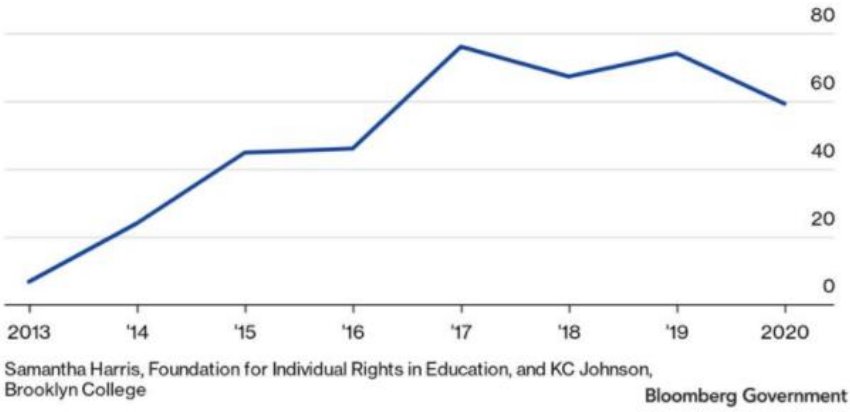
SPECIAL REPORT

Appellate Court Decisions for Allegations of Campus Due Process Violations, 2013-2020

SAVE

On April 4, 2011 the U.S. Department of Education (DOE) released its Dear Colleague Letter (DCL) on sexual violence.[1] The guidance required colleges and universities to adjudicate sexual misconduct claims internally, absent many of the due process protections found in the criminal justice system. Not surprisingly, these due process deficiencies led to a growing number of civil lawsuits filed by accused students who had been suspended or expelled from their universities:[2]



As of March 2021, over 680 lawsuits had been filed by accused students against their universities.[3] The stabilization in the numbers of lawsuits in 2018 and 2019 may reflect modest improvements in campus procedures as a result of previous, highly publicized legal decisions in favor of accused students.[4] The decline in lawsuits in 2020 likely is due to the fact that many campuses were closed during the COVID pandemic.

In 2017, the Proskauer Higher Education Group conducted detailed reviews of 130 complaints filed by accused students. The following due process violations were most commonly alleged:[5]

1. Investigative failures: 46.9%
2. Hearing failures: 46.2%
3. Improper/insufficient policies, or failure to conform to policies: 17.7%
4. Sex bias: 15.4%
5. Improper use or exclusion of witness testimony: 12.3%
6. Insufficient/improper training of school personnel: 11.5%
7. Insufficient notice to accused: 10.0%

---

[1] Department of Education Office for Civil Rights, *Dear Colleague Letter* (APRIL 4, 2011). http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.
[2] Andrew Kreighbaum, *Title IX Court Decisions Make it Harder for Biden to Rewrite Rules.* (April 5, 2021). https://www.bloomberg.com/news/articles/2021-04-05/devos-legacy-snags-biden-s-rewrite-of-college-male-bias-rules
[3] Title IX For All. https://www.titleixforall.com/
[4] Robert Carle, *The Strange Career of Title IX.* Academic Questions. (2016). https://www.nas.org/academic-questions/29/4/the_strange_career_of_title_ix
[5] Proskauer Higher Education Group, *Title IX Report: The Accused.* (2017) https://www.proskauer.com/report/title-ix-report-the-accused-08-28-2017

Among the 298 substantive decisions rendered through August, 2019, 151 were primarily in favor of the accused student.[6] The preponderance of decisions favoring accused students was even more striking than indicated by the raw numbers, given that "these rulings went against many decades of extremely broad judicial deference to university disciplinary decisions."[7]

In a minority of cases, one of the parties filed an appeal. As of the end of 2020, federal and state appellate courts rendered 23 decisions mostly favorable to the accused student. Appellate decisions are important because they have force of law for all other universities within the area of the court's jurisdiction.

This Special Report enumerates these 23 decisions, identifies the most common due process violations, discusses legal implications, and makes concluding observations.

SUMMARY OF APPELLATE LAWSUITS

Courts of appeals decisions are significant because they represent binding precedents that require other courts in that region to follow the appeals court's ruling in similar cases. State appeals courts may be referred to as a "Court of Appeals," "Supreme Court," or other similar designations.

The 23 decisions were rendered in these years:

- 2013: 1
- 2016: 3
- 2017: 3
- 2018: 7
- 2019: 5
- 2020: 4

Table I presents the Case Name and Decision Year, Court Name, and Due Process Violations for each decision. The cases are listed in chronological order.

[6] Samantha Harris and KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications,* 22 N.Y.U. J. LEGIS. & PUB. POL'Y 49 (2019). https://nyujlpp.org/wp-content/uploads/2019/12/Harris-Johnson-Campus-Courts-in-Court-22-nyujlpp-49.pdf

[7] Linda Chavez, et al., *Ending Sex Discrimination in Campus 'Sexual Misconduct' Proceedings.* (June 26, 2018). https://regproject.org/wp-content/uploads/RTP-Race-Sex-WorkingGroup-Paper-Campus-Misconduct-Proceedings.pdf

Table I

Listing of Appellate Decisions

No.	Case Name, Decision Year	Court Name	Due Process Violations
1	I.F. v. Administrators of the Tulane Educational Fund (2013)[8]	Court of Appeal of Louisiana, 4th Circuit	Insufficient hearing process; Insufficient notice
2	John Doe v. University of Southern California (2016)[9]	California Court of Appeals, 2nd District, Division Four	Insufficient hearing process; Insufficient notice; Inadequate credibility assessment
3	John Doe v. Columbia University (2016)[10]	US Court of Appeals, 2nd Circuit	Improper use or exclusion of witness testimony; Potential sex bias
4	Abdullatif Arishi v. Washington State University (2016)[11]	Washington Court of Appeals, Division III	Insufficient hearing process
5	In the Matter of John Doe v. Skidmore College (2017)[12]	Appellate Division of New York, 3rd Circuit	Insufficient notice; Inadequate investigation; Improper use or exclusion of witness testimony
6	John Doe v. University of Cincinnati (2017)[13]	US Court of Appeals, 6th Circuit	Insufficient hearing process; Insufficient notice; Lack of cross-examination; Inadequate credibility assessment
7	Matthew Jacobson v. Butterfly Blaise (SUNY Plattsburgh) (2018)[14]	Appellate Division of New York, 3rd Circuit	Insufficient hearing process; Misuse of affirmative consent policy
8	John Doe v. University of Miami (OH) (2018)[15]	US Court of Appeals, 6th Circuit	Insufficient hearing process; Insufficient notice; Inadequate investigation; Conflicting roles of college

[8] *I.F. v. Adm'rs of Tulane Educ. Fund*, 131 So.3d 491 (La. App. 4th Cir. 2013).
[9] *Doe v. Univ. of S. Cal.*, 246 Cal. App. 4th 221 (2016).
[10] *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016)
[11] *Arishi v. Wash. State Univ.*, 385 P.3d 251 (2016).
[12] *Matter of Doe v. Skidmore Coll.*, 152 A.D.3d 932 (3rd Dep't 2017).
[13] *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017).
[14] *Matter of Jacobson v. Blaise*, 164 A.D.3d. 1072 (3d Dep't 2018).
[15] *Doe v. Miami Univ.*, 822 F.3d 579 (6th Cir. 2018).

			officials; Potential sex bias; Misuse of affirmative consent policy
9	In the Matter of Ryan West v. SUNY at Buffalo (2018)[16]	Appellate Division of New York (4th)	Insufficient hearing process; Inadequate credibility assessment
10	John Doe v. Boston College, et. al. (2018)[17]	US Court of Appeals, 1st Circuit	Insufficient hearing process; Conflicting roles of college officials
11	John Doe v. Claremont McKenna College (2018)[18]	California Court of Appeals, 2nd District, Division One	Lack of cross examination; Inadequate credibility assessment
12	John Doe v. David H Baum, et al. (University of Michigan) (2018)[19]	US Court of Appeals, 6th Circuit	Lack of cross examination; Inadequate credibility assessment; Potential sex bias
13	John Doe v. The Regents of the University of California, et al. (2018)[20]	California Court of Appeals, 2nd District, Division Six	Insufficient hearing process; Inadequate investigation; Lack of cross-examination
14	John Doe v. University of Southern California (2018)[21]	California Court of Appeals, 2nd District, Division Seven	Insufficient hearing process; Inadequate investigation; Conflicting roles of college officials; Lack of cross-examination; Inadequate credibility assessment; Improper use or exclusion of witness testimony
15	John Doe v. Kegan Allee et al. (2019, USC) (2019)[22]	California Appeals Court, 2nd District, Division Four	Lack of cross examination; Single investigator model
16	John Doe v. Ainsley Carry et al. (USC) (2019)[23]	California Appeals Court, 2nd District, Division Four	Lack of cross examination; Single investigator model; Improper review of appeal

[16] *Matter of West v. State Univ. of N.Y. at Buffalo*, TP 17-00481 (4th Dep't 2018)
[17] *Doe v. Trs. of Bos. Coll.*, 892 F.3d 67 (1st Cir. 2018).
[18] *Doe v. Claremont Mckenna Coll.*, 25 Cal. App. 5th 1055 (2018).
[19] *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).
[20] *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44 (2018).
[21] *Doe v. Univ. of S. Cal.*, No. B271834, 2018 WL 6499696 (2018)
[22] *Doe v. Allee*, 242 Cal. Rptr. 3d 109 (Cal. App. 2d Dist. 2019)
[23] *Doe v. Carry*, B282164, 2019 WL 155998 (Cal. App. 2d Dist. Jan. 8, 2019)

17	John Doe v. Westmont College, et al. (2019)[24]	California Appeals Court, 2nd District, Division Six	Inadequate credibility assessment; Withholding evidence from accused; Inability to question witnesses
18	Matter of Bursch v. Purchase Coll. of the State Univ. of N.Y. (2019)[25]	Court of Appeals of New York (New York's Supreme Court)	University refused to allow student's attorney to attend disciplinary hearing
19	John Doe v. Purdue University et al. (2019)[26]	U.S. Court of Appeals, Seventh Circuit (Barrett, J.)	University withheld evidence from accused; Inaccurate investigative report; Hearing panel did not read investigative report
20	John Doe v. University of the Sciences (2020)[27]	U.S. Court of Appeals, Third Circuit	Selective enforcement of sexual misconduct policy; Lack of live hearing with cross examination
21	John Doe v. Oberlin College (2020)[28]	U.S. Court of Appeals, Sixth Circuit	"inexplicable" decision to discipline plaintiff; University's failure to follow own policy or meet its own deadlines
22	David Schwake v. Arizona Board of Regents (2020)[29]	U.S. Court of Appeals, Ninth Circuit	Initial refusal to allow appeal; Open hostility to accused; Appeals panel only credited female testimony
23	John Doe v. University of Arkansas – Fayetteville (2020)[30]	U.S. Court of Appeals, Eighth Circuit	"Unexplained" finding of female student's incapacitation; External pressure from OCR and state legislature; Student protests

[24] *Doe v. Westmont College*, 246 Cal. Rptr. 3d 369 (Cal. App. 2d Dist. 2019), *reh'g denied* (May 17, 2019)
[25] *Bursch v. Purchase College of State U. of New York*, 125 N.E.3d 830 (N.Y. 2019)
[26] *Doe v. Purdue U.*, 928 F.3d 652 (7th Cir. 2019) (Barrett, J.)
[27] *Doe v. U. of Scis.*, 961 F.3d 203 (3d Cir. 2020)
[28] *Doe v. Oberlin College*, 963 F.3d 580 (6th Cir. 2020)
[29] *Schwake v. Arizona Bd. of Regents*, 967 F.3d 940 (9th Cir. 2020)
[30] *Doe v. U. of Arkansas - Fayetteville*, 974 F.3d 858 (8th Cir. 2020)

In two other cases, an appellate court ruled in favor of the accused student, but these cases are not included in the Table:

1. *Collick, et. al. v. William Paterson University:*[31] The court did not have access to the complete factual record and the decision was not published.
2. *Boermeester v. Carry*:[32] The Court's original decision stated, "Certified for Publication," which afforded the decision precedential value. But the California Supreme Court subsequently depublished the Court of Appeal opinion.[33]

Table II lists the 23 decisions according to their area of geographical applicability:

Table II

Federal and State Decisions, by Area of Jurisdiction

Jurisdiction	Decisions
Federal Courts	
First Circuit: Massachusetts, Rhode Island, and Maine	Doe v. Boston College
Second Circuit: New York, Connecticut, and Vermont	Doe v. Columbia University
Third Circuit: Pennsylvania, New Jersey, and Delaware	In the Matter of Doe v. Skidmore College; Matthew Jacobson v. Butterfly Blaise
Sixth Circuit: Michigan, Ohio, Kentucky, and Tennessee	Doe v. University of Cincinnati; Doe v. University of Miami (OH); Doe v. David H Baum; Doe v. Oberlin College
Seventh Circuit: Illinois, Indiana, and Wisconsin	Doe v. Purdue University
Eighth Circuit: North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri, and Arkansas	Doe v. University of Arkansas – Fayetteville
Ninth Circuit: California, Arizona, Oregon, Washington, Nevada, Idaho, and Montana	David Schwake v. Arizona Board of Regents

[31] *Collick v. William Paterson Univ.*, 699 Fed. App'x. 129 (3d Cir. 2017)
[32] *Boermeester v. Carry.* https://www.courtlistener.com/opinion/4758721/boermeester-v-carry/
[33] California Women's Law Center, *California Supreme Court Grants Review in USC Campus Domestic Violence Case Boermeester v. Carry.* (September 24, 2020). https://www.cwlc.org/2020/09/california-supreme-court-grants-review-in-usc-campus-intimate-partner-violence-case-boermeester-v-carry/

State Courts	
California	Doe v. University of Southern California; Doe v. Claremont McKenna College; Doe v. Regents of the University of California; Doe v. University of Southern California; Doe v. Kegan Allee (USC); Doe v. Ainsley Carry (USC); Doe v. Westmont College
Louisiana	I.F. v. Administrators of the Tulane Educational Fund
New York	In the Matter of Ryan West v. SUNY at Buffalo; Matter of Bursch v. Purchase Coll. of the State Univ. of N.Y.
Washington	Abdullatif Arishi v. Washington State University

These findings can be summarized as follows:

1. The due process violations spanned the full range of campus procedures, including lack of notice, biased investigations, flawed adjudications, and inadequate appeal processes. Deficiencies were noted even for the most fundamental due process procedures, notice and hearing.[34]
2. With the exception of *Arishi v. Washington State University*, all of the cases involved multiple procedural violations. The *Doe v. University of Miami* case involved six significant due process infractions.
3. The University of Southern California was the defendant in four of the appellate cases, suggesting a possible institutional hostility to fairness.
4. The appellate decisions now have force of law in 31 states, representing 67.4% of all public and private non-profit institutions of higher education in the United States.[35]
5. The largest number of decisions are clustered in California (7 decisions) and in the Sixth Circuit (4 decisions).

[34] *Dixon v. Ala. State Bd. of Ed.*, 294 F.2d 150, 151 (5th Cir. 1961).
[35] There are 2,714 public and private non-profit institutions of higher education in the 31 states: AR: 54; AZ: 58; CA: 374; CT: 46; DE: 12: IA: 56: ID: 15: IL: 155: IN: 83: KY: 52; LA: 55; MA: 122: ME: 29; MI: 114; MN: 89; MO: 113; MT: 26: ND: 20: NE: 31; NJ: 89; NV; 13; NY: 336; OH: 193; OR: 50; PA: 237; RI: 15; SD: 23; TN: 98: VT: 17; WA: 74; WI: 65. Total: 2,714. 2,714 divided by 4,026 in the entire country = 67.4%. Source: National Center for Education Statistics, College Navigator. https://nces.ed.gov/collegenavigator/ Accessed April 10, 2021.

DISCUSSION

Below, we summarize the three most egregious cases. We then discuss how the courts view cross examination as an element of due process, as well as pleading standards for sex discrimination cases.

Egregious Cases

The dictionary definition of "Kangaroo Court" states:[36]

> 1. A mock court in which the principles of law and justice are disregarded or perverted, or
> 2. A court characterized by irresponsible, unauthorized, or irregular status or procedures.

By this definition, each of the 23 decisions revealed the characteristics of a proverbial Kangaroo Court. Particularly egregious were the cases involving Oberlin College, the University of Southern California, and Purdue University:

1. *Doe v. Oberlin College*: During the hearing before the Sixth Circuit Court, counsel for the accused student revealed that Oberlin's Title IX coordinator had implemented an overhaul of the school's procedures that resulted in a 100% conviction rate of male students formally accused of sexual misconduct. In response, the Sixth Circuit strongly reprimanded the College, noting that "in this country, we determine guilt or innocence individually—rather than collectively, based on one's identification with some demographic group, and concluded the institution's expulsion of the innocent student was "arguably inexplicable."

2. *Doe v. Allee*: The University of Southern California used a single investigator model, an often-criticized form of Title IX adjudication where a single person conducts both the investigation and adjudication of the case. Worse, the university allowed an accused student to appeal an investigator's determination of guilt only if the investigator's decisions were not consistent with the information the investigator chose to include in the investigative report. Since the investigator decided what facts were included in the report, this made a successful appeal highly unlikely. The California Court of Appeals found this process "fundamentally unfair" and required that, when credibility is an issue, universities must provide some form of cross examination.

[36] Merriam-Webster. Kangaroo Court. https://www.merriam-webster.com/dictionary/kangaroo%20court

3. *Doe v. Purdue*: First, the university distributed a biased media article titled "Alcohol isn't the cause of campus rape. Men are." The article ignored the fact that sexual violence against men is also a widespread problem.[37] Second, the university refused to let the accused student review the evidence against him. Most egregiously, two of the hearing board members admitted to not reading the investigative report. The court found that these missteps, including the article that blamed "men as a class" for the problem of campus rape, raised a plausible inference of sex bias.

Cross Examination as an Element of Due Process

Several of the cases reveal that some appellate courts are willing to consider whether cross examination is required by due process or mandated by considerations of basic fairness. The Sixth Circuit ruled first; in *Doe v. Baum*, the Sixth Circuit held that when credibility is at issue, cross examination is required by due process. *Doe v. Baum*, 903 F.3d 575, 584.

Two other appellate courts followed suit, with slightly different standards:

- *Haidak v. Univ. of Mass.-Amherst,* 933 F.3d 56, 69: Held that "due process in the university disciplinary setting requires some opportunity for real-time cross-examination, even if only through a hearing panel" (internal quotations omitted)
- *U. of Sciences,* 961 F.3d at 215: Held that "basic fairness," as a matter of Pennsylvania law, requires "a live, meaningful, and adversarial hearing and the chance to test witnesses' credibility through some method of cross-examination"

In contrast, *U. of Arkansas - Fayetteville*, 974 F.3d at 867-68 held that cross examination is not required by due process.

The Ninth Circuit has not yet weighed in on whether cross examination is required by due process, but has suggested that it might so rule. In *Oyama v. Univ. of Haw.*, 813 F.3d 850, 875, the court stated in dicta that in contrast to academic decisions that do not require a hearing, disciplinary adjudications may require "more formal procedures." The Ninth Circuit did not address this question in *Schwake* because the university already provided cross examination protections.

The *U. of Sciences* decision deserves particular attention. The court held that since the private university promised a "fair" process in its Student Handbook, but did not define it, the court had to interpret the word "fair" according to its plain meaning and its usage in Pennsylvania state courts -- not according to the federal Constitution. So the court held that private universities in Pennsylvania are required to provide cross examination. The applicability of the ruling is unclear, however, for institutions in other states.

[37] Lara Stemple and Ilan Meyer, *Sexual Victimization of Men in America: New Data Challenge Old Assumptions.* American Journal of Public Health. (2014). https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4062022/

Pleading Standards for Allegations of Sex Discrimination

In the past, courts across the country looked to the Second Circuit's framework in *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994) when evaluating a Title IX sex discrimination claim. The *Yusuf* court set out two means through which an accused student could allege a sex discrimination violation: erroneous outcome or selective enforcement. In addition, the Sixth Circuit recently added "deliberate indifference" and "archaic assumptions" to the list of possible Title IX causes of action by accused students. *See Doe v. Miami Univ.*, 882 F.3d 579, 589.

Each of these frameworks required certain elements:

- A plaintiff suing under an "erroneous outcome" theory would have to show "(1) 'facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding' and (2) a 'particularized ... causal connection between the flawed outcome and gender bias.'" *See, e.g., Doe v. Miami U.*, 882 F.3d 579, 592 (6th Cir. 2018), *citing Yusuf.*
- For "selective enforcement", a plaintiff had to show, among other things, that a similarly situated (usually female) student of the opposite sex was treated more favorably by the university. *See, e.g., Mallory v. Ohio U.*, 76 Fed. Appx. 634 (6th Cir. 2003) (unpublished). This doctrinally mandated showing of a similarly situated student is often difficult for selective enforcement plaintiffs to muster, because they must find a similarly situated accused female so as to control for "anti-respondent bias." *See Doe v. U. of Denver*, 952 F.3d 1182 (10th Cir. 2020) (holding that "anti-respondent bias" does not raise an inference of gender discrimination).

Enter *Purdue.* On June 28, 2019, the Seventh Circuit held that in order to state a Title IX claim, an accused student plaintiff must only "raise a plausible inference that the university discriminated against [him] 'on the basis of sex.'" *Purdue*, 928 F.3d at 667-68. This broad construction of a Title IX claim opens the door to wrongly disciplined plaintiffs who may have had difficulty meeting the "erroneous outcome" or "selective enforcement" elements. Under the *Purdue* framework, an accused student must show, using any or all of the facts, that the university discriminated against him on the basis of sex.

The simplicity of the *Purdue* standard is compelling, which may explain why three other federal circuit courts have adopted it:

1. *Doe v. U. of Sciences*, 961 F.3d 203
2. *Schwake v. Arizona Bd. of Regents*, 967 F.3d 940
3. *Doe v. U. of Arkansas - Fayetteville*, 974 F.3d 858

As a result, roughly one third of federal courts across the country now recognize the *Purdue* standard, a remarkable development considering how new the standard is.

Summary

Collectively, the decisions on cross examination and pleading standards show that courts are increasingly skeptical of university sexual misconduct processes. The trend towards cross examination helps assure more reliable adjudication decisions, and the *Purdue* standard relaxes the burden an accused student must meet to plead his case.

CONCLUSIONS

The original implementing regulation of the Title IX law required that grievance procedures "provide for the prompt and equitable resolution of student and employee complaints."[38] Although these 23 cases may have been resolved in a prompt manner, clearly the process was far from being "equitable."

Overall, the appellate decisions clarify what protections are due on college campuses regarding the need for adequate notice of the allegations, impartial and accurate investigations, disclosure of evidence to the accused, fair hearings, lack of conflict among college officials, proper use of testimony by parties, and institutional compliance with its own policies.

Lawmakers, campus administrators, and students should take heed of these milestone judicial opinions. Students have needlessly suffered due to flawed campus policies. As a society, we must utilize the lessons learned from these opinions to prevent future miscarriages of justice.

ACKNOWLEDGEMENTS

Christopher Perry, Esq. conducted much of the research for the original version of this Special Report. Benjamin North played a lead role in researching the 2021 update.

[38] U.S. Department of Education, *Designation of coordinator, dissemination of policy, and adoption of grievance procedures.* 34 CFR 106.8(c) https://www.ecfr.gov/cgi-bin/text-idx?SID=69a8d5e1a8a4e43ee9%201685c254404%202c2&mc=true&node=pt34.1.106&rgn=div5#se34.1.106_18