § 1983 and the remedial scheme that Congress devised."
- "The Court is unpersuaded by HHC's argument that, because Congress seems to have enacted the FNHRA pursuant to the Spending Clause, Talevski cannot invoke § 1983 to vindicate rights recognized by the FNHRA."

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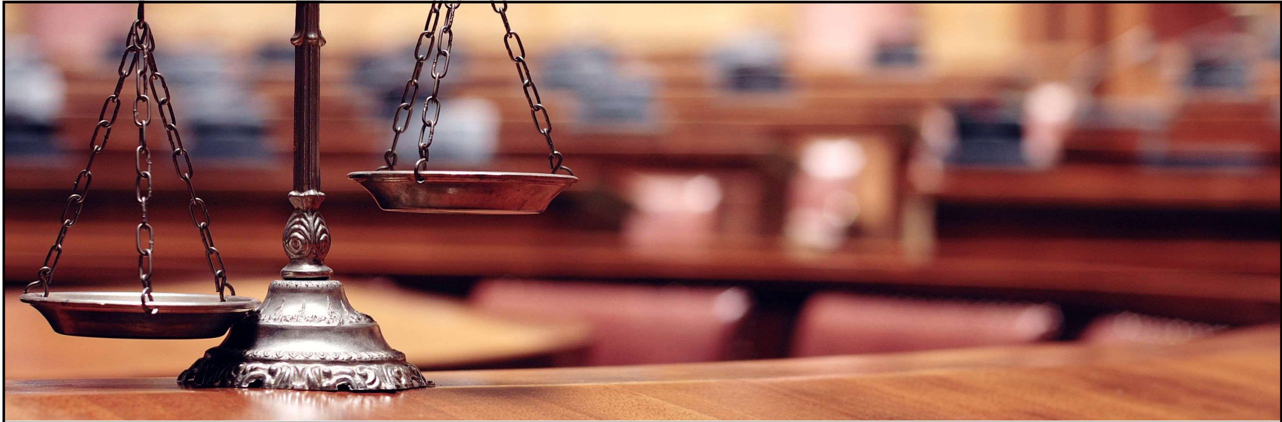

Other TIX Cases

***Smith v. Brown University*, 2023 WL 6314646 (D. Rhode Island, Sept. 28, 2023)**

FERPA litigation exception permits comparator discovery

Respondent filed Title IX claim challenging University's internal investigation process; sought "comparator discovery" regarding other sexual misconduct cases; University argued disclosure would violate privacy rights of third parties under FERPA

- Court determined requested discovery was relevant to Respondent's claim; Univ. argument that records not relevant b/c they involved different decision-makers and Title IX policies no longer in effect ignored "the nuanced ways in which systemic discrimination might manifest across a lengthy investigation, adjudication, and appeal process" and glossed over "substantial imbalance in access to information."
- FERPA did not bar disclosure – "litigation exception" permits disclosure without prior consent if pursuant to judicial order or lawfully issued subpoena provided University makes reasonable effort to notify student or parent in advance

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Snyder-Hill v. Ohio State Univ., 143 S.Ct. 2659 (U.S. S.Ct., June 26, 2023) (slide 1 of 2)

Title IX Statute of Limitations

- Refresher - Former university physician and athletic team doctor allegedly abused hundreds of young men during medical examinations between 1978 and 1998. Allegations became public in 2018. Former students and several non-student plaintiffs alleged University was deliberately indifferent to their heightened risk of abuse and filed suit under Title IX. District court ruled claims barred by statute of limitations. Reversing district court, a panel of the Sixth Circuit found students adequately alleged "that they did not know and could not reasonably have known that Ohio State injured them until 2018."
- On June 26, 2023, the U.S. Supreme Court denied a petition for writ of certiorari.

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Hecox v. Little, 79 F.4th 1009 (9th Circuit, Aug. 17, 2023) (slide 1 of 2)

Ninth Circuit upholds preliminary injunction prohibiting enforcement of Idaho law prohibiting transgender girls from participating on girls' sports teams

- Idaho's "Fairness in Women's Sports Act," signed into law in March 2020, prevents transgender women from participating on women's sports teams.
- The Act has three key components:
  - Express designation of sports as: "males, men, or boys;" "females, women, or girls;" or "coed, or mixed."
  - Dispute resolution process for individuals to "dispute" any transgender or cisgender female athlete's sex. If any female athlete's gender is disputed, she must undergo a
  - potentially invasive sex verification process.
  - A private cause of action for any student negatively impacted by a violation of the Act.
- Plaintiffs include both a transgender female athlete and a cisgender female athlete.
- Lower court granted preliminary injunction, preventing its enforcement.

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Hecox v. Little, 79 F.4th 1009 (9th Circuit, Aug. 17, 2023)

(slide 2 of 2)

- Ninth Circuit Court of Appeals upheld the injunction
  - Applied heightened scrutiny standard of review
  - Concluded "“[b]ecause the Act subjects only women and girls who wish to participate in public school athletic competitions to an intrusive sex verification process and categorically bans transgender girls and women at all levels from competing on ‘female[ ], women, or girls’ teams…’, and because the State of Idaho failed to adduce any evidence demonstrating that the Act is substantially related to its asserted interests in sex equality and opportunity for women athletes, we affirm the district court's grant of preliminary injunctive relief.”
  - Petition for rehearing en banc filed August 31, 2023.

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B.P.J. v. West Virginia State Bd. of Educ., No. 23-1078 Doc: 169 (4th Circuit, Aug. 4, 2023)

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

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

- On Feb. 22, 2023, a panel of the Fourth Circuit stayed the district court's Jan. 5 order dissolving its preliminary injunction pending appeal. The U.S. denied an application to vacate the injunction on April 6, 2023.
- On Aug. 4, 2023, the Fourth Circuit declined to lift the injunction, finding the athlete's improvements in the shotput and discus events during the recent track season did not constitute a significant change in circumstances warranting relief. The court noted the athlete's improvements in these two event was not matched by improvements in running events. Oral argument held October 27, 2023.

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TIX and Religious Institutions

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Friday, December 8, 2023
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Webinar

Hazing Investigations Bootcamp
Wednesday, January 24, 2024
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Thank You