

Appellate Court Decisions for Allegations of Campus Sexual Misconduct, 2013-2018

APPENDIX

Summary of Appellate Cases

Following are summaries of the 14 appellate cases, arranged in chronological order. Summaries are based on information presented in the appeals court's written opinion.

1. I.F. v. Administrators of Tulane Educational Fund

Campus Adjudication

"I.F." and "K.K." were both students at Tulane University (University). K.K. accused I.F. of raping her and subsequently filed a complaint with the University and the New Orleans Police Department. I.F. was arrested and charged but later acquitted of all criminal charges. However, I.F. was also charged with sexual misconduct in violation of the University's "Code of Student Conduct." As such, I.F. appeared before the University Joint Hearing Board. The Hearing Board found I.F. responsible for sexual misconduct.

I.F. appealed the decision to the University's Appellate Board. I.F. argued that "(a) new and significant evidence had appeared . . . ; (b) procedural errors deprived him of a fair hearing; and (c) the decision by the Joint Hearing Board was arbitrary and capricious."⁴⁹ The appeal was denied.

Trial Court

After his failed appeal, I.F. filed a petition for preliminary injunction and permanent injunction to enjoin the University from enforcing the discipline and to reverse the decision. The University filed a motion to dismiss. The trial court granted the University's motion and dismissed I.F.'s petition. The matter was appealed and reversed after a finding that the trial court erred when it failed to hold an evidentiary hearing prior to ruling on the motion to dismiss.

Following the Appellate Court's remand, the trial court held an evidentiary hearing on I.F.'s petition for an injunction. After the hearing, the University moved for an involuntary dismissal. The trial court granted and dismissed. I.F. appealed again to the Appellate Court.

⁴⁹ *I.F. v. Adm'rs of Tulane Educ. Fund*, 131 So.3d 491, 494 (La. App. 4th Cir. 2013).

Appeals Court

On his second appeal, I.F. asserted that the trial court erred when it limited the review of the University's disciplinary decision and that the University's actions were arbitrary and capricious and violated his due process rights.

Regarding I.F.'s first claim, the trial court limited admissible evidence to the issue of due process. The court did not consider any evidence as to whether the University's decision was arbitrary and capricious. The Appellate Court found that "the trial court should not have issued reasons for judgment on the issues of arbitrariness and capriciousness" without hearing the evidence.⁵⁰ The Court remanded this claim for further proceedings.

On I.F.'s due process claim, the Court determined that the trial court erred by failing to examine the University's appellate process and remanded for a full evidentiary hearing. The Court reasoned that the University "must adhere to the standards it provides. It imposed upon itself the duty by its own policies and procedures and it is obligated contractually to follow through completely, meaningfully, and in good faith."⁵¹ The Court reached this determination after it examined the University's "Student Conduct Policies and Procedures." This policy contains a "Procedural Due Process Rights" provision.

While Louisiana appellate courts have held that "a private institution has almost complete autonomy in controlling its internal disciplinary procedures[,] there is still a rebuttable presumption as to whether the institution took action in "absolute good faith and for the mutual best interest of the school and the student body."⁵² However, the Court found that this policy of restraint does not allow private institutions to disregard due process safeguards.⁵³ Disciplinary decisions by private institutions may be reviewed for arbitrary and capricious action.⁵⁴

Following this standard, the Court examined the University's "Conduct Manual" as it pertained to the disciplinary procedure. The manual contains an explanation of University sexual misconduct cases; however, I.F. was never afforded an opportunity to review these materials. The Court stated the following:

I.F. was entitled to know the standards by which his evidence would be received, his burden of proof, and what the hearing panel would be considering when determining whether he was guilty of sexual

⁵⁰ *Id.* at 497.

⁵¹ *Id.*

⁵² *Id.*; *Citing Flint v. St. Augustine High School*, 323 So.2d 229, 233 (La. App. 4th Cir. 1975).

⁵³ *Id.* at 499.

⁵⁴ *Id.*; *Citing Babcock v. New Orleans Baptist Theological Seminary*, 554 So.2d 90, 96-97 (La. App. 4th Cir. 1989).

misconduct . . . I.F.'s procedural due process rights were ill-defined, ambiguously applied, and, as such, presumptively violated.⁵⁵

2. John Doe v. University of Southern California

Campus Adjudication

University of Southern California (USC) found that student "John Doe" violated USC's student conduct code as a result of his participation in a group sexual encounter at a fraternity party. Another student, "Jane Roe," alleged she had been sexually assaulted by a group of men at the party. She reported that her sexual contact with John was consensual, but certain contact with the other men was not.

Following the fraternity party, Jane reported to USC that she had experienced nonconsensual sexual contact. She described an encounter with John, and then a later encounter with other unidentified males at the party. According to Jane, the initial sexual encounter with John was consensual, while the contact with the other men was not. Despite this statement from Jane, the Office of Student Judicial Affairs and Community Standards (SJACS) decided to investigate John, eventually finding him to be in violation of nine offenses under the Student Code of Conduct.

Doe appealed to the Student Behavior Appeals Panel (Panel), which found insufficient evidence of a sexual assault. However, the Panel did hold John responsible for two other offenses. First, the Panel found that John "encouraged or permitted" other students to slap Jane on the buttocks. And second, that by leaving Jane alone in a bedroom after the alleged incident, John violated Student Conduct Code Section 11.32, "Conducting oneself in a manner that endangers the health or safety of oneself, other members, or visitors within the university community."

Trial Court

John petitioned the superior court for a writ of administrative mandamus, alleging that he was not afforded a fair hearing, nor was there sufficient evidence to support the Panel's findings. "The remedy of administrative mandamus is available to review adjudicatory decisions of private organizations, including universities."⁵⁶ The superior court denied the petition but ruled there was insufficient evidence to support the finding of violating Section 11.32.

John then appealed to the California Court of Appeals.

⁵⁵ *Id.* at 499-500.

⁵⁶ *Doe v. Univ. of S. Cal.*, 246 Cal. App. 4th 221, 237 (2016).

Appeals Court

SJACS focused on Jane's allegation that the sexual contact was nonconsensual and relied on information never provided to John. In contrast, the Panel suspended John on a different theory than the SJACS. Throughout the process, John was not provided with any information about the factual basis of the charges, was not allowed to access any evidence unless he actively sought it through written request and was not provided with any opportunity to appear directly before the decision-making panel.

The Court ruled, "If notice is to be meaningful, it must include information about the basis of the accusation . . . Because John was sanctioned based on activities that he was never informed might be the cause for sanctions, John was not provided with sufficient notice required of a fair hearing . . ." ⁵⁷ Further, the Court noted that there was not substantial evidence to support the Panel's conclusion that John violated the school conduct code. In light of the entire record, the Court deemed the Panel's decision an abuse of discretion.

The judgment of the trial court was affirmed to the extent that it set aside USC's decision that John violated Section 11.32. The judgment was reversed in all other respects, and the matter was remanded to the trial court with directions to grant John's petition for writ of mandate.

3. John Doe v. Columbia University

Campus Adjudication

During the evening of May 12, 2013, "John Doe" took a walk with "Jane Roe," during which the two began discussing the topic of "hooking up." Upon returning to their residence, Jane told John to wait in the bathroom while she went to her bedroom to retrieve a condom. She then undressed herself and they proceeded to engage in sexual intercourse. Over the next two weeks, Jane twice expressed doubts to John about how their friends would react to news of the encounter.

At the start of the next school year, Columbia University (University) contacted John to inform him that a fellow student had made allegations of sexual assault against him, and an investigation was to be conducted.

During the two-hour hearing, the panel did not call any of John's witnesses or ask all of the questions he had submitted. John was found responsible of sexual assault on the basis that "he directed unreasonable pressure for sexual activity toward Jane Doe over a period of weeks" and that "this pressure constituted coercion [so that] the sexual

⁵⁷ *Id.* at 244.

intercourse was without consent.” He was suspended for three semesters. When Jane learned of the sanction, she submitted a request to reduce the punishment.

Trial Court

John filed his suit on June 9, 2014. He alleged that the University subjected him to sex discrimination in violation of Title IX and state law because the Title IX Coordinator was motivated by pro-female sex bias.

The University submitted a motion to dismiss which the district court granted.

Appeals Court

The Second Circuit first clarified its earlier decision with respect to whether a burden-shifting analysis applies in Title IX claims, as it does with Title VII claims. Specifically, the Second Circuit stated that even though it did “not explicitly state in *Yusuf* that we were incorporating *McDonnell Douglas*'s burden-shifting framework into Title IX jurisprudence,” this framework applies.⁵⁸

But this burden-shifting framework does not apply in the context of Civ. R. 12(b) motions to dismiss. Rather, the Court held:

[A] complaint under Title IX, alleging that the plaintiff was subjected to discrimination on account of sex in the imposition of university discipline, is sufficient with respect to the element of discriminatory intent, like a complaint under Title VII, if it pleads specific facts that support a *minimal plausible inference* of such discrimination.⁵⁹

In discussing this “minimal plausible inference,” the Second Circuit noted:

McDonnell Douglas temporary presumption reduces the facts a plaintiff would need to show to defeat a motion for summary judgment prior to the defendant's furnishing of a non-discriminatory motivation, that presumption also reduces the facts needed to be pleaded under *Iqbal*⁶⁰ . . . [b]ecause ‘[t]he discrimination complaint, by definition, occurs in the first stage of the litigation . . . the complaint also benefits from the temporary presumption and must be viewed in light of the plaintiff's minimal burden to show discriminatory intent.’⁶¹

In this case, the Court agreed that John adequately pled facts that plausibly support at least the needed minimal inference of sex bias.

⁵⁸ *Doe v. Columbia Univ.*, 831 F.3d 46, 55 (2d Cir. 2016).

⁵⁹ *Id.* at 56.

⁶⁰ *Id.* at 54.

⁶¹ *Id.* at 55.

However, the Court also warned district courts against dismissing Title IX lawsuits where there may be a benign, gender-neutral motivation for a university's actions: "This reasoning fails to recognize the court's obligation to draw reasonable inferences in favor of the sufficiency of the complaint."⁶² As a result, the Second Circuit determined the district court incorrectly concluded that "any bias in favor of Jane Roe 'could equally have been--and more plausibly was--prompted by lawful, independent goals, such as a desire . . . to take allegations of rape on campus seriously and to treat complainants with a high degree of sensitivity."⁶³

The Court vacated the lower court's decision dismissing the John's Title IX claim and remanded the case for further proceedings.

4. Abdullatif Arishi v. Washington State University

Campus Adjudication

Abdullatif Arishi (Arishi), a PhD student at Washington State University (University), was involved in a relationship with "MOS," a 15-year-old girl. The two met on an adult dating site. One day, the two were involved in a car accident. The police arrived and became suspicious of the relationship between Arishi and MOS. After speaking with MOS, authorities learned that there had been some sexual activity between them. Arishi was charged criminally with 3rd degree rape and molestation. He pled not guilty, asserting that he believed she was older than 16, which was the age of consent in Washington.

The University charged Arishi with a violation of the school code of conduct. Both parties declined to speak with the school investigator. The matter proceeded to a hearing described as a "brief adjudication" (Hearing). Only two witnesses testified at the Hearing. One of the witnesses, the school investigator, relied on the assessment of the two police officers who initiated the criminal investigation, who characterized the girl as "credible," despite significant questions with her story and actions. Arishi countered with evidence from the dating site where the two met, where MOS's profile stated she was 19 years of age.

Arishi was found responsible, and his appeal to University was denied. These decisions led to the loss of Arishi's student visa, and he was forced to return to Saudi Arabia.

Trial Court

Arishi argued that the hearing was not fair because there were no rules of evidence, only Hearing members could question witnesses, there was no right to subpoena

⁶² *Id.* at 57.

⁶³ *Id.*

witnesses or documents, and his lawyer could only act as an advisor. The superior court affirmed the University's decision.

Appeals Court

Under Washington state law, a "brief adjudication" requires only that the agency inform the party of the agency's view on the matter, offer the party an opportunity to explain, and give the party a statement of the reasons for the decision.⁶⁴ The Court sought to determine if the University's procedures were adequate, or if they should have provided a "full adjudication" with a more formal process, as established by the state's Administrative Procedures Act.

After reviewing several decisions from the U.S. Supreme Court, the Court concluded, "An issue may warrant full adjudication where the nature of disputed facts and character of the relevant evidence make the trial-like elements of full adjudication valuable safeguards against the risk of an erroneous deprivation."⁶⁵

The Court therefore deemed the University's disciplinary procedure to be an inadequate use of the "brief adjudication" process because the alleged victim did not appear for the Hearing or respond to investigators. "The issue in Mr. Arishi's case pitted his version of events against the version of events charged by Whitman County."⁶⁶ The Court concluded, "Because assessment of veracity and credibility were key, safeguards of the subpoena power, oral testimony, and cross-examination were critical."⁶⁷ Moreover, the Court noted the denial of representation by counsel also undermined its confidence in the campus result.⁶⁸

The charges against Arishi presented the risk of severe hardship via loss of financial and personal investment along with damage to personal reputation. As such, a more robust process was due.

As a result, the trial court decision was reversed, along with the University finding. The case was remanded and Arishi was awarded attorney fees.

⁶⁴ *Arishi v. Wash. State Univ.*, 385 P.3d 251, 255 (2016).

⁶⁵ *Id.* at 262.

⁶⁶ *Id.* at 264.

⁶⁷ *Id.*

⁶⁸ *Id.* at 265.

5. In the Matter of John Doe v. Skidmore College

Campus Adjudication

In January 2014, a male (John Doe) and female (Jane Roe) student engaged in conduct of a sexual nature. They kissed and removed some or all of their clothing but did not have sexual intercourse.

Almost two years later, John received a complaint that he had engaged in sexual misconduct. The complaint cited Skidmore College's (College) policy that John allegedly had violated but did not specify the exact nature of the alleged offense – nonconsensual oral sex.

The Title IX coordinator conducted interviews with the parties and 10 witnesses. One of the witnesses stated she had heard that Jane was "in a 'non-committed relationship' with some guy, but he over-stepped one day," but did not testify about any specific actions committed during the evening in question. Three drafts of an investigation report were created, with input from the parties. The parties then appeared before an adjudication panel (Panel) for a "comment session."

Without stating the specific actionable offense, the Panel found John in violation and imposed expulsion as the penalty. Upon administrative appeal, it was found that the College erred in interviewing one of the witnesses and Jane together but determined that it was not a significant error. The expulsion was upheld.

Trial Court

John filed suit alleging that "the adjudication panel's findings were arbitrary and capricious, that the findings and sanction were arrived at in violation of respondent's procedures, that those procedures violated the requirements of fundamental fairness, and that the penalty imposed was excessive."⁶⁹ The court dismissed the application, so John filed an appeal to the Appellate Division.

Appeals Court

The Appellate Division noted, "the failure to establish the nature of the allegations at the outset of the proceeding by stating them in the complaint had an ongoing prejudicial effect upon petitioner's ability to prepare a defense that continued throughout the investigation and was aggravated by the respondent's failure to notify him of a new factual allegation until after the investigation had closed."⁷⁰

⁶⁹ *Matter of Doe v. Skidmore Coll.*, 152 A.D.3d 932, 933 (3rd Dep't 2017).

⁷⁰ *Id.* at 939.

The Court further determined that the College erred in applying its own policy. The College was in violation after it considered a prior incident involving public speech which was not "substantially similar" to the incident at hand.⁷¹ Because the determination relative to the violations and the recommendation for John's expulsion were not made in substantial compliance with the College's policy, the decision of the trial court was annulled as arbitrary and capricious. The Court concluded, "We find that there were multiple failures here, taken together, demonstrated a lack of substantial compliance."⁷²

The judgment of the trial court was reversed, and the College was directed to reinstate John as a student and expunge all reference to the matter from his school record.

6. John Doe v. University of Cincinnati

Campus Adjudication

"John Doe" met "Jane Roe" online, and after communicating for several weeks, the two met in person. Afterwards, John invited Jane back to his apartment, where the two engaged in sexual intercourse. Three weeks later, Jane filed a complaint with the University of Cincinnati's (University) Title IX Office claiming the sexual encounter was nonconsensual.

A hearing panel was convened. Jane did not appear for the hearing but provided a written statement. The panel accepted her written statement despite the fact that it was not notarized as required by school policy. The panel reviewed the written report compiled by the Title IX investigator but heard from no witnesses. During his opportunity to speak, John responded to the panel's questions and challenged a number of Jane's allegations, especially the claim that the sexual encounter was not consensual.

John was found responsible and suspended for two years. After an unsuccessful appeal to the University, John filed suit alleging lack of due process arising from a failure to allow for cross-examination.

Trial Court

The district court ruled that John demonstrated a strong likelihood of success on the merits of his due process claim. Accordingly, the court entered an order enjoining the University from suspending John. The University filed an immediate appeal.

⁷¹ *Id.* at 940.

⁷² *Id.* at 935.

Appeals Court

The Court observed that the University's finding of responsibility necessarily credits Jane's version of events and her credibility.⁷³ However, the Title IX Office proffered no other evidence "to sustain the University's findings and sanctions" apart from Jane's hearsay statements.⁷⁴ The University's failure to provide any form of confrontation of Jane made the proceeding against John fundamentally unfair.⁷⁵

Given the parties' competing claims, and the lack of corroborative evidence to support or refute Jane's allegations, the present case left the panel with "a choice between believing an accuser and the accused."⁷⁶ "Yet, the panel resolved this 'problem of credibility' without assessing Roe's credibility."⁷⁷

The Court further noted that in the case of competing narratives, "cross-examination has always been considered a most effective way to ascertain the truth."⁷⁸ If a university's procedures are insufficient to make "issues of credibility and truthfulness clear to the decision makers," that institution risks removing the wrong students, while overlooking those it should be removing.⁷⁹

"While protection of victims of sexual assault from unnecessary harassment is a laudable goal, the elimination of such a basic protection for the rights of the accused raises profound concerns."⁸⁰

The district court ruling was affirmed. The district court subsequently denied the University's motion to dismiss.

7. Matthew Jacobson v. Butterfly Blaise (SUNY at Plattsburgh)

Campus Adjudication

A male and female student had sex three times on the night of Oct. 31, 2015 in the female student's dorm room. Five days later, she filed a complaint with the State University of New York at Plattsburgh (University) health center, alleging that she did not give affirmative consent to the encounter, which was required under the state's recently enacted "Enough is Enough" law.

⁷³ *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401 (6th Cir. 2017).

⁷⁴ *Id.*

⁷⁵ *Id.* at 396.

⁷⁶ *Id.* at 402; *Citing Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005).

⁷⁷ *Id.*

⁷⁸ *Id.* at 401; *Citing Watkins v. Sowders*, 449 U.S. 341, 349 (1981).

⁷⁹ *Id.* at 403; *See Furey v. Temple Univ.*, 844 F. Supp. 2d 223 (E.D. Pa. 2012).

⁸⁰ *Id.* at 404; *Citing Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 604-605 (D. Mass. 2016).

The investigator/Title IX coordinator, Butterfly Blaise (Blaise), met with the female student, then with the accused over three and a half months later. At the hearing, the male student was not allowed to pose questions to the female student. Instead, he was only able to question Blaise, whom the University had designated the “complainant,” because she was the individual who decided that charges were warranted.

The “Enough is Enough” law defines affirmative consent as “a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.”⁸¹ However, during the hearing, the Title IX coordinator incorrectly stated that only the initiating party was required to get consent, and inaccurately defined affirmative consent by rejecting the notion that affirmative consent can be inferred from conduct.

The panel determined that the male student had not met the affirmative consent standard and imposed a punishment of dismissal. The University’s appeals board upheld the decisions.

Trial Court

Upon receiving the University’s decision, the male student submitted a motion to have his case transferred to the Appellate Division. This motion was granted, and the case was transferred.

Appeals Court

Blaise's mistakes raise a concern with regard to the University’s determination, which was, simply, that the male student was responsible for violating the student code of conduct because he "initiated sexual intercourse with another student three different times without establishing affirmative consent."⁸² By this determination, the University failed to provide the requisite "findings of fact . . . [and] rationale for the decision and the sanction."⁸³ As a consequence of Blaise's erroneous interpretations, the Court was unable to discern whether the University properly determined that the male student initiated the sexual activity or even considered whether affirmative consent was given based on the reporting individual's conduct.

The Court agreed with the male student that Blaise gave an erroneous interpretation of affirmative consent and failed to determine whether the male student initiated sexual activity. The case was remanded for a new hearing.

⁸¹ *Matter of Jacobson v. Blaise*, 164 A.D.3d. 1072, 1074 (3d Dep’t 2018).

⁸² *Id.* at 1079.

⁸³ *Id.* at 1075; *Citing* Education Law § 6444(5)(b).

8. John Doe v. University of Miami (OH)

Campus Adjudication

On September 13, 2014, “John Doe” and “Jane Roe” engaged in sexual activity while both were under the influence of alcohol. John did not recall the events of the night, so the facts were established based on Jane’s recollection.

Jane and John engaged in consensual kissing in John’s bed. John then asked to take things further. Jane first refused, but ultimately said “ok, fine.” Then, Jane told John to stop. He did, and the two went back to kissing. Shortly thereafter, John asked to perform oral sex. Despite telling him that she was not interested, John proceeded. Although Jane did not tell John to “stop,” she eventually pushed John off and the two then went to sleep.

A few days later, Jane informed some of her friends about the sexual encounter. One of those friends told a Resident Advisor (RA), who then notified the University of Miami (University).

On October 1, John was informed that a panel hearing was scheduled for October 7. The notification stated he needed to supply any written statement, witness list, and objection to the panel members by October 3. During the hearing, one of the panel members applied an affirmative consent standard, even though the University did not have such a policy.

John was found responsible and suspended for eight months. John’s appeal to the University was denied.

Trial Court

John filed suit against the University alleging three Title IX violations: erroneous outcome, selective enforcement, and deliberate indifference. He also alleged Section 1983 violations under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The University filed a motion to dismiss for failure to state a claim, which the district court granted.

Appeals Court

Erroneous Outcome: At the motion to dismiss stage, where all reasonable inferences must be drawn in favor of the plaintiff, the Court found that the inconsistency in Jane's testimony (said "no" and later said that she didn't say "no"), the unexplained

discrepancy in the hearing panel's finding of fact, and the use of an erroneous definition of consent created "some articulable doubt as to the accuracy" of the decision.⁸⁴

Equal Protection: The Court found that John sufficiently alleged the University treated him differently from those similarly situated without any rational basis. In this case, John alleged the University did not initiate an investigation into Jane for the same conduct he was found responsible for, and it was because of her sex.⁸⁵

Procedural Due Process: The Court found that John sufficiently pleaded a procedural due process claim against a panel member because she was not an impartial adjudicator (playing multiple roles as investigator, prosecutor and panel member who "dominated" the hearing), and she did not provide John with all the evidence used against him.⁸⁶

The Court affirmed the district court's dismissal of John's Title IX hostile environment claim, Title IX deliberate indifference claim, and 1983 substantive due process claim. However, the Court reversed the district court's dismissal of John's procedural due process and equal protection (failure to discipline Jane for her sexual misconduct) claims.

The case was remanded for further proceedings consistent with the Appellate ruling.

9. In the Matter of Ryan West v. SUNY at Buffalo

Campus Adjudication

Ryan West (West) was found responsible for sexual misconduct after he was accused of having sex with another student (Complainant) after she alleged that she was incapacitated during the encounter. The State University of New York at Buffalo (University) placed West on persona non grata status which barred him from campus and placed a notation of a disciplinary violation in his academic transcript.

Trial Court

After a hearing, the administrative court upheld the University's determination that West was responsible for having nonconsensual sex with Complainant. West immediately sought review by the Appellate Court.

⁸⁴ *Doe v. Miami Univ.*, 822 F.3d 579, 592 (6th Cir. 2018).

⁸⁵ *Id.* at 597.

⁸⁶ *Id.* at 603.

Appeals Court

On appeal, West sought to set aside the University's determination that his sexual encounter with Complainant was nonconsensual.

The Court determined that it may review whether "the determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."⁸⁷ After reviewing the record as a whole, the Court found that Complainant's testimony at the hearing contradicted her statement to the Buffalo Police Department. Furthermore, the Court cited the affidavit of a witness which established that the Complainant could not have been incapacitated at the time of the incident.

The Court found the University's determination was not supported by substantial evidence. As such, the Court set aside the University's ruling.

10. John Doe v. Boston College

Campus Adjudication

On October 20, 2012, "John Doe," a senior at Boston College, attended a school event on the Spirit of Boston cruise ship. While crossing a heavily crowded dance floor, a woman (A.B.) turned around and screamed at him, claiming she felt a hand go up her dress and two fingers forcibly inserted into her anus.

According to John, another male (J.K.), who was walking in front of him across the dance floor, turned around after A.B. screamed and said, "Sorry, dude, that was my bad." Regardless, John was detained by security guards on the ship, and turned over to Massachusetts State Police upon returning to the pier. The police arrested John and took swabs of his clothing, hands, and fingernails for evidence.

The Commonwealth of Massachusetts (Commonwealth) filed criminal charges against John in October 2012. In February 2013, the forensic testing was completed, showing that John's hands were negative for traces of blood. During the discovery phase, John produced a surveillance video from the ship that had been forensically enhanced. In May 2014, the Commonwealth moved to dismiss the charges, and the court granted the motion.

In the meantime, Boston College (College) placed John on a summary suspension. The College's disciplinary hearing began on November 8, two weeks after the alleged incident. Without the benefit of the forensic evidence or the enhanced video, the panel

⁸⁷ *Matter of West v. State Univ. of N.Y. at Buffalo*, TP 17-00481 (4th Dep't 2018); *See Matter of Haug v. State Univ. of N.Y. at Potsdam*, 149 A.D.3d 1200, 1201 (3d Dep't 2017).

heard from several witnesses, none of whom saw John do anything. The panel also called in J.K. to testify, after reassuring him that he was not charged with anything so as to put him “at ease.” J.K. denied any wrongdoing or admission of guilt on the dance floor to John.

After deliberations, the panel could not reach a decision, so they delayed the proceedings for one week. Over the weekend, one of the panel members spoke to then-Senior Associate Dean of Students Carole Hughes (Hughes) to advise that the panel was “struggling” whether to reach a “no finding” decision. Hughes then told Dean of Students Paul Chelator (Chelator), who advised Hughes that he “discouraged” no-finding verdicts. Hughes then conveyed this information to the panel members.

When the panel reconvened, it found John responsible for a lesser offense of indecent assault and battery. John’s appeal was later denied by Chebator.

Trial Court

Following the College’s adverse decision, John filed suit. The district court granted summary judgment in favor of the College on all counts.

Appeals Court

On appeal, the Court explained, “Under the standard of reasonable expectations, it is reasonable for a student to expect that the B.C. Student Guide’s language stating that ‘[t]he Board will meet in private to determine whether the accused is responsible or not [,]’ means exclusion of outside influences in the Board’s deliberations. Furthermore, during oral argument, B.C.’s counsel agreed that B.C. is required to conduct disciplinary proceedings with basic fairness. In this context, conducting these proceedings with basic fairness excludes having an associate Dean of Students tell the Board Chair that one of the verdict options favorable to the student (“no finding”) was discouraged by the Dean of Students.”⁸⁸

As such, the Court decided to “[v]acate the district court’s grant of summary judgement as to John’s (1) breach of contract claim for the 2012 disciplinary proceedings and (2) basic fairness claim.”⁸⁹ The district court’s decision to dismiss all of the other claims was affirmed.

⁸⁸ *Doe v. Trs. of Bos. Coll.*, 892 F.3d 67, 86 (1st Cir. 2018).

⁸⁹ *Id.* at 95.

11. John Doe v. Claremont McKenna College

Campus Adjudication

“John Doe,” a student at Claremont McKenna College (College) and “Jane Roe,” student at neighboring Scripps College, went to John’s room one night when both were drunk. They began kissing and undressed each other. John left at some point to get condoms from outside his resident advisor’s (RA) room but struggled to keep one on. According to Jane, the sexual activity with John was consensual until she withdrew consent near the end of the encounter.

Jane filed her sexual assault claim months later. However, her version of events contradicted what she told friends and medical officials. Jane’s story to College officials evolved over time, as well. John was informed that the allegation centered around the question of consent, without advising him that it was the alleged withdrawal of consent near the end of the encounter that was at issue.

During the campus adjudication, the College’s Title IX investigator also served as a committee member. Jane did not appear at the hearing. As such, neither John nor the committee was able to ask Jane any questions, nor was there any basis for the committee to evaluate her credibility.

The committee accepted Jane’s contention that she did not consent to have unprotected sex. Committee members also found the fact that Jane sustained injuries during the encounter and sought medical treatment afterward corroborated her testimony that John became rough during sex, and that she had struggled to break free. The committee also found that John’s own words—that Jane did not seem “super into it” and that he could not remember her verbally giving consent—weighed against him.

The school review committee found John responsible for having nonconsensual sex with Jane and imposed a one-year suspension.

Trial Court

Following the College’s determination, John filed suit. John raised claims about lack of adequate notice, improper investigation, and an erroneous finding that was not supported by substantial evidence. John argued that he was denied a fair hearing because Jane failed to appear, thus preventing him and the committee from questioning her and assessing her credibility. The trial court did not agree.

Appeals Court

On appeal, the Court noted that the College's obligation in a case which turns on the complaining witness's credibility is to "provide a means for the [fact finder] to evaluate an alleged victim's credibility, not for the accused to physically confront his accuser."⁹⁰

The Court determined, where the accused faces potentially severe consequences and the committee's decision turns on the credibility of the complainant (Jane), the committee's procedures should have included an opportunity for the committee to assess the complainant's credibility by having her appear at the hearing in person or by videoconference technology. The Court reasoned that such a mechanism would allow appropriate questions to be posed by the committee or the accused.⁹¹

The Court reversed the judgment of the lower court.

12. John Doe v. Baum

Campus Adjudication

"John Doe" and "Jane Roe" were both students at the University of Michigan (University) when they had sex at a fraternity party. Two days later, Jane filed a complaint with the University claiming that she was too intoxicated to consent. An investigation was initiated shortly thereafter. John maintained that the event was consensual; however, Jane asserted that she lapsed in and out of consciousness throughout the incident. Witness testimony did not prove helpful to the investigation.

Following a three-month investigation, the Title IX investigator recommended that the University rule in John's favor and close the case. Jane appealed this decision and the case was sent to the University appeals board (Board). The Board eventually reversed because it found Jane's description of the events to be more credible than John's. Subsequently, John withdrew from the University to avoid potential expulsion.

Trial Court

Following his departure from the University, John filed suit and claimed that the University's disciplinary proceeding violated the Due Process Clause and Title IX. John argued that the University violated his due process rights because it was required to provide a hearing with the right to cross-examine. John also argued that the University violated Title IX when it discriminated against him on the basis of sex. Under John's Title

⁹⁰ *Doe v. Claremont Mckenna Coll.*, 25 Cal. App. 5th 1055, 1073 (2018); *Citing Doe v. Univ. of Cincinnati*, 872 F.3d 393, 406 (6th Cir. 2017).

⁹¹ *Id.* at 1057.

IX claim, he asserted three separate theories. John claimed that the University “(1) reached an erroneous determination because of his sex, (2) relied on assumptions about sexes when reaching a determination, and (3) exhibited deliberate indifference to sex discrimination in his proceeding.”⁹²

The University filed a motion to dismiss all of John’s claims and the district court granted in full. The district court reasoned that the absence of cross-examination was “immaterial.”⁹³ . John appealed the district court’s decision.

Appeals Court

Regarding John’s due process claim, the Sixth Circuit has held that “if a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension, and when the university’s determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination.”⁹⁴ The Court found that “students have a substantial interest at stake when it comes to school disciplinary hearings for sexual misconduct.”⁹⁵ As such, the Court reversed the district court’s ruling and determined that John did raise a plausible claim for relief under the Due Process Clause.

Under John’s Title IX claim, he appealed all three legal theories. The Court only considered John’s erroneous outcome theory as the latter two theories do not apply in the context of university disciplinary proceedings. Regarding John’s erroneous determination theory, the Court reversed the district court’s ruling after it found that the University’s decision to reject all of the male witness testimony and accept all of the female witness testimony could have been gender-bias. The Court found that an “allegation of adjudicator bias, combined with the external pressure facing the university, makes Doe’s claim plausible.”⁹⁶

13. John Doe v. Regents of University of California

Campus Adjudication

“John Doe” and “Jane Roe” were both undergraduate students at the University of California – Santa Barbara (University). On the night of the alleged incident, Jane was celebrating the birthday of John’s girlfriend (Witness) at an apartment that John and Witness shared. Jane became intoxicated and decided to lie down on a mattress that was located in the living room. John later returned to the apartment intoxicated and

⁹² *Doe v. Baum*, 903 F.3d 575, 585 (6th Cir. 2018).

⁹³ *Id.* at 581.

⁹⁴ *Id.* at 582; *Citing Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399-402 (6th Cir. 2017).

⁹⁵ *Id.*

⁹⁶ *Id.* at 586.

was instructed to lie down on the mattress with Jane. John did so with Witness and another individual in the same room. John and Jane were both fully clothed.

Jane alleged that John sexually assaulted her while she slept on the mattress. Jane eventually filed a formal complaint with the University Title IX office. John was immediately notified that he was being placed on suspension and was not allowed on campus. Although John contested the suspension, the University upheld its decision. After nearly 10 months, the University concluded its investigation and determined that Jane's claims were substantiated. John was charged with multiple violations of the University's Student Conduct Code.

John was later notified that he had a hearing before the Sexual/Interpersonal Violence Conduct Committee (Committee). Prior to the hearing, John submitted a list of exhibits, witnesses, and other evidence. Jane submitted a list of witnesses and her Sexual Assault Response Team (SART) report prior to the rescheduled hearing. A SART kit is collected by a medical practitioner and typically contains the results of a sexual assault examination or evidence collected in response to an alleged sexual assault.⁹⁷

A two-member Committee conducted a hearing to determine if John was in violation. Jane testified that, while she was sleeping next to John, she felt severe pain in her anus and could tell that her stomach and breasts were exposed. Jane asserted that she eventually realized it was John who was assaulting her. Jane began mumbling in French to get the attention of Witness who was seated on a couch near the mattress. Jane told Witness, "[W]hoever's behind me is hurting me badly . . . [my] butt and nipples hurt."⁹⁸ Witness informed Jane that she was having a bad dream because Jane's clothes were still on.

John denied all of Jane's allegations and testified that he has a genetic neurological disorder "which affects his motor skills, especially when tired or drunk."⁹⁹ John's disorder would have made the conduct alleged by Jane quite difficult. Witness also testified and stated that she did not hear or see any sexual assault and that it was physically impossible for any of Jane's allegations to be true. The Committee eventually found that John had violated the student conduct code. John was placed on suspension.

Trial Court

Following the Committee's decision, John filed a writ of administrative mandate in superior court to challenge the finding. John argued that he was "deprived of due process during the administrative hearing because, among other reasons, the Committee chose to apply the rules of evidence on an ad hoc basis and to withhold

⁹⁷ See *People v. Uribe*, 162 Cal. App. 4th 1457, 1463 (2008).

⁹⁸ *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44, 50 (2018).

⁹⁹ *Id.* at 51.

critical and exculpatory evidence.”¹⁰⁰ John asserted that he was not provided with Jane’s SART report, which was a subject of testimony, and was not permitted to present evidence about the effects of an anti-depressant which Jane was taking.

The superior court denied John’s petition for a writ.

Appeals Court

On appeal, John argued that the University violated his due process rights after it withheld and excluded relevant evidence, as well as selectively enforced the rules of evidence.

John’s due process claim centers around the availability of Jane’s SART report. John contests that the University’s decision to withhold the report hindered his ability to cross-examine witnesses and challenge the report. While the Court found that a university need not adhere the formal rules of evidence, it determined that the rules “serve as a guide for the Committee to arrive at a decision based on ‘principles of fairness and common sense.’”¹⁰¹ The Court stated that “The Committee should not have considered the SART evidence without giving John timely and complete access to the report . . . The error was prejudicial and requires reversal.”¹⁰²

The Court also considered other cumulative errors that occurred at the Committee hearing. Most notably, the Court found John was unable to cross-examine Jane as she refused to answer his questions, John’s counsel was unable to actively participate in the hearing while University counsel was, and John was not permitted to present witnesses who could testify about the effects of Jane’s anti-depressants.

As such, the judgment was reversed and remanded.

14. John Doe v. University of Southern California

Campus Adjudication

In April 2014, “John Doe” and “Jane Roe” both attended a fraternity paint party while they were both students at the University of Southern California (University). John and Jane eventually ended up at Jane’s apartment where they began having sex. During the sexual encounter, John attempted to have anal sex with Jane. Jane became very upset and the encounter eventually ended. Later that morning, John left the apartment.

¹⁰⁰ *Id.* at 55.

¹⁰¹ *Id.* at 57.

¹⁰² *Id.* at 59.

That same day, Jane was driven to a rape treatment center where a SART kit was obtained. Jane refused to release the SART kit to the Los Angeles Police Department. Following the examination, Jane was picked up at the treatment facility by her friend Andrew. The two returned to her apartment where Jane asked Andrew to throw away her bed sheets. Later that month, Jane filed a formal complaint to the University SJACS. Jane alleged that John sexually assaulted her, and she was subsequently interviewed by Dr. Allee. John was notified and immediately placed on interim suspension.

Although Dr. Allee was the initial Title IX investigator, she was replaced by an outside attorney (Mirkovich) who conducted several witness interviews. The case was eventually transferred back to Dr. Allee. Throughout the investigation, the University provided summaries of witness interviews and other information; however, John never received Jane's medical report, her clothing from the night of the incident, or any evidence from the rape treatment center.

After the investigation was completed, Dr. Allee found that John violated the student conduct code. Dr. Allee found that John knew or should have known that Jane was too intoxicated to consent to sexual activity. The University expelled John. Although John appealed the decision, the appeal was denied. John was then expelled from the University.

Trial Court

Following his expulsion, John filed a writ of administrative mandamus. John claimed that he was denied fair process and that the University findings were not supported by substantial evidence.

The trial court denied John's petition after it found that there was substantial evidence to support the University's determination.¹⁰³

Appeals Court

On appeal, John first argued that he was not provided a fair administrative proceeding. John claims that he was denied a fair hearing because Dr. Allee did not interview witnesses to assess their credibility.

The Court stated the following:

Where a student faces a potentially severe sanction from a student disciplinary decision and the university's determination depends on witness credibility, the adjudicator must have the ability to observe the demeanor of those witnesses in deciding which witnesses are more credible.¹⁰⁴

¹⁰³ *Doe v. Univ. of S. Cal.*, No. 3271834, 2018 WL 6499696 at 11* (2018).

Since there was a lack of physical evidence, the Court found Dr. Allee had to rely on the statements of numerous witnesses. However, a fair hearing was required so that Dr. Allee could “assess the credibility of critical witnesses . . . in person or by videoconference or other technological means, which would have provided Dr. Allee an opportunity to observe the witnesses’ demeanor.”¹⁰⁵

After reviewing the record, the Court found that John was deprived of a fair hearing because of Dr. Allee’s failure to personally assess the credibility of critical witnesses. During the hearing, Dr. Allee relied on witness testimony that was clearly inconsistent. Additionally, the Court determined that there was a conflict of interest as Dr. Allee was both an investigator and adjudicator during the grievance procedure.

John also argued that the University violated its own policies and procedures when it failed to conduct “[a] fair, thorough, neutral and impartial investigation of the incident.”¹⁰⁶ The Court found that Dr. Allee failed to request that Jane provide her clothes from the night of the incident and failed to request that Jane release her medical records, thus “hampering John’s ability to defend himself.”

The Court reversed the trial court’s decision and remanded the matter with instructions to allow for cross-examination if a new hearing occurs.

¹⁰⁴ *Id.* at 14.

¹⁰⁵ *Id.* at 16.

¹⁰⁶ *Id.* at 17.