



Higher Ed – Title IX Litigation Update

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Disclaimers



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

- We are not giving you legal advice
- Many of these cases may still be in appeals – stay tuned
- The impact of the 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 Additional Title IX Important Matters

- Cases brought by Complainants
 - Cases brought by Respondents
 - Cases brought by Employees (TIX v. TVII continues)
 - Cases against DoE
 - Athletics
- Transgender high school student athlete
 - Case brought by Volunteers
 - Medical Treatment



Cases Brought by Student Complainants

***Doe v. Morgan State University*, 2021 WL 2550496 (D. Maryland, June 21, 2021)**



MSJ denied in complaints stemming from University's response to report of sexual assault and harassment

- Court rejected University's argument that Complainant was required to identify post-notice harassment to satisfy Complainant's claim that she was subjected to sexual harassment that was so severe, pervasive, and objectively offensive that it effectively deprived her of equal access to educational opportunities or benefits provided by the school; and that the University had actual knowledge of the alleged sexual harassment.
- Deliberate indifference: University motion for summary judgment denied. Triable issues of fact exist as to University's failure to issue second no-contact order, decision to partially reverse assailant's sanction, and post-report hostility toward Complainant.

Doe v. Board of Trustees of Nebraska State Colleges, 2021
WL 2383176 (D. Nebraska, June 10, 2021)



- In the present case, the College’s actions are linked to emotional trauma and a second assault.
- College’s response—doing nothing in response to first report and failing to suspend or expel assailant, allowing him to roam freely on campus, requiring him to obtain counseling at same place as Complainant, while requiring Complainant to take classes online and changing her place of employment—could be seen as inadequate to address the known discriminatory effects of peer sexual assault.
- On July 26, 2021, the Court denied College’s motion to certify an interlocutory appeal of whether *Shank* requires a post-report assault and when the college had notice under Title IX.

Doe v. Board of Regents of University of Wisconsin, 2021 WL 5114371 (W.D. Wisconsin, Nov. 3, 2021)



Deliberate indifference and erroneous outcome

- Complainant asserted Title IX deliberate indifference and erroneous outcome claims based on University's decision to overturn a prior finding of a Title IX violation by two members of the football team. Court denied motion to dismiss Title IX claims.
- Deliberate indifference: While the court agrees University cannot be liable for alleged assault and harassment by Respondents, or for the harassment Complainant experienced more broadly by the public, Complainant adequately pleaded actionable harassment by alleging she was forced to attend school with her perpetrator. At the pleading stage, this is sufficient.
- Erroneous outcome: Complainant adequately alleged University was motivated by Respondent's status as a star member of the football team.

Doe v. University of Tennessee at Chattanooga, 2021 WL 4724187 (W.D. Wisconsin, Nov. 3, 2021)



University not deliberately indifferent as no further actionable harassment alleged

Complainant alleged University violated Title IX because its procedures did not afford victims proper due process protections, favored perpetrators, and did not deliver prompt remedial relief.

- Erroneous outcome: Complainant failed to allege facts establishing a causal connection between the allegedly erroneous outcome of the male student's disciplinary proceedings and gender bias.
- Selective enforcement theory failed for same reason – no showing that University's conduct motivated by sexual bias.
- Deliberate indifference: Complainant sufficiently alleged she was subjected to actionable harassment, she reported the incident, and University's response was objectively unreasonable. However, she does not allege occurrence of any further actionable harassment.
- Appeal filed Oct. 8, 2021.

***Totten v. Benedictine University*, 2021 WL 3290926 (N.D. Illinois, Aug. 2, 2021)**



Deliberate indifference

- Complainant alleged University discriminated against her in violation of Title IX by displaying deliberate indifference to her claims of sexual assault and retaliated against her for reporting her assault.
- Court denied University's motion to dismiss claims. As alleged:
 - University repeatedly failed to enforce its no contact order despite Complainant's reports of continued harassment by assailant.
 - Despite concluding assailant sexually assaulted Complainant and prior no contact orders issued by University police and DuPage County, the only remedial recommendation was that Assailant not be permitted to live on campus for spring semester.
 - University ignored Complainant's requests for accommodations to avoid being in same class as assailant.
 - University failed to provide any accommodations that would have allowed Complainant to continue in her education in a harassment-free environment.



Cases Brought by Student Respondents

***Doe v. University of Denver*, 1 F.4th 822 (10th Cir., June 15, 2021)**



Reasonable jury could conclude sex was a motivating factor in University's decision to expel Respondent

- Male Respondent made prima facie showing that university's one-sided investigation into female Complainant's accusation of sexual assault and its ultimate decision to expel him was motivated by sex, on claim for sex discrimination under Title IX.
- University's proffered reason that university employees were biased against sexual-misconduct respondents regardless of their sex was legitimate, nondiscriminatory reason for its conduct.
- Issues of fact remain whether proffered reason for one-sided investigation and ultimate decision to expel Respondent was pretextual for sex discrimination based on anti-male bias, precluding summary judgment.

***Doe v. Regents Univ. of Minn.*, 999 F.3d 571 (8th Cir.,
June 1, 2021)** **(1 of 3)**



Title IX discrimination claims remanded to District Court

- Respondents, former football players, asserted variety of claims arising out of University's investigation of a complaint of sexual assault and harassment.
- University's MTD denied on Respondents' Title IX discrimination claims, granted for Title IX retaliation, Title VI race discrimination claims, and deprivation of procedural due process rights claims.
- Amended complaint alleged circumstances sufficient to support plausible claim that University discrimination against Respondents on the basis of sex.

***Doe v. Regents Univ. of Minn.*, 999 F.3d 571 (8th Cir.,
June 1, 2021)** **(2 of 3)**



- The detailed allegations of investigator bias and dubious investigative procedures in these particular proceedings lend sufficient credence to the inference of discrimination “on the basis of sex.”
 - External pressure from public attention and threatened loss of federal funding, when combined with other circumstantial evidence of bias, gives rise to plausible claim of intentional bias.
 - University settled prior OCR investigation for potential Title IX violations – specter of another federal investigation could motivate University to discriminate against male athletes accused of sexual misconduct to demonstrate ongoing compliance with Title IX.
 - Complaint alleged internal pressure on University officials to charge male football players with sexual misconduct. Alleged investigator believed football players had covered-up sexual misconduct complaints during a 2015 investigation, motivating her to punish as many players as possible.

***Doe v. Regents Univ. of Minn.*, 999 F.3d 571 (8th Cir.,
June 1, 2021)** **(3 of 3)**



Elements for Title IX Retaliation Claim:

- Participation in an activity protected by Title IX
- Adverse action by the university
- Because of the protected activity

Ruling: Respondents did not plausibly allege that their request for a Student Sexual Misconduct Subcommittee hearing was tantamount to a complaint of sex discrimination. Even if request for a hearing by person accused of sexual misconduct could amount to protected activity, alleged adverse public statements do not satisfy the adverse action element.

Selective enforcement

- Respondent dismissed from university after he was found responsible for violating university's sexual misconduct policy.
- Respondent had also filed an incident report against the Complainant – outcome letter did not address Respondent's claims against Complainant. After reconsideration review, letter issued to Respondent also failed Respondents claims.
- Respondent filed suit, asserting selective enforcement in violation of Title IX.
- On November 4, 2021, the court issued rulings on cross-motions for summary judgement – “material issues of fact preclude a grant of summary judgment as to Plaintiff's Title IX claim in favor of either party”

Doe v. Embry-Riddle Aeronautical Univ., 2021 WL 5141032
(M.D. Florida, Nov. 4, 2021)

(2 of 4)



Similarly situated:

- Respondent and Complainant both expressed a desire not to engage in sexual activity prior to the incident, both subsequently consumed significant sums of alcohol, both initiated at least some sexual acts with the other, and both filed formal complaints.
- Differentiating or mitigating circumstances, at best, create an issue of fact for the jury. Neither party entitled to summary judgement on this issue.

Treated differently:

- Respondent argued Complainant treated more favorably because she was not suspended from track team and university failed to investigate Respondent's complaint. Court found reasonable jury could find university failed to investigate Respondent's complaint.

Causal connection between differential treatment and gender bias:

- Material issues of fact exist regarding whether the investigation was impacted by gender bias, precluding summary judgment.
 - Reasonable jury could infer that any differential treatment was the result of gender bias.
 - Individuals from university relied on unsubstantiated and gender biased assumptions that because Respondent became and maintained an arousal and ejaculated, he could not have been the victim of sexual misconduct or incapacitated at the time of the incident.

Causal connection between differential treatment and gender bias:

- (Continued)
 - They noted as important to their conclusion that Complainant felt “taken advantage of.”
 - Report fails to note Respondent stated prior to the party that he did not want to have sex.
 - They failed to provide any evidence they asked Complainant if or how she obtained consent from Respondent.
- Reasonable jury could also determine university had nondiscriminatory reasons for its actions, precluding grant of summary judgment on Title IX claim in favor of either party.

Doe v. Saint John's University, Minnesota, 2021 WL 4993087 (D. Minnesota, Oct. 27, 2021)



Erroneous outcome

- Respondent failed to allege facts to support plausible inference that University disciplined him because he is male.
 - Plaintiff-Respondent argued that “significant evidentiary weaknesses” in the University’s findings demonstrate the presence of discrimination
 - Argument that b/c complainant didn’t object to sexual contact, there can be no assault - Not accurate under the University’s definition of consent
 - Rejected by the court
 - Procedural flaws: Respondent failed to address how alleged procedural flaws caused the allegedly erroneous outcome or that the outcome would have been different absent these errors.

Doe v. Saint John's University, Minnesota, 2021 WL 4993087 (D. Minnesota, Oct. 27, 2021) (cont.)



Erroneous outcome

- Respondent failed to allege facts to support plausible inference that University disciplined him because he is male.
 - Bias: Respondent advanced nothing more than conclusory allegations.
 - Statistics: Courts consistently reject this argument as supporting an inference of sex discrimination.
 - Pressures: General reference to pressure from United States government is insufficient to show gender bias under Title IX.
- Outcome – University's MTD granted

Selective enforcement claims survives MTD

- Respondent claims University discriminated against him because of his gender when it imposed an interim suspension and investigated and adjudicated complaints filed by several Complainants.
 - No notice or hearing for the interim suspension
- MTD granted on number of claims including selective enforcement and harassment claims regarding interim suspension, and erroneous outcome claim as to one Complainant.

Selective enforcement claims survives MTD

- Respondent alleged procedural defects that may have affected the outcome of the disciplinary proceedings, and alleged circumstances giving rise to plausible inference of discriminatory intent by University.
- Outcome: Respondent stated selective enforcement claim with respect to one Complainant as they were similarly situated and University treated Complainant better than Respondent.
 - University investigated Complainant's complaint for sexual assault but failed to investigate counter-complaint against Complainant for sexual misconduct and sexual exploitation.

Noakes v. Case Western Reserve Univ., 2021 WL 4440608
(N.D. Ohio, Sept. 28, 2021)

(1 of 2)



Court denies request to halt investigation

- Respondent asked the court to impose a temporary restraining order to prevent the University from pursuing any investigation or disciplinary actions related to alleged retaliation against Complainant.
 - Tumblr site with info only Respondent might know (per the school)
- McDonnell Douglas standard requires “adverse action” against the Plaintiff
 - To qualify as adverse, the action must be sufficiently severe to dissuade a “reasonable person” from engaging in protected activity
 - Commencement of a Title IX investigation doesn’t qualify

Noakes v. Case Western Reserve Univ., 2021 WL 4440608
(N.D. Ohio, Sept. 28, 2021)

(2 of 2)



Court denies request to halt investigation

- Even if investigation constituted adverse action, Respondent did not establish a substantial likelihood that he will successfully demonstrate a causal connection between his protected activity and that investigation.
- University had legitimate, nondiscriminatory reasons for commencing investigation – it is required by Title IX, and University had a reasonable basis in that posts disclosed details only accessible to Respondent.
- Outcome: TRO denied

Doe v. Trustees of Indiana University, 2021 WL 2982186
(S.D. Indiana, July 15, 2021)



Motion for preliminary injunction denied

- Respondent was suspended following University's investigation of Complainant's accusation of rape and sexual misconduct.
- Respondent sought injunction to prohibit University from enforcing his suspension and seeking to revoke his visa immigration status. Injunction denied.
- Respondent argued decision-making process was biased and that University's policy in evaluating consent builds in bias. Court found mere fact that hearing panel found Complainant more credible does not reasonably suggest bias against Respondent because of his sex.
- On issue of consent, Respondent's complaint that University's policy put burden on Respondent amounts to a challenge to a bias in favor of alleged sexual-assault victims. Such bias does not suggest a bias based on sex.

***Doe v. William Marsh Rice Univ.*, 2021 WL 4215501 (S.D. Texas, Sept. 16, 2021)** **(1 of 2)**



Erroneous outcome, selective enforcement, and archaic assumption theories not supported

- Respondent was found to have violated the Code of Conduct’s “reckless disregard” provision for failing to provide Complainant with appropriate, necessary, and timely information” about his herpes diagnoses prior to engaging in sexual contact with Complainant.
- Title IX claim asserting erroneous outcome, selective enforcement, and archaic assumptions theories.
 - Erroneous outcome theory failed. Evidence revealed Respondent did not sufficiently disclose that he had herpes; his admission coupled with his apology establishes he engaged in “reckless action.” No evidence that Respondent’s gender was motivating factor.

***Doe v. William Marsh Rice Univ.*, 2021 WL 4215501 (S.D. Texas, Sept. 16, 2021)** **(2 of 2)**



Erroneous outcome, selective enforcement, and archaic assumption theories not supported

- Title IX claim asserting erroneous outcome, selective enforcement, and archaic assumptions theories.
 - (Cont).
 - Selective enforcement: No evidence enforcement proceedings or discipline motivated by gender bias, and no evidence University selectively enforced its procedures.
 - Archaic assumptions: Record devoid of any evidence that indicates that the University placed a different duty on male students to disclose the risks of unprotected sex than it does on female students.
- Outcome: University's MSJ granted
- Appealed to 5th Circuit Oct. 18, 2021.



**Cases Brought by Employees
(Includes Title IX and TVII)**



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***Harrington v. Lesley University*, 2021 WL 3616075 (D. Massachusetts, Aug. 12, 2021)**



Title VII did not preclude employee's claims under Title IX

- University employee brought employment discrimination claims against university and former supervisor under Title VII, Title IX, and Massachusetts employment discrimination statute.
- Court denied motion to dismiss.
- Fundamental question posed is whether plaintiff may bring employment discrimination claims under both Title VII and Title IX.
- Court found she could, subject to the constraints of the statutes of limitations proscriptions separately applicable to the two statutory schemes.

***Abraham v. Thomas Jefferson University*, 2021 WL 4132566
(E.D. Pennsylvania, Sept. 10, 2021)**



Doctor's raised plausible inference of Title IX discrimination

Allegations supported plausible inference of gender discrimination:

- Plaintiff was told “a man cannot be sexually assaulted by a woman,” and was discouraged from making such a claim.
- Plaintiff alleged a complete failure to investigate his report.
- Plaintiff spelled out his allegations about gender-biased investigation against the backdrop of the 2011 Dear Colleague Letter.

Title IX retaliation claim dismissed – no causal connection between adverse action and Plaintiff's report of misconduct.

***Trudeau v. University of North Texas*, 861 F.Appx. 604 (5th Cir., July 9, 2021)**



Professor's discipline was not because of his participation in investigation

- Remember—5th Cir doesn't allow Title IX discrimination cases by employees, but Title IX retaliation is separate.
- Professor disciplined following a Title IX investigation that substantiated allegations of sexual harassment.
- Professor did not establish causal link between his participation in the investigation and the adverse employment action.
- Same standard as under Title VII – must show a causal connection, or but-for standard, but not “sole cause.”
- Grievances with investigation process do not add up to a claim of retaliation under Title IX.
- Professor did not plausibly allege he was punished at the conclusion of the investigation because he participated in the investigation.

***Sanders v. University of Idaho*, 2021 WL 3409668 (D. Idaho, Aug. 3, 2021)**



D. Idaho rules Title VII claims do not bar Title IX claims

- Ruling on motion for summary judgment. Professor brought race and gender discrimination claims under Title VI, Title VII, and Title IX.
- Defendants argued Title VII was the exclusive remedy for Professor's claim of employment discrimination.
- Ninth Circuit has not yet expressly addressed whether plaintiff can bring employment discrimination claims under both Title IX and Title VII.
- District Court ruled Title VII claims did not bar Title IX claims. For the same reasons discussed in addressing Professor's Title VII claims, there is genuine issue of material fact as to whether University violated Title IX.

Meldrum v. Arizona Board of Regents, 2021 WL 3371538 (D. Arizona, Aug. 3, 2021)



D. Arizona rules Title VII claims do not bar Title IX claims

- Ruling on motion for to dismiss. Professor brought a number of claims, including a Title IX discrimination claim.
- Ninth Circuit has not yet determined whether an employee of a federally-funded educational institution can pursue an employment discrimination claim under Title IX.
- District Court ruled Title VII was not exclusive remedy for employment discrimination actions.
- Plaintiff plausibly alleged her expulsion as a Biodesign Director was discriminatory on the basis of sex b/c another Center Director and his research center were allowed to remain despite having a lower performance metric rating than Plaintiff.

Schrader v. Emporia State University, 2021 WL 428453 (D. Kansas, Sept. 21, 2021)



This is not the usual case...

A university professor was the subject of a Title IX investigation and, although cleared of misconduct by the faculty committee, was nonetheless sanctioned. A “storm of media coverage” then followed, and a university official solicited individuals to come forward with complaints. Another student did, and professor was placed on administrative leave. The professor eventually resigned.

- Professor alleged the Title IX investigation and proceedings were biased against him because he is a man.
 - Court found plaintiff alleged facts capable of supporting plausible inference that sex was a motivating factor in the University’s disciplinary decision.
 - “This is a close call, but the allegation that ESU sanctioned plaintiff even though the faculty committee cleared him of misconduct is the critical allegation that nudges this claim across the 12(b)(6) line.”
- Also raised Title VII claims for constructive discharge. Claim dismissed, as he failed to allege any facts supporting inference that but for his status as a man his constructive discharge would not have occurred.

Kincaid v. Unified School District No. 500, 2021 WL 5231993
(D. Kansas, Nov. 10, 2021)



Tenth Circuit prediction

- In a case brought by an assistant principal asserting claims under Title VII and Title IX for retaliation, retaliatory harassment, and sexual harassment, court ruled Title VII did not preempt (or displace) claims for employment discrimination under Title IX.
- “In short, the Tenth Circuit hasn't held or even suggested that Title VII provides the exclusive statutory vehicle for employment discrimination claims. Absent such direction—and given that the Tenth Circuit appears comfortable with hybrid Title VII and Title IX claims—the court predicts that the Tenth Circuit, if presented with this issue, would hold that Title VII doesn't “preempt” or displace Title IX in employment discrimination cases. Thus, the court follows that majority view here.”



Cases Against U.S. DoE



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Victim Rights Law Center v. Cardona, 2021 WL 3185743 (D. Massachusetts, July 28, 2021)



Cross-examination

- U.S. District Court for the District of Massachusetts entered a decision vacating the provision in the new Title IX regulations that prohibited decision-makers from considering statements not subject to cross-examination.
- The U.S. Department of Education subsequently issued a Dear Colleague Letter on August 25, 2021, indicating that it was immediately ceasing enforcement of that provision.
- On September 27, 2021, the State of Texas successfully intervened in the lawsuit and filed an appeal to the U.S. Court of Appeals for the First Circuit.

Hunter v. U.S. Department of Education, 2021 WL 3861154 **(D. Oregon, Aug. 30, 2021)**



Title IX religious exemption

- Lawsuit challenging U.S. Department of Education's application of the religious exemption included in Title IX to LGBTQ+ students who attend private religious colleges and universities that receive federal funding.
- On Aug. 30, 2021, the court denied plaintiffs' motion for a temporary restraining order.
 - Plaintiffs' did not show likelihood of irreparable harm – while it is possible OCR might dismiss some of the complaints under the religious exemption, the Court could not find it was likely to do so as opposed to dismissing on any other grounds.
 - Balance of equities and public interest did not favor plaintiffs.
- On Oct. 8, the Court granted motions to intervene filed by three Christian universities and the Council for Christian Colleges and Universities.



TIX Athletics

Portz v. St. Cloud State Univ., 2021 WL 4997659 (8th Cir., Oct. 28, 2021)



Equality of athletic programs

- University has three tiers of support for its sport programs. District court found the University failed to provide equitable treatment between men's and women's sports because substantially fewer women benefited from Tier I level of support than men.
- On appeal, the First Circuit ruled lower court erred in conducting the treatment-and-benefits analysis using tiers. Lower court should have focused on program-wide benefits and opportunities, rather than on smaller subdivisions.
- District court did not err in concluding that the University violated Title IX by not providing equitable participation opportunities for men and women.

***Berndsen v. North Dakota University System*, 7 F.4th 782
(8th Cir., Aug. 10, 2021)**

(1 of 2)



Title IX Selection of Sports and Separate Teams

- Former members of university's women's ice hockey team filed complaint alleging university violated Title IX when it discontinued the women's ice hockey program but not the men's.
- Circuit court ruled lower court erred in dismissing complaint – lower court improperly relied on a compliance test from the Levels of Competition provision as the only way to analyze a claim under the separate, unrelated Selection of Sports provision. Circuit's precedent directs the court to give controlling deference to the entire 1979 Interpretation, not just the three-part test.
- Agency's decisions to repeatedly clarify the 133 words in the three-part test does not mean it has decided to abandon the 1979 Interpretation's other 5,300-plus words.

***Berndsen v. North Dakota University System*, 7 F.4th 782
(8th Cir., Aug. 10, 2021)**

(2 of 2)



- Lower court also erred in concluding that the Contact Sports Clause is “inconsistent” with the regulation's Separate Teams Provision.
- The Contact Sports Clause use of “must” unambiguously requires an institution sponsoring a single-sex contact sports team (e.g., men's ice hockey) to sponsor a team for the other sex (e.g., women's ice hockey) if: (1) “opportunities for members of the excluded sex have historically been limited”; and (2) “[t]here is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.”

Anders et al. v. California State University, Fresno, 2021 WL 5040405 (E.D. California, Oct. 29, 2021)



Title IX financial aid claim

- University announced it would stop sponsoring women's lacrosse, men's wrestling and men's tennis in the 2021-22 academic year.
- Plaintiffs, members of the women's lacrosse team, alleged Title IX financial aid claim.
- Court ruled Plaintiffs failed to state a financial aid claim under Title IX.
- Data in the sources cited by Plaintiffs do not show that the female share of athletics-based financial aid was less than the female share of the student-athlete population at University in the two most recent years for which allegations are made.



TIX Transgender Student Athlete

***B.P.J. v. West Virginia State Board of Educ., 2021 WL
3081883 (S.D. WV, July 21, 2021)***

(1 of 2)



Transgender student-athletes

- Transgender girl told she would not be able to join girls’ track team because recently enacted state law prohibits “biological males” from participating on girls’ sports teams.
- Court found student was likely to succeed on the merits of her equal protection claim and issued a preliminary injunction to enjoin the state law.
- State’s proffered objective—to provide equal athletic opportunities for female athletes and to protect female athletes while they participate in athletics—was not supported as applied to the student in this case. Student had not undergone endogenous puberty and would not have physical advantage over other girls.

***B.P.J. v. West Virginia State Board of Educ., 2021 WL
3081883 (S.D. WV, July 21, 2021)*** **(2 of 2)**



- Student also likely to succeed on the merits of her Title IX claim.
- She was excluded from athletics on the basis of her sex, she was harmed by the law, and she will be treated worse than girls with whom she is similarly situated because she is the only one who cannot join the team corresponding to her gender identity.



Title IX and Volunteers



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Douglass v. Garden City Community College, 2021 WL 2352430 (D. Kansas, June 9, 2021)



Volunteer within protection of Title IX

- Volunteer alleged Title IX and First Amendment retaliation after she publicly supported students who were sexually harassed.
- Court denied motion to dismiss.
- College argued volunteer fell outside Title IX protections for retaliation because she was not a student or faculty member.
- Court disagreed. For over 25 years, the volunteer served as a host mom for student athletes, a volunteer for the endowment association, and a booster for a college-sanctioned fundraising organization.
- “Adult employees or school leaders like plaintiff ‘are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators.’”



Title IX and FERPA in Litigation



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***Doe v. Yale University*, 2021 WL 4437856 (D. Connecticut, Sept. 28, 2021)**



FERPA does not protect records from discovery

- Plaintiff, MBA student, expelled for honor code violations.
- Federal court had jurisdiction – Plaintiff alleged selective enforcement in violation of Title IX.
- University moved to quash Plaintiff’s subpoena, arguing information about other, non-party students is irrelevant and protected from disclosure under FERPA.
- Court ruled FERPA allows disclosure if “such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution.”
- Plaintiff is entitled to lawful discovery of fact that may support his claim.



TIX in Medical Treatment

***Hammons v. University of Maryland Medical System Corp.*, 2021 WL 3190492 (D. Maryland, July 28, 2021)**



Hysterectomy denied because of Plaintiff's sex

- Plaintiff sought to have a hysterectomy as a medically necessary treatment of gender dysphoria. The hospital cancelled the surgery shortly before it was to take place, citing the medical center's religious beliefs.
- Court refused to dismiss the ACA claim. Section 1557 incorporates Title IX and prohibits discrimination and the denial of benefits on the basis of sex in any health program or activity receiving federal funding.
 - Medical center's prohibition on sterilization and the imperative concerning bodily integrity permit exceptions, including when their direct effect is the cure or alleviation of a present and serious pathology and simpler treatment is not available.
 - Plaintiff alleged although his treating physicians determined that the hysterectomy was a medically necessary treatment for his gender dysphoria, the hospital refused to perform the surgery, specifically because it was linked to this condition.
 - As explained in *Bostock*, a defendant who takes adverse action against someone for being transgender "inescapably intends to rely on sex in" his decision-making. Thus, Plaintiff alleges that the Hospital denied him the benefits of its services on the basis of sex, in violation of § 1557.

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