ANALYSIS OF JUDICIAL DECISIONS AFFIRMING THE 2020 TITLE IX REGULATION

AS OF JANUARY 1, 2022

ABOUT THE ANALYSIS

Overview

The Fifth and Fourteenth Amendments to the U.S. Constitution provide that no person may be "deprived of life, liberty, or property, without due process of law." In recent years, numerous individuals and groups have expressed concerns about the lack of due process protections on college campuses, resulting in over 700 lawsuits by accused students against universities. As a consequence, campus due process has become a rapidly developing area of the law.

On August 14, 2020, the Department of Education's revised Title IX regulation, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," took effect.[1] The Rule consists of 27 due process provisions. The preamble to the regulation explains,

> "These final regulations, however, provide recipients with prescribed procedures that ensure that Title IX is enforced consistent with both constitutional due process, and fundamental fairness, so that whether a student attends a public or private institution, the student has the benefit of a consistent, transparent grievance process with strong procedural protections regardless of whether the student is a complainant or respondent." (page 78)

As of January 1, 2022, over 200 judicial decisions had been handed down affirming one or more of the major provisions of the 2020 regulation.[2] Three of the decisions arose from efforts to block the implementation of the newly issued regulation: *Victim Rights Law Center v. Cardona, Pennsylvania v. DeVos,* and *New York v. U.S. Department of Education.* In 175 of these cases, the judge provided a substantive legal rationale for the decision:

- U.S. Supreme Court: One decision
- Federal and state appellate courts: 29 decisions
- Federal and state trial courts: 145 decisions

This Analysis reviews each of these 175 decisions, provides a parenthetical that cites the legal basis, and quotes the passage(s) pertaining to the relevant regulatory provision. The 27 major provisions are presented in the order that they appear in the regulation; within each regulatory provision, the judicial decisions are arranged in reverse chronological order.

For each of 27 major regulatory provisions, this Analysis presents:

- Introduction
- Regulatory language
- Supreme Court and Appellate Court decisions, if available
- Trial Court decisions

[1] Title IX Regulations Addressing Sexual Harassment 2020, https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf

[2] Post Dear-Colleague Letter Rulings/Settlements. https://docs.google.com/spreadsheets/d/1CsFhy86oxh26SgTkTq9GV_BBrv5NAA5z9cv178Fjk3o/edit#gid=0

- Summary
- Recommendation for the upcoming Title IX regulation
- Memorable quote

Conclusions

This Analysis of Judicial Decisions reaches the following conclusions:

1. Judges view constitutionally based due process protections as requisite to campus sexual misconduct proceedings in public schools: "Everyone agrees that procedural due process is implicated when a public university imposes a suspension of this magnitude." (*Munoz v. Strong*, 2021)

2. In general, the judicial decisions did not turn on subtle interpretations of nuanced legal precepts. Rather, they were based on judicial recognition that colleges were failing to observe the most fundamental notions of fairness, often so gross as to suggest that sex bias was the motivating factor.

3. All 27 major provisions of the 2020 regulation were affirmed by, and/or consistent with at least one judicial decision.

4. The following eight regulatory provisions were affirmed by 25 or more court decisions:

    - Impartial Investigations (Section 106.45(b)(1)): 50 decisions
    - Bias Towards Complainant or Respondent (Section 106.45(b)(1)(iii)): 47 decisions
    - Institutional Sex Bias (Section 106.45): 44 decisions
    - Notice (Sections 106.45(b)(2)(i)(A), 106.45(b)(2)(i)(B), and 106.45(b)(5)(v)): 40 decisions
    - Cross Examination (Section 106.45(b)(6)(i)): 38 decisions
    - Evidence Evaluation (Section 106.45(b)(1)(ii)): 36 decisions
    - Access to Evidence (Sections 106.45(b)(5)(iii) and 106.45(b)(5)(vii)): 28 decisions
    - Credibility Assessment (Section 106.45 (b)(1)(ii)): 26 decisions

5. The most common legal bases for these decisions were, in descending order of frequency:

    - Title IX statutory law — 50% of decisions
    - Constitutional law: Due process and equal protection — 32% of decisions
    - Contract law — 20% of decisions
    - "Fundamental fairness" — 10% of decisions
    - State law — 9% of decisions
    - Other bases — 9% of decisions

6. In *Victim Rights Law Center v. Cardona,* Judge William Young rejected 12 of 13 challenged provisions in the 2020 Title IX Regulation. The only invalidated section was the provision that precluded postsecondary institutions from considering any statement made by a party

or witness who did not submit to cross examination at a live hearing. Judge Young's decision is notable because it addressed so many provisions in a single ruling:[3]

- Institutional Sex Bias; Section 106.30
- Geographical/Programmatic Scope: Section 106.44(a)
- Presumption of Non-Responsibility: Section 106.45(b)(1)(iv)
- Reasonably Prompt Time Frames: Section 106.45(b)(1)(v)
- Possible Sanctions and Remedies: Section 106.45(b)(1)(vii)
- Mandatory Dismissal of Formal Complaints: Section 106.45(b)(3)(i)
- Discretionary Dismissals/Notice of Dismissal: Section 106.45(b)(3)(ii)
- Prohibiting the Restriction of the Ability of Either Party to Discuss the Allegations or Gather and Present Relevant Evidence: Section 106.45(b)(5)(iii)
- Elementary and Secondary School Recipients May Require Hearing and Must Have Opportunity to Submit Written Questions: Section 106.45(b)(6)(ii)
- Preemptive Effect: Section 106.6(h)
- Exercise of Rights Protected by the First Amendment is not Retaliation: Section 106.7(b)(1)
- Making a Materially False Statement in Bad Faith is not Retaliation: Section 106.71(b)(2)

Special Reports

SAVE previously published three Special Reports that examine various facets of campus due process lawsuits:

- 2021: Appellate Court Decisions for Allegations of Campus Due Process Violations, 2013-2020[4]
- 2018: 'Believe the Victim:' The Transformation of Justice[5]
- 2016: Victim-Centered Investigations: New Liability Risk for Colleges and Universities[6]

These Special Reports are available on the SAVE website.

Cases Not Included in Analysis

For about 30 opinions, the judge did not explain the legal or regulatory basis for the decision. In addition, the following decisions could not be located and are not included in this Analysis:

- *John Doe v. Ben Fils* (UC Berkeley)
- *Mohammadreza Alaeddini v. Regents of the University of California*
- *Christian Werner, et al. v. Albright College*
- *John Doe v. Duke University*
- *John Doe v. Regents of the University of California*

---

[3] *Victim Rights Law Center v. Cardona.* https://scholar.google.com/scholar_case?case=5400180818776936787&q=victim+rights+law+center+v.+cardona&hl=en&as_sdt=20000006&as_vis=1

[4] https://www.saveservices.org/wp-content/uploads/2021/04/Appellate-Court-Cases-2013-2020.pdf

[5] https://www.saveservices.org/wp-content/uploads/SAVE-Believe-the-Victim.pdf

[6] https://www.saveservices.org/wp-content/uploads/Victim-Centered-Investigations-and-Liability-Risk.pdf

- *John Doe v. University of California Santa Barbara, et al.*
- *John Doe v. University of Oregon*
- *Michigan State University Student #A44797612 v. Michigan State University*
- *John Doe v. UCLA*
- *John Doe v. Temple University, et al.*
- *John Doe v. Regents of the University of California (UCLA)*
- *John Doe v. Board of Regents of the University System of Georgia*

Acknowledgements

The reviews of these judicial decisions were conducted by the following third-year law students: Christian Cooper, George Mason University; Michael Miley, George Mason University; and Erin Pine, Villanova University, with the assistance of Edward Bartlett and Benjamin North.

Ordering Information

Online access to this Analysis is available for purchase for $100. Checks should be made payable to "SAVE" and mailed to P.O. Box 1221, Rockville, MD 20849. Or send via PayPal: https://www.paypal.com/donate/?hosted_button_id=JELDTQDKAQB6A

For more information, visit https://www.saveservices.org/title-ix-regulation/analysis-of-judicial-decisions/ , or email TitleIX@saveservices.org

JUDICIAL DECISIONS

For each of the 27 pertinent regulatory provisions in the Title IX regulation, this section lists:

- Introduction
- Regulatory language
- Supreme Court decisions, if available
- Appellate Court decisions, if available
- Trial Court decisions
- Summary
- Recommendation for the upcoming regulation
- Memorable quote

1. Equitable Grievance Procedures

Introduction

Due process is a bedrock principle in a society governed by fairness and rule of law.

Regulatory Language

The original implementing regulation of Title IX states at 34 CFR 106.8(b), "A recipient shall adopt and publish grievance procedures providing for prompt and *equitable* resolution of student and employee complaints alleging any action which would be prohibited by this part." (emphasis added).

Appellate Court Decisions

1. *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. Sep. 7, 2018) (reversing district court's dismissal of Doe's Title IX claim on due process grounds): "When it comes to due process, the 'opportunity to be heard' is the constitutional minimum… our circuit has made two things clear: (1) 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 (2) 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."

2. *I.F. v. Administrators of Tulane Educ. Fund*, 131 So. 3d 491, 499–500 (La. App. 4th Cir. Dec. 23, 2013) (holding that plaintiff I.F's procedural due process rights were violated): "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 misconduct. Based on the record before us, which does not contain the evidence that Tulane would have presented if the trial court had not granted the motion for involuntary dismissal, we find that I.F.'s procedural due process rights were ill-defined, ambiguously applied, and, as such, presumptively violated."

Trial Court Decisions

1. *Munoz v. Strong*, No. 1:20-CV-984, at *3-4 (W.D. Mich. June 23, 2021) (denying defendant's motion to dismiss on procedural due process grounds): "Everyone agrees that procedural due process is implicated when a public university imposes a suspension of this magnitude. The only question is what the particular requirements of notice and an opportunity to be heard are in this context. That is a necessary fact-based inquiry . . . plaintiff has sufficiently articulated alleged flaws in the process that could plausibly amount to a due process violation."

2. *Doe v. Coastal Carolina Univ.*, No. 4:18-CV-00268-SAL, 2021 WL 779144, at *5 (D.S.C. Mar. 1, 2021) (holding that Doe established a genuine issue of material fact as to sex bias by the University, thus warranting a Title IX claim): "Courts in other circuits have treated the Dear Colleague letter as relevant in evaluating the plausibility of a Title IX claim. *Id.* (citing *Doe v. Miami University*, 882 F.3d at 594 (6th Cir. 2018); *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018); *Doe v. Columbia Univ.*, 831 F.3d 46, 58 (2d Cir. 2016)). The rationale for the letter's relevance is as follows: the letter applied government pressure and threatened financial punishment in a way that could lead colleges to discriminate against men in their sexual assault adjudication processes."

3. *Doe v. Rensselaer Polytechnic Inst.*, No. 1:20-CV-1185, 2020 WL 6118492 (N.D.N.Y. Oct. 16, 2020) (holding that Doe established a prima facie case of sex discrimination, warranting a Title IX claim):

a. "In other words, whether the Department of Education would have penalized RPI for not complying with the new rules or not, it could easily have implemented the 2020 policy for Doe's hearing because it must implement that policy for all future Title IX complaints. Instead, defendant decided that it would be best to maintain two parallel procedures solely to ensure that at least some respondents would not have access to new rules designed to provide due process protections such as the right to cross-examination that have long been considered essential in other contexts. Such disregard for the inevitable administrative headaches of a multi-procedure approach certainly qualifies as evidence of an irregular adjudicative process. Similarly, the Court finds that a school's conscious and voluntary choice to afford a plaintiff, over his objection, a lesser standard of due process protections when that school has in place a process which affords greater protections, qualifies as an adverse action. That is precisely what RPI did in this case."*Id.* at *6–7.

b. "It is with no great difficulty that the Court resolves that issue in Doe's favor. Although RPI correctly noted at oral argument that Roe's rights need to be protected in this case as well, that protection cannot come at the expense of Doe's in the absence of a fair determination of his culpability. Moreover, that the new Title IX rules exist at all is evidence that national policymakers have determined that protecting the due process rights of those accused of sexual assault on college campuses is a matter of grave national import. There is no cause to actively impede those efforts by allowing a disciplinary hearing to move forward despite credible evidence of sex discrimination." *Id*. at *14.

4. *Pennsylvania v. DeVos*, no. 1:20-cv-01468-CJN, at *16 (D.D.C. Aug. 12, 2020) (denying the state's motion for preliminary injunction to enjoin the implementation of the 2020 Title IX Regulations because the state failed to establish a likelihood of success on the merits and that they were likely to suffer substantial irreparable harm): "The Court has reviewed the [Education] Department's discussion of the formal grievance process and its reasons for having adopted it and concludes that it cannot be characterized as 'arbitrary and capricious.'"

5. *New York v. U.S. Department of Education*, no. 20-cv-4260-JGK, at *20 (S.D.N.Y. Aug. 9, 2020) (denying the state's motion for preliminary injunction, or in the alternative, stay the 2020 Title IX Regulations because state failed to establish a likelihood of success on the merits and that they were likely to suffer substantial irreparable harm): "Because the [Title IX] statute does not specifically lay out how grievance procedures must be designed, it is within the authority of the DOE to decide, based on comments it received, that in order to ensure nondiscriminatory treatment of both complainants and respondents, schools should follow grievance procedures that are fair to both complainants and respondents before any disciplinary sanction can be taken against a respondent."

6. *Doe v. University of Michigan*, 448 F. Supp. 3d 715, 732 (E.D. Mich. Mar. 23, 2020) (granting Doe's motion for partial summary judgment and denying the university's MTD on due process grounds): "Due process safeguards apply to disciplinary proceedings in higher education. Flaim, 418 F.3d at 633; Miami Univ., 882 F.3d at 599; Cincinnati, 872 F.3d at 399."

7. *Doe v. Rollins College*, no. 6:18-cv-01069-Orl-37LRH, at *28 (M.D. Fla. Mar. 9, 2020) (granting in part Doe's partial motion for summary judgment because the university breached its contract with Doe regarding the university's sexual assault policy and denying in part the university's partial motion for summary judgment because Doe plausibly stated an issue of genuine fact regarding fundamental fairness): "Doe presented evidence Rollins [College] didn't treat him fairly or equitably—deciding he was responsible before hearing his side of the story and failing to follow procedures mandated by the Policy and Responding Party Bill of Rights."

8. *Doe v. Johnson & Wales Univ.*, 425 F. Supp. 3d 108, 114 (D.R.I. Nov. 26, 2019) (holding that there was a genuine issue of material fact as to whether the disciplinary proceeding provided by J&W was fair): "Whether Doe was entitled to the procedural protections he specifies depends on whether the guarantee of a 'fair' proceeding would create a reasonable expectation that those aspects would be included. I find that in the context of an uncounseled college junior, facing the frightening and very serious prospect of possible expulsion from school, in a case of contrary 'he said,' 'she said' allegations, a reasonable juror could determine that the meaning of 'fair' includes being provided more protections than Doe alleges he received."

9. *Doe v. Loyola Univ. of Chicago*, No. 18 C 7335, 2019 WL 3801819 at *2 (N.D. Ill. Aug. 13, 2019) (finding that Doe had successfully pleaded a claim of promissory estoppel):

    a. "According to Doe, Loyola did not comply with those procedures. Because Loyola initially provided Doe with the incorrect version of its investigative report for the Roe complaint, he had less than 48 hours to review the correct version before the Roe hearing. Although Doe identified two individuals with relevant exculpatory information, Loyola's investigators did not interview them. Love (Associate Dean of Students and interim Title IX Coordinator) wrongly told Doe that he was *not* entitled to have an advisor present at his interview with investigators, and that error was not corrected in time for Doe to secure an advisor's presence for his interview."

    b. "The complaint alleges, for instance, that Doe 'was not able to explain to Jane's hearing board that Elizabeth's claims were baseless,' ostensibly because he was under the impression - due to Loyola's assurances - that the board would be screened off from Elizabeth's complaint." *Id*. at *3.

10. *Oliver v. University of Texas Southwestern Medical School*, no. 3:18-cv-01549-B, at *27 (N.D. Tex. Feb. 11, 2019) (denying the university's motion to dismiss because Oliver plausibly claimed Title IX and due process violations): "[W]here there are significant factual disputes over whether the alleged misconduct occurred, additional procedural safeguards may be required such as presentation of the actual incriminating evidence, confrontation by adverse witnesses, and perhaps cross-examination of those witnesses."

11. *Doe v. University of Oregon*, No. 6:17-CV-01103-AA, 2018 WL 1474531, at *11 (D. Or. Mar. 26, 2018) (denying defendant's MTD regarding Doe's due process claim and 14th Amendment equal protection claim): "Moreover, when federal courts have found a state-law anchor for a property right in higher education, they have consistently found that right to be 'sufficiently important to warrant protection under the Due Process Clause.'

12. *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573 (E.D. Va. Mar. 14, 2018) (finding that Doe established a likelihood of sex bias in his hearing and therefore substantiated a Title IX claim):

    a. "As a historical note, Doe's erroneous outcome claim is but the latest of a spate of actions where a male student accused of sexual assault sues his university or college alleging gender discrimination in violation of Title IX. Some commentators, including some federal courts, have observed that this spate of cases can be traced to the now-rescinded April 4, 2011 Dear Colleague Letter ('Dear Colleague Letter') from the Department of Education's Office of Civil Rights ('OCR'), which, on threat of withholding federal funds, instructed universities to replace the 'beyond a reasonable doubt' or 'clear and convincing' evidence standards previously used by many universities when adjudicating sexual assault complaints with a 'preponderance of the evidence' standard. By this letter, OCR sought to lower or remove perceived barriers faced by students reporting sexual assault, which naturally led to (i) the removal of certain procedural protection for alleged assailants, and (ii) increased rates of conviction for alleged assailants based on lower burdens of proof. Doe, like the many plaintiffs who have raised similar erroneous outcome claims, argues that OCR's Dear Colleague Letter led universities to change their sexual assault policies to discriminate against students accused of sexual assault, students who are almost invariably male." *Id.* at 583.

    b. "Doe also alleges that Marymount's sexual assault policy was influenced by the Dear Colleague Letter and other political forces and that the University's procedures were designed to convict male students of sexual assault, whether they were guilty or not. Specifically, Doe alleges that Marymount's Deputy Title IX Coordinator admitted to Doe's parents during a face-to-face meeting that 'the Title IX process is increasingly politicized, especially in Virginia.' This statement by a senior university official appears to be an implicit acknowledgment that Marymount's sexual assault policies and Title IX procedures were influenced, at least in part, by political pressure to convict respondents in sexual assault cases—respondents who are almost invariably male." *Id*. at 587.

13. *Painter v. Adams*, W.D.N.C. No. 315CV00369MOCDCK, 2017 WL 4678231, at *7 (W.D.N.C. Oct. 17, 2017) (citations omitted) (denying defendant's MSJ; genuine issue of material fact as to adequacy and fairness of University proceedings): "It is, however, troubling that an accused person could not place the actual texts in front of the tribunal, which raises a genuine issue of material fact as to whether plaintiff was denied Due Process. School disciplinary procedures satisfy procedural due process requirements where the accused student had adequate notice of the charges against him, he had an opportunity to be heard by disinterested parties, he was confronted by his accusers, and he had the right to have a record of the hearing reviewed by a student appellate body. Here, defendants maintain in their Memorandum in Support of summary judgment that 'plaintiff presented no documentary evidence' at the disciplinary

hearing. However, it appears that he presented no documentary evidence because he was prevented from doing so. The evidence, viewed in a light most favorable to the party resisting summary judgment, shows that he was prevented from placing into the record exculpatory physical evidence, which raises a concern as to whether plaintiff was denied Due Process."

14. *Doe v. Brandeis University*, 177 F. Supp. 3d 561 (D. Mass. March 31, 2016). (commenting on the need to follow college contractual obligations in order to achieve "basic fairness") "Brandeis appears to have substantially impaired, if not eliminated, an accused student's right to a fair and impartial process. And it is not enough simply to say that such changes are appropriate because victims of sexual assault have not always achieved justice in the past. Whether someone is a "victim" is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning. Each case must be decided on its own merits, according to its own facts. If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision. Put simply, a fair determination of the facts requires a fair process, not tilted to favor a particular outcome, and a fair and neutral fact-finder, not predisposed to reach a particular conclusion."

15. *Sterrett v. Cowan*, 85 F. Supp. 3d 916, 934 (E.D. Mich. Feb. 4, 2015), *vacated pursuant to settlement*, No. 2:14-CV-11619, 2015 WL 13719720 (E.D. Mich. Sept. 30, 2015) (finding that individual defendants should have known that they were violating Plaintiff's Due Process rights): "Based on the set of circumstances involving the sexual misconduct claim against Sterrett and possible penalties alleged by Sterrett in his Complaint, Sterrett has stated sufficient facts to support his claim that his rights to a more formal notice prior to the August 6, 2012 interview with Cowan and a more formal meaningful hearing prior to Cowan's November 30, 2012 Final Report and Findings were clearly established under the Due Process clause. Whether the individual Defendants acted as 'reasonable officials' under the circumstances in this case, because the 'contours' of the rights noted above are clearly established and that the Due Process Clause is a 'floor' of those rights, a reasonable official in the shoes of Defendants in this case (as more specifically noted below) would understand that their actions violated Sterrett's right to Due Process."

16. *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 747 (S.D. Ohio Mar. 12, 2014) (holding that Wells pled viable claims of libel and a Title IX violation): "It appears to the Court that the UCB here, a body well-equipped to adjudicate questions of cheating, may have been in over its head with relation to an alleged false accusation of sexual assault. Such conclusion is strongly bolstered by the fact that the County Prosecutor allegedly investigated, found nothing, and encouraged Defendant Father Graham to drop the matter. Plaintiff's allegations suggest Graham did not do so due to Xavier's mishandling of other cases that were at nearly the same time, subject to investigation by the OCR."

Summary

In recent years, courts have become increasingly skeptical of university disciplinary procedures. In the public university setting, students are entitled to constitutional due process protections before the university can remove their educational opportunities. These due process protections, as articulated by two circuit courts and 16 trial courts, include, but are not limited to, the right to a live hearing and some form of cross examination. In the private university setting, students also are entitled to equitable and

unbiased resolution of sexual misconduct complaints. To effectuate this principle, courts are increasingly willing to hold private universities to the same standards as public universities, under statutory, contractual, or common law "fairness" theories.

Recommendation

Courts have imposed several requirements (e.g., live hearings, cross examination) that cannot be contravened. In order to protect students and to give universities clear and consistent direction on what is required in this context, OCR should preserve the 2020 Regulations' protection of due process generally, and specifically as they protect students' right to a live hearing and cross examination.

Memorable Quote

Munoz v. Strong, No. 1:20-CV-984, at *3-4 (W.D. Mich. June 23, 2021) (denying defendant's motion to dismiss on procedural due process grounds): "Everyone agrees that procedural due process is implicated when a public university imposes a suspension of this magnitude. The only question is what the particular requirements of notice and an opportunity to be heard are in this context. That is a necessary fact-based inquiry . . . plaintiff has sufficiently articulated alleged flaws in the process that could plausibly amount to a due process violation."

---

2. Institutional Sex Bias

Introduction

Sex bias contravenes the animating purpose of the Title IX law.

Regulatory Language

Section 106.45: "A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX."

Appellate Court Decisions

1. *Doe v. Regents of the University of California* (UCLA), No. 20-55831 (9th Cir. Jan. 11, 2022) (reversing and vacating the order and judgment of the District Court of the Central District of California dismissing a Title IX action brought by Doe because Doe plausibly stated a Title IX claim against the Regents):
    a. "[R]espondents in Title IX complaints that UCLA decided to pursue from July 2016 to June 2018 were overwhelmingly male (citing specific statistics for each of those years), and that the Regents doesn't report by gender the percentage of respondents found to have violated campus policy. Doe also alleges that the University 'has never suspended a female for two years based upon these same circumstances, nor [has it] used the reasoning that two years is a minimum suspension when issuing a suspension to a female ... under these types of facts[.]'" *Id.* at *17.

b. “Jason Zeck, UCLA’s Respondent Coordinator, advised Doe in July 2017, during the pending Title IX investigation, that ‘no female has ever fabricated allegations against an ex-boyfriend in a Title IX setting.’ Mr. Zeck’s statement suggests that UCLA’s Title IX officials held biased assumptions against male respondents during the course of Doe’s disciplinary proceeding.” *Id*. at *19.

c. “Associate Dean Rush, the ultimate decisionmaker here, advised Doe that if she were in his shoes, she would have invited Roe into her office during the February 2017 incident. Associate Dean Rush’s comment suggests that she did not view Roe as an aggressor, and at the very least raises the question of whether, if the gender roles were reversed, Associate Dean Rush would have made the same recommendation to a female approached by her angry, male ex-fiancé when he showed up unannounced to confront her at her place of employment.” *Id.* at *20.

d. “[T]he University demonstrated its disparate treatment of Doe as a male during its investigation by failing to investigate his claim that Roe was not a student at the time of the incident and not discrediting Roe when it became apparent that Roe had misrepresented her status as a student and falsely stated that she fractured a rib on February 13.” *Id.* at 20-21.

2. *Doe v. University of Denver*, 10th Cir. No. 19-1359, 2021 WL 2426199, at *11 (10th Cir. June 15, 2021) (reversing the district court’s order granting the University summary judgment because Doe satisfies the requirements of the *McDonnell Douglas* test through a Title IX claim to overcome summary judgment): “[W]here there is a one-sided investigation plus some evidence that sex may have played a role in the school’s disciplinary decision, it should be up to a jury to determine whether the school’s bias was based on a protected trait or merely a non-protected trait that breaks down accross gender lines.”

3. *Does 1-2 v. Regents of the Univ. of Minnesota*, No. 19-2552, 2021 WL 2197073, (8th Cir. June 1, 2021) (finding that the Does alleged a plausible Title IX claim of discrimination on the basis of sex):

a. “First, the Does allege that the University was biased against them because of external pressures from the campus community and the federal government over a perceived lack of diligence in investigating and expelling students accused of sexual assault. The Does allege that, in response to the football team's boycott, various groups on campus urged officials to take a tougher stance against campus sexual misconduct which pressured University officials to corroborate Jane's accusations. President Kaler's public statements before the SSMS hearing further ‘poisoned the well’ and exacerbated biased attitudes towards male African-American athletes. Additional pressure came from past criticism of President Kaler and the University for an inept response to former A.D. Teague's sexual harassment of multiple staff members. That these pressures influenced the University in this case can be inferred from A.D. Coyle's comment that the players should be suspended when initially accused ‘because of optics.’” *Id.* at *4.

b. “Second, the Does allege historical facts that reinforce the inference of bias in this specific proceeding. In 2014, the OCR investigated the University for potential Title IX violations after charges were lodged that the University discriminated against female

athletes by denying them equal funding and resources and by tolerating a male gymnastics coach's sexual harassment of a female gymnast. The University settled the harassment charge by paying the female gymnast $250,000. It is 'entirely plausible' that the specter of another federal investigation of potential Title IX violations could motivate the University to discriminate against male athletes accused of sexual misconduct to demonstrate ongoing compliance with Title IX." *Id*.

c. "It is alleged that investigator Marisam believed football players had covered up sexual misconduct complaints during a 2015 investigation, motivating her to punish as many players as possible in response to Jane's accusations. After the 2015 investigation, Director Hewitt opined to Kaler and Teague that there was a 'concerning pattern' of behavior among the football team, and warned that the players posed an increased risk of committing sexual assault or harassment in the future. It is reasonable to infer that investigator Marisam was aware of and agreed with these sentiments. These allegations support the inference that the University, and specifically its investigators, discriminated against the Does on the basis of sex." *Id.* at *5.

4. *Schwake v. Arizona Bd. of Regents*, 967 F.3d 940, 949 (9th Cir. July 29, 2020) (reversing district court's dismissal of Title IX action for failure to state a claim): "Schwake's allegations of a pattern of gender-based decision-making against male respondents in sexual misconduct disciplinary proceedings make [inference of outside pressure] plausible. He alleged that '[m]ale respondents in student disciplinary proceedings involving alleged sexual harassment and misconduct cases at [the University] are invariably found guilty, regardless of the evidence or lack thereof.' Schwake further alleged that he was 'aware of recent [University] disciplinary cases against male respondents in alleged sexual misconduct cases who were all found guilty regardless of the evidence or lack thereof.' The district court was not free to ignore this non-conclusory and relevant factual allegation … Here, we are satisfied that Schwake's allegations … establish background indicia of sex discrimination"

5. *Doe v. Oberlin Coll.*, 963 F.3d 580, 586 (6th Cir. June 29, 2020)**:** (Reversing district court's motion to dismiss for failure to state a Title IX claim): "Oberlin argues that, to show a 'particularized causal connection' between the flawed outcome and sex bias, Doe must identify some bias unique to his own proceeding. But that argument misreads our precedents. [The Sixth Circuit] has never held that, to be 'particularized' in this sense, the effects of the causal bias must be limited to the plaintiff's own case. To the contrary, for example, we have held that 'patterns of decision-making' in the university's cases can show the requisite connection between outcome and sex."

6. *Doe v. Univ. of Scis.*, 961 F.3d 203, 210 (3d Cir. May 29, 2020): (holding sex was a motivating factor in decesion to investigate male student, thus warranting a Title IX claim**)**: **"**Doe alleges that USciences '[e]ngaged in selective investigation and enforcement of [its] policies by failing to consider [Doe's] alcohol consumption and whether [Roe] 2 should have been charged with violations of [the Policy] if [Doe] was intoxicated when they had sex[.]' According to the investigator's report, Roe 2 and Doe consumed between three and five drinks each. Doe further alleges that '[a]lthough both [he] and [Roe] 2 had been drinking [during the party], [USciences] identified [Doe] as the initiator of sexual activity, notwithstanding the comparable intoxication of both participants.'"

7. *Doe v. University of Arkansas-Fayetteville*, 974 F.3d 858, 865-66 (8th Cir. Sep. 4, 2020) (reversing the district court's order dismissing Doe's Title IX Claim): "External pressure on a university to demonstrate that it acted vigorously in response to complaints by female students may support an inference that a university is biased based on sex, although not necessarily in a particular case. Doe's complaint alleges both: a dubious decision in his particular case taken against the backdrop of substantial pressure on the University to demonstrate that it was responsive to female complainants. The allegations are sufficient to state a claim under Title IX that is plausible on its face."

8. *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. July 29, 2016) (reversing the district court's MTD because Doe has a plausible Title IX claim):

    a. "Those alleged biased attitudes were, at least in part, adopted to refute criticisms circulating in the student body and in the public press that Columbia was turning a blind eye to female students' charges of sexual assaults by male students." *Id.* at 56.

    b. "As outlined above, the Complaint alleges that during the period preceding the disciplinary hearing, there was substantial criticism of the University, both in the student body and in the public media, accusing the University of not taking seriously complaints of female students alleging sexual assault by male students. It alleges further that the University's administration was cognizant of, and sensitive to, these criticisms, to the point that the President called a University-wide open meeting with the Dean to discuss the issue. Against this factual background, it is entirely plausible that the University's decision-makers and its investigator were motivated to favor the accusing female over the accused male[.]" *Id.* at 57.

Trial Court Decisions

1. *Doe v. University of Texas Health Science Center at Houston*, no. 4:21-cv-01439, at *19-20 (S.D. Tex. Dec. 13, 2021) (denying defendant's motion to dismiss because Doe plausibly alleged a Title IX erroneous outcome claim against the university and a due process claim against the individual defendants): "[University of Texas (UT) Health presumed [Doe] to be 'guilty from the start, as a male accused . . .' there was gender bias[.]"

2. *Doe v. Embry-Riddle Aeronautical University*, no. 6:20-cv-1220-WWB-LRH (M.D. Fla. Nov. 4, 2021) (denying in part the university's motion to dismiss because Doe plausibly presented Title IX selective enforcement and breach of contract violations):

    a. "Most notably, in several instances [Embry-Riddle Aeronautical University (ERAU)] . . . relied on unsubstantiated and gender biased assumptions that because Plaintiff 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." *Id.* at *11-12.

    b. "Jane Roe expressed concerns about being 'taken advantage of' and Plaintiff's failure to obtain consent for the sexual activity, but the report fails to note that Plaintiff also stated, unequivocally, that he did not want to have sex prior to the party and failed to provide any evidence that they ever asked Jane Roe if or how she obtained consent from Plaintiff. A reasonable jury could infer from this evidence that ERAU operated under

biased gender stereotypes regarding the role of males and females in giving and obtaining consent for sex." *Id.* at *12.

3. *Doe v. Board of Trustees of the University of Illinois*, No. 20-cv-02265-CSB-EIL (C.D. Ill. Sep. 23, 2021) (text order denying defendant's MTD plaintiff's Title IX claim and due process claim without giving specific reasons): "Plaintiff has alleged 'enough facts to state a claim to relief [for Title IX and due process violations] that is plausible on its face.

4. *Moe v. Grinnell College*, No. 4:20-cv-00058-RGE-SBJ (S.D. Iowa Aug. 23, 2021) (denying the college's motion for summary judgment on Moe's Title IX claim and breach of contract claim):

    a. "In the 2015 case opinion [with similar facts to Moe's case, but it was between two women], the adjudicator found both the female respondent and female complainant credible. Although the complainants in both cases indicated they had not consented to sexual intercourse, in the 2015 case opinion, the adjudicator did not address whether the initial sexual contact between the parties was consensual. The adjudicator considered whether the initial sexual contact between Moe and Complainant 1 was consensual. Also, unlike Moe's case, the adjudicator did not make findings regarding the uncharged conduct of nonconsensual sexual contact in the 2015 case. Finally, in the 2015 case opinion, the adjudicator credited the female respondent's testimony that the complainant 'was an active participant in their sexual activities.' The adjudicator did not credit similar testimony by Moe." *Id.* at *22.

    b. "In light of differential treatment between Moe and the female respondent identified above, a jury could find the adjudicator's assessment about Moe's credibility was based on biased notions as to men's sexual intent." *Id.* at *23.

    c. "The adjudicator relied in part on the inferences she drew about the intent behind Moe's physical actions to assess his credibility. The adjudicator's credibility finding then formed the basis for finding Moe responsible for violations alleged by Complainant 2 and Complainant 3 . . . a reasonable jury could determine the adjudicator's inferences as to Moe were based on stereotypes about male sexual intent." *Id.* at *24.

5. *Doe v. Columbia University*, Case 1:20-cv-06770-GHW (S.D.N.Y. Aug 1, 2021) (denying the University's MTD Doe's Title IX erroneous outcome claim in imposing interim suspension, Title IX selective enforcement claim in the Jane Doe 1 proceeding, Title IX erroneous outcome claim in the Jane Doe 4 proceeding, and Title IX erroneous outcome claim in the Jane Doe 3 proceeding):

    a. "[I]t is plausible that, as Plaintiff alleges, Columbia was sensitive to this criticism and that it was thus motivated to favor female complainants over a male respondent, to protect Columbia from further accusations that it had failed to protect female students from gender-based misconduct." *Id.* at *47.

    b. "[T]he publication of an article reporting that Plaintiff, a student government leader, was being investigated for Title IX violations and that one of the complaints against him had been made by a campus activist— plausibly support an inference that public pressure and criticism impacted the way Columbia treated male respondents in general and

Plaintiff in particular, and motivated Columbia to treat Plaintiff more harshly." *Id.* at *47-48.

6. *Victim Rights Law Center v. Cardona*, no. 1:20-cv-11104-WGY, at *38 (D. Mass. July 28, 2021) (affirming 12 of 13 challenged Department of Education's 2020 Title IX Regulations based on Title IX statutory law): "The [Education] Department interpreted Title IX's prohibited sex discrimination to encompass only (1) *quid pro quo* sexual conduct, (2) '[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity,' and (3) '[s]exual assault . . . dating violence . . . domestic violence . . . and stalking,' as defined in other provisions of the U.S. Code. Final Rule § 106.30."

7. *Doe v. Coastal Carolina Univ.*, No. 4:18-CV-00268-SAL, 2021 WL 779144, at *5 (D.S.C. Mar. 1, 2021) (holding that Doe established a genuine issue of material fact as to sex bias by the University, warranting a Title IX claim): "Plaintiff argues University data in sexual misconduct cases demonstrates a pattern of bias against male respondents. From January 1, 2014 through December 31, 2016, there were eight sexual misconduct investigations, complaints, or cases that resulted in a Student Conduct Board Hearing. In all eight cases, the accused were males. There were three appeals from sexual misconduct cases during this time. Two males appealed, and one female appealed. Only the female's appeal was granted."

8. *Doe v. American University*, No. 19-CV-03097 (APM), 2020 WL 5593909, at *8 (D.D.C. Sep. 18, 2020) (denying the university's MTD under Title IX and breach of contract grounds): "The italicized statement begs an obvious question: Why was it 'important' for [the investigator] to 'note' that H.S.'s information came from Doe and not Roe or C.G.? Quasem offers no explanation. Her statement plausibly could be read to discount H.S.'s reporting merely because it came from an accused male, as opposed to a female accuser and her female roommate. Thus, it is evidence of plausible gender bias."

9. *Doe v. Purdue Univ.*, 464 F. Supp. 3d 989 (N.D. Ind. June 1, 2020) (finding that Purdue discriminated against Doe on the basis of sex, thus violating Title IX):

    a. "Furthermore, as in *John Doe v. Purdue University*, 928 F.3d 652, 668–70 (7th Cir. 2019), the Defendants were under immense pressure because of (1) various lawsuits filed by female students against Purdue University for its handling of allegations of sexual assault perpetrated by male students; (2) the negative media publicity regarding the lawsuits and the number of sexual assaults on campus; (3) various campus protests; and (4) the financial pressure caused by the Office of Civil Rights' investigations. Such pressure explains why the Defendants may have been motivated to discriminate against male students on the basis of gender." *Id*. at 1008.

    b. "Furthermore, during the disciplinary proceedings, Defendant Sermersheim posed questions and made comments based upon sex-based stereotypes. Likewise, a panel member also made comments based upon sex-based stereotypes. Such gender-based stereotyping allows a reasonable inference that the 'defendants acted with a nefarious discriminatory purpose and discriminated against him based on his membership in a definable class.'" *Id*.

10. *Doe v. Colgate Univ.*, 457 F. Supp. 3d 164 (N.D.N.Y. Apr. 30, 2020) (Denying University's motion for summary judgement as to Doe's Title IX claims):

    a. "Plaintiff points out … that there is a direct comparator to his case in that a female respondent was found responsible in February 2018 for non-consensual sexual contact and sexual harassment. That female respondent was issued a two-year suspension, thus permitting her to return as a student upon completion of the suspension. Plaintiff asserts that, although 'non-consensual sexual contact' and 'non-consensual sexual intercourse' are both defined as 'Sexual Assault' under Defendant's [Title IX] policy, Plaintiff, as a male respondent, was assessed a much more severe punishment than the female respondent." *Id.* at 173-74.

    b. "Dean [of Conduct for Colgate] noted that Defendant 'generally regard[s] sexual offenses as being on a continuum of gravity[.]' She attempted to distinguish the female respondent's case by explaining, '[t]hat case did not involve penetration of any kind and therefore did not constitute non-consensual sexual intercourse within the definition of [University's Title IX] policy.' In fact … Defendant has not had a single case where a female has been accused of non-consensual penetration of any kind or where a male has claimed to be the victim of non-consensual penetration of any kind.

        i. Plaintiff, however, was found responsible for non-consensual sexual intercourse because he was found to have 'penetrated [Roe]'s vagina with [his] penis at a time when she was asleep and, therefore, unable to give affirmative consent...' Due to biological differences between men and women, a female respondent could never be found responsible for this exact conduct. Thus, for purposes of Title IX selective enforcement litigation, the female respondent is a direct comparator to Plaintiff because they both were found responsible for 'Sexual Assault' under the [University Title IX policy's] definition. When considering the female respondent as a direct comparator, Plaintiff and she should have been assessed similar or equal penalties. Instead, the Hearing and Appeal Panelists assessed upon Plaintiff the harshest penalty of expulsion, meaning he could never return to Defendant's university and he would have to disclose his expulsion when applying to attend other schools. The female respondent, however, could ultimately return as a student after two years."

11. *Doe v. Syracuse University*, 457 F. Supp. 3d 178 (N.D.N.Y. Apr. 30, 2020) (denying Syracuse's Motion for Summary Judgment under Title IX selective enforcement):

    a. "The Plaintiff first argues that he and Jane Roe engaged in 'the exact same sexual conduct.' Since they both admitted to drinking, they had both had sexual contact with a person incapable of consent, and both should have received the same sanction. Jane Roe was not even investigated for violating the sexual misconduct policy. *Id.* at 195.

    b. "[T]here are questions of fact about whether gender bias motivated the fact that Plaintiff received a penalty for the incident and Jane Roe did not." *Id.* at 200.

12. *Feibleman v. Trustees of Columbia University in City of New York*, No. 19-CV-4327 (VEC), 2020WL 882429, at *10 (S.D.N.Y. Feb. 24, 2020) (denying the university's MTD on Title IX and breach of contract grounds): "Here, Feibleman alleges that Columbia and its investigators were under similar pressure throughout his investigation, hearing, and appeal process. Two weeks after Doe complained of sexual assault, Barnett and other investigators assigned to the case became the subject of a Department of Education investigation into their alleged refusal to investigate a sexual assault case initiated by a female student . . . [f]urthermore, during the pendency of Feibleman's appeal, Columbia allegedly received weeks of negative press coverage for settling a court case with a male student who had been accused of rape in a high-profile case . . . [b]ased on those allegations, consistent with the holding in *Doe*, Plaintiff has provided a plausible motivation on the part of Columbia to discriminate against male students accused of sexual assault."

13. *Doe v. Syracuse University.*, 440 F. Supp. 3d 158, 168 (N.D.N.Y. Feb. 21, 2020) (holding that Defendant failed to provide Plaintiff with adequate notice, which violates plaintiff's due process): "On January 25, 2017, the day after OCR came to campus, 'Syracuse initiated its Title IX Complaint against [Plaintiff].' The complaint was brought by Syracuse, not RP. Plaintiff alleges that Syracuse initiated this complaint, over two months after the report by RP, and over a month after the SPD had closed its investigation 'in response to public and governmental pressure to extirpate the so-called 'rape culture' among Syracuse male students.'"

14. *Doe v. University of Maine System*, no. 1:19-cv-00415-NT (D. Me. Feb. 20, 2020) (denying the university's motion to dismiss because Doe plausibly claim Title IX violations and a procedural due process violation):

    a. "There may be an argument that Doe's report of these details—which occurred after the Settlement Agreement—was a new starting point for assessing how [the University of Maine System (UMS)] responded to his allegations. If so, any failure by UMS to investigate those allegations, while actively investigating the complaints against Doe, could potentially be a new act of selective enforcement or could have contributed to a hostile environment for Doe." *Id.* at *17.

    b. "The Plaintiff alleges that UMS had a 'retaliatory motive' when it took several adverse actions against him. *See Compl*. ¶¶ 137–43. Those adverse actions appear to be complete. *See Compl*. ¶ 140 (actions include barring Doe from his employment, suspending Doe, making public statements about Doe's Title IX case, providing Doe's Title IX case files to the press and others, and failing to disclose that Doe's disciplinary proceedings had been dismissed for exculpatory reasons)." *Id.* at *26.

15. *Unknown Party v. Arizona Bd. of Regents*, No. CV-18-01623-PHX-DWL, 2019 WL 7282027, at *2 (D. Ariz. Dec. 27, 2019) (holding Doe's hearing contained plausible evidence of sex bias, warranting a Title IX claim): "In May 2014, as part of an effort to follow-up on the issuance of the 'Dear Colleague' letter, OCR published a list of 55 universities that were under investigation for Title IX violations. ASU was one of the universities named on this list. OCR officials visited ASU in 2012 and 2013 to 'gather information' about ASU's processes for investigating sexual assault complaints. Following these visits, ASU was 'subjected to extraordinary pressure,' including two additional OCR complaints 'that were filed as [Doe's] case was ongoing.'"

16. *Overdam v. Texas A&M University*, No. 4:18-cv–02011, at *4 (S.D. Texas Nov. 5, 2019) (denying the university's MTD Overdam's Title IX selective enforcement claim): "[The University] creates an environment in which male students accused of sexual misconduct are nearly assured of a finding of responsibility. This environment denies the accused his fundamental due process rights and deprives these male students of educational opportunities solely on the basis of their sex."

17. *Doe v. Grinnell College*, 473 F. Supp. 3d 909 (S.D. Iowa July 9, 2019) (denying defendant's MSJ on Doe's Title IX and breach of contract claims):

    a. "Doe claims the determination in Complainant #1's case arbitrarily found Complainant #1's side of the story more credible and made unwarranted assumptions about Complainant #1 being naïve and sexually inexperienced." *Id.* at 927.

    b. "The Court concludes Doe has presented sufficient evidence from which a reasonable jury could deduce the determinations of responsibility relied upon by Grinnell to dismiss Doe were based on a biased perspective regarding the behavior of women during sexual encounters." *Id.*

    c. "The analysis in the determination of responsibility in the 2015 case, which found a female respondent responsible for sexual misconduct, supports Doe's assertion that there is a dispute regarding the impact of gender bias on Doe's disciplinary proceeding. The 2015 determination of responsibility, like the determination in Doe's case, considers evidence of two conflicting accounts of a sexual encounter. The 2015 determination of responsibility notes the female respondent believed she had consent for sexual conduct with the complainant, also female, who reported she was trying to sleep when the respondent digitally penetrated her vagina. That determination ultimately concluded the sexual intercourse was non consensual and recommended a sanction for the respondent." *Id.* at 929.

18. *Oliver v. University of Texas Southwestern Medical School*, no. 3:18-cv-01549-B, at *39 (N.D. Tex. Feb. 11, 2019) (denying the university's motion to dismiss because Oliver plausibly claimed Title IX and due process violations): "It could very well be that [the University] considered [Oliver's] defenses; however, the lack of any record or mention of them in the expulsion letter or the hearing supports a claim, at this stage, that Oliver's gender was a motivating factor in this erroneous outcome. This inference of gender bias in the erroneous outcome is further exacerbated by the fact that Oliver was never given access to the incriminating evidence against him nor was Rowan required to testify against him at trial, which significantly limited his ability to mount a viable defense."

19. *Doe v. University of Mississippi*, 361 F.Supp.3d 597 (S.D. Miss. Jan. 16, 2019) (holding that Doe had raised plausible claims of sex bias and due process violations):

    a. "Doe argues that Defendants violated his rights under the Equal Protection Clause by disciplining him for engaging in sexual intercourse with Roe while she was under the influence of alcohol but failing to discipline Roe for engaging in sexual intercourse with him." *Id.* at 614.

b. “As it is, Doe has alleged that he and Roe drank together at his fraternity party; that Roe reported to her doctor that she and Doe ‘were both drunk and that she felt it was a mutual decision between both of them’ to have sex; and that the University pursued disciplinary action against him but not Roe.” *Id*. at 615.

20. *Doe v. Rollins College*, 352 F. Supp. 3d 1205 (M.D. Fla. Jan. 16, 2019) (denying the university’s motion to dismiss because Doe plausibly alleged college acted out of gender bias, violating Title IX, and college violated various provisions in sexual misconduct policy, warranting breach of contract):

    a. “Rollins [College] investigated Plaintiff's claims amidst a clamor of public and campus scrutiny over its treatment of sexual assault complaints by female students. Alone, allegations of external pressure fail to support an inference of gender discrimination. *See* Doe v. Baum, 903 F.3d 575, 586 (6th Cir. 2018). Yet Plaintiff has also pointed to the negative attention Rollins received after *Mancini* [a Rollins College Title IX case] that caused it to buckle down in support of its policies, along with circumstantial evidence of bias in Plaintiff's specific proceeding. Thus, taking Plaintiff's allegations of external pressure from increased public scrutiny with the *Mancini* litigation and the particular circumstances of Plaintiff, the Court finds Plaintiff's claim plausible.” *Id.* at 1210-11.

    b. “[T]he information Rollins collected during the investigation could have equally supported disciplinary proceedings against Jane Roe for also violating the Sexual Misconduct Policy. Yet Rollins treated Jane Roe—a female student—differently.” *Id.* at 1211.

21. *Rossley v. Drake University*, 342 F. Supp. 3d 904, 946 (S.D. Iowa Oct. 12, 2018) (denying in part the university’s motion for summary judgment because there was an genuine issue of material fact regarding Plaintiff’s breach of contract claim and Title IX claim under the selective enforcement theory): “[The University] Defendants' motion for summary judgment is denied as to the alleged breaches of contract that Defendants failed to conduct an equitable investigation of Plaintiff's claim and Defendants discriminated against Plaintiff on the basis of sex.”

22. *Doe v. Syracuse University*, 341 F. Supp. 3d 125, 138 (N.D.N.Y. Sep. 16, 2018) (denying the university’s motion to dismiss because Doe plausibly stated a Title IX claim under the erroneous outcome theory and a Title IX claim under the selective enforcement theory): · “Doe, like the plaintiffs in *Columbia University* and *Rolph*, has coupled his factual allegations with the allegations of public pressure on [Syracuse] University to more aggressively prosecute sexual abuse allegations. Like in these other cases, Doe's disciplinary proceeding occurred in the context of public criticism of the University's handling of sexual abuse complaints against males. A reasonable inference could be drawn that the Investigator, the University Conduct Board, the Appeals Board, and the University official who ultimately decided the appeal were ‘motivated to refute [public] criticisms [of Syracuse's handling of sexual abuse allegations] by siding with the accusing female and against the accused male.’”

23. *Doe v. Brown University*, 327 F. Supp. 3d 397 (D.R.I. Aug. 27, 2018) (denying in part the university's motion to dismiss because Doe plausibly stated a Title IX selective enforcement claim, a Title IX deliberately indifference claim, a Title VI racial discrimination claim, a gender discrimination claim under a Rhode Island state statute, and intentional infliction of emotional distress claim):

    a. "John [Doe] alleges sufficient plausible facts that, if proven, could lead a jury to find that Brown [University] was deliberately indifferent to known harassment so that its response to that harassment was unreasonable. For example, he alleges that both he and Jane [Roe, the accuser,] reported the other to Brown for sexual assault occurring from their alley encounter, but Brown chose to pursue disciplinary action against John while failing to bring any charges against Jane." *Id.* at 411.

    b. "Because the decision to launch the second investigation [into sexual assault], and the decision to separate, were directly related to the first investigation, John [Doe] plausibly alleges that those decisions were affected by his gender." *Id.* at 412.

    c. "Both John [Doe] and Jane [Roe, the accuser,] were students at Brown [University]. Both brought complaints of sexual assault. Both complaints of sexual assault occurred, at most, within six months of each other. Brown investigated Jane's complaint; it ignored John's complaint. While the two are not exactly identical,11 the allegations as pleaded present John and Jane as similarly situated." *Id.* at 412-13.

24. *Doe v. University of Oregon*, No. 6:17-CV-01103-AA, 2018 WL 1474531, at *15 (D. Or. Mar. 26, 2018) (denying defendant's MTD regarding Doe's due process claim and 14th Amendment equal protection claim): "But another plausible inference from the complaint is that the University was predisposed to believe Roe *because she is a woman* and disbelieve plaintiff *because he is a man.* That inference could be supported by, among other things, evidence that when the accused is a woman and/or when the accuser is a man, the University conducts sexual misconduct investigations and adjudications differently than it did in this case."

25. *Doe v. Marymount Univ.,* 297 F. Supp. 3d 573, 585 (E.D. Va. Mar. 14, 2018) (finding that Doe established a likelihood of sex bias in his hearing and therefore substantiated a Title IX claim): "Doe raises many allegations which he believes demonstrate Marymount's gender bias. But one particular allegation is noteworthy because, if accepted as true, it reveals that Doe's adjudicator, Professor Lavanty, adhered to certain gendered beliefs. Specifically, Doe alleges that in a subsequent sexual assault investigation at Marymount, a male student accused a female student of touching his genitals without his consent and of pushing his hand into her genitals without his consent. Professor Lavanty served as the investigator in that case and allegedly asked the male student 'were you aroused' by this unwanted touching? When the student responded, 'no,' Lavanty, in apparent disbelief, allegedly asked the male student again, 'not at all?' This unpleasant exchange between Lavanty and another male student at Marymount, a fact which must be accepted as true at this stage, reveals that Lavanty's decision-making was infected with impermissible gender bias, namely Lavanty's discriminatory view that males will always enjoy sexual contact even when that contact is not consensual. Because Lavanty served as Doe's adjudicator and was ultimately responsible for determining Doe's guilt or innocence, any evidence of Lavanty's gender bias is particularly probative. If Lavanty possessed the outdated and discriminatory views of gender and sexuality alleged in Doe's Complaint, these views would

have naturally infected the outcome of Doe's Title IX disciplinary proceedings. Therefore, this allegation alone is sufficient to satisfy Doe's burden to plead a fact that creates an inference of gender discrimination in Marymount's disciplinary proceedings."

26. *Doe v. University of Chicago*, 1:16-cv-08298 (N.D. Ill. Sep. 20, 2017) (denying the University's motion to dismiss because Doe plausibly claimed Title IX and intentional infliction of emotional distress violations):

    a. "If [the University's Dean of Students] Inabinet intentionally encouraged Jane Doe to file a false complaint—that is, he knew or believed that her complaint was false and encouraged her to file it anyway—then it is plausible that Inabinet did so based on gender bias. The plausibility is reinforced by another allegation: as noted earlier, on August 5, 2016, John Doe and Inabinet discussed the complaints on a phone call." *Id.* at *12.

    b. "It is plausible to expect that Inabinet, if he were treating both genders alike, would have answered directly (and would have answered that the situations would be treated the same regardless of gender)." *Id.*

27. *Doe v. Case W. Rsrv. Univ.*, No. 1:17 CV 414, 2017 WL 3840418, at *7 (N.D. Ohio Sept. 1, 2017) (holding that Doe had raised a plausible claim of sex bias warranting a Title IX claim): "Here Plaintiff has alleged that the Deputy Title IX Coordinator Ms. Milliken, who was the person to investigate the complaint, prepare the evidentiary report, and testified at the hearing was biased against men and or considered them the sexual aggressor based upon statements made in her recent doctoral dissertation. He also alleged that sexual misconduct complaints more than doubled during Ms. Milliken's tenure as Deputy Title IX Coordinator. Making all inferences in Plaintiff's favor, these allegations at least give rise to the possibility that Ms. Milliken had a bias against men in these types of situations, and while she was not the decision maker in this instance, she exercised enormous influence over the record and evidence presented to the decision maker."

28. *Doe v. Ohio State University*, 239 F. Supp. 3d 1048 (S.D. Ohio Mar. 10, 2017) (denying defendant's MTD plaintiff's claim of a Title IX erroneous outcome):

    a. "Plaintiff counters that indirect/circumstantial evidence of gender bias can trigger Title IX liability, including that pressure from the executive branch of the Federal government motivated the discipline of John Doe. In support of this, Plaintiff offers the temporal connection between the United States Department of Education's Office of Civil Rights ("OCR")'s investigation of OSU and OSU's investigation of John Doe. (Doc. 40, Pl.'s Resp. at 7). OSU ultimately entered into a settlement with OCR and documentation relating to this settlement states that "since 2013, OSU had permanently expelled every student found guilty of sexual assault" and that "[u]pon information and belief, all of these students were male." (Id. at 8, (citing Doc. 36, Am. Compl. ¶ 25)." *Id.* at 1070.

b. “OSU has affirmatively stated that it promises to continue to aggressively discipline male students accused of sexual misconduct with no reassurance of ensuring fairness and due process in the disciplinary process.” *Id.* at 1072.

29. *Doe v. Amherst College*, no. 3:15-cv-30097-MGM (D. Mass. Feb. 28, 2017) (denying the university’s motion for judgment on the pleadings because Doe plausibly stated breach of contract, national origin discrimination, and Title IX violations):

    a. “[Amherst] College took proactive steps to encourage [the accuser] Jones to file a formal complaint against Doe when it learned he may have been subjected her to nonconsensual sexual activity. But, when the College learned Jones may have initiated sexual activity with Doe while he was ‘blacked out,’ and thus incapable of consenting, the College did not encourage him to file a complaint, consider the information, or otherwise investigate. Doe also alleges the severity of his punishment was due to his gender because the College intended his punishment to appease campus activists who sought the expulsion of a male student. These factual allegations are sufficient to survive a motion for judgment on the pleadings.” *Id.* at *37

    b. “[W]hile Doe never filed a formal complaint, [Amherst] College certainly learned that [the accuser] Jones may have engaged in sexual activity with Doe while he was “blacked out” and yet, Doe asserts, the College did not take even minimal steps to determine whether Doe should have been viewed as a victim under the terms of the [the sexual misconduct] Policy . . . [thus warranting a claim for deliberate indifference under Title IX].” *Id.*

30. *Doe v. Lynn Univ., Inc.*, 235 F. Supp. 3d 1336 (S.D. Fla. Jan. 19, 2017) (holding that the proceedings held against Doe violated Title IX’s prohibition against discrimination on the basis of sex):

    a. “Plaintiff cites a news media report that school security chose not to press charges against a young male perpetrator accused of having sexually harassed four female students on Lynn University's campus during February 2015, despite the fact that two of the female students desired to do so. Plaintiff contends that the news media report generated pressure from the parents of Defendant's female students and from the public in Boca Raton for Defendant to take ‘action against the next male student accused of sexual battery by a female student.’ Plaintiff was the first male student against whom a sexual assault complaint was filed during the 2015–2016 school year.” *Id.* at 1340-42.

    b. “Plaintiff has also alleged that Defendant's administrators were cognizant of that pressure from both the public and the parents of female students. Specifically, Plaintiff alleges that ‘[a]s a result, Lynn administrators were instructed to take a hard line toward male students accused of sexual battery by female students, while not prosecuting any female students for similar alleged offenses.’ Plaintiff also puts forward the fact that in April 2015 Defendant curated a sexual assault awareness month that included ‘dedicated demonstrations to honor a female who was raped by a male instructor[,] who was found not guilty because of her choices in clothing.’” *Id*.

31. *Ritter v. Oklahoma City Univ*., W.D. Okla. No. CIV-16-0438-HE, 2016 WL 3982554, at *2 (W.D. Okla. July 22, 2016) (denying MTD for failure to state a Title IX claim): “[C]onsidering all the

allegations in the amended complaint, including the asserted facts underlying plaintiff's alleged offense, the alleged manner in which the investigation and disciplinary process were conducted, the allegation that females facing comparable disciplinary charges have been treated more favorably than plaintiff and the assertion that, because of his gender, the sanctions imposed on plaintiff were disproportionate to the severity of the charges levied against him, the court concludes plaintiff has stated a selective enforcement claim."

32. *Marshall v. Indiana University*, 170 F. Supp. 3d 1201 (S.D. Ind. Mar. 15, 2016) (denying MTD under Title IX action):

    a. "[O]n September 22, 2014, Marshall met with Ms. Hinton and informed her that he too had been sexually assaulted by another female student. (Filing No. 1–1 at 5.) However, the Defendants never investigated Marshall's reported sexual assault. *Id.* at 1204.

    b. "[T]he Defendants cannot credibly argue that the issue of intentional gender discrimination is not factually alleged by Marshall's assertion of selective, gender-based enforcement against Marshall personally." *Id.* at 1210.

33. *Doe v. Brown University*, 166 F. Supp. 3d 177, 189 (D.R.I. Feb. 22, 2016) (denying Brown's MTD under Title IX and breach of contract): "Requiring that a male student conclusively demonstrate, at the pleading stage, with statistical evidence and/or data analysis that female students accused of sexual assault were treated differently, is both practically impossible and inconsistent with the standard used in other discrimination contexts."

34. *Doe v. Washington & Lee Univ.*, W.D. Va. No. 6:14-CV-00052, 2015 WL 4647996, at *10 (W.D. Va. Aug. 5, 2015) (denying MTD for failure to state a Title IX claim): "[G]ender bias could be inferred from [Title IX Officer]'s alleged October 5, 2014 presentation, wherein she introduced and endorsed the article, *Is It Possible That There Is Something In Between Consensual Sex And Rape ... And That It Happens To Almost Every Girl Out There?* That article, written for the female-focused website *Total Sorority Move,* details a consensual sexual encounter between a man and the female author of the article, who comes to regret the incident when she awakens the next morning. As Plaintiff describes it, the article posits that sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations that she did not outwardly express. This presentation is particularly significant because of the parallels of the situation it describes and the circumstances under which Plaintiff was found responsible for sexual misconduct. Bias on the part of [Title IX Officer] is material to the outcome of John Doe's disciplinary hearing due to the considerable influence she appears to have wielded in those proceedings."

35. *Doe v. Salisbury University*, no. 1:14-cv-03853-JKB, at *10-11 (D. Md. June 2, 2015) (denying in part the university's motion to dismiss because Doe plausible alleged retaliation in violation of Title IX): "Defendants chose to investigate the [alleged] 2012 [sexual assault] Incident because of Plaintiff's prior Title IX complaints [against the university and its employees]. Such factual allegations include: Defendants had been aware of the 2012 Incident since May 2012, but the Office of Institutional Equity did not investigate until soon after Plaintiff filed his Title IX complaints, Defendants launched their investigation without any input from the alleged victim of

the 2012 Incident (Id. ¶ 20), and no criminal charges were ever filed against Plaintiff for the 2012 Incident."

36. *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 747 (S.D. Ohio Mar. 12, 2014) (holding that Wells pled viable claims of libel and a Title IX violation): "Plaintiff alleges the allegations against him came within the context of Xavier's recent mishandling of sexual assault allegations that triggered an investigation in January 2012 by the United States Department of Education's Office of Civil Rights. OCR's investigation focused on the allegation that Xavier allowed a male student accused of sexual assault of two women to remain on campus. In February, OCR opened yet another investigation with regard to a third alleged sexual assault case Ultimately Xavier and OCR entered into an agreement so as to establish training and reporting programs to address sexual assault and harassment on campus."

Summary

Eight appellate decisions and 36 trial court decisions affirmed the necessity of avoiding sex bias in campus adjudications, relying upon Title IX statutory law to reach their conclusions. Two of the decisions also cited constitutional due process grounds: *Doe v. University of Mississippi* and *Doe v. University of Oregon.* Sex bias violative of Title IX can take the form of wrongful discipline or disparate treatment of male students as compared to female students.

Recommendation

OCR should retain the existing procedural protections afforded in the 2020 Regulation in order to avoid sex bias.

Memorable Quote

Victim Rights Law Center v. Cardona, no. 1:20-cv-11104-WGY, at *38 (D. Mass. July 28, 2021): "The [Education] Department interpreted Title IX's prohibited sex discrimination to encompass only (1) *quid pro quo* sexual conduct, (2) '[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity,' and (3) '[s]exual assault . . . dating violence . . . domestic violence . . . and stalking,' as defined in other provisions of the U.S. Code. Final Rule § 106.30."

---

3. Definition of Sexual Harassment

Introduction

Explicit definitions are essential so students can understand what conduct is prohibited, so free speech is not infringed upon, and so schools are able to take reasonable steps to prevent future incidents of sexual misconduct. Definitions that are vague and overly broad cannot be refuted, thereby enabling false allegations.

Regulatory Language

Section 160.30: “sexual harassment must be so severe, pervasive, and objectively offensive so as to deny a student educational access.”

Supreme Court Decision

1. *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (reversing the 11th Circuit’s decision dismissing the case for failure to state a claim because a relevant Title IX claim exists):

    a. “Where, as here, the misconduct occurs during school hours and on school grounds—the bulk of G.F.'s misconduct, in fact, took place in the classroom—the misconduct is taking place ‘under’ an ‘operation’ of the funding recipient. In these circumstances, the recipient [of Title IX funding] retains substantial control over the context in which the harassment occurs . . . [w]e thus conclude that recipients of federal funding may be liable for ‘subject[ing]’ their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority.**”** *Id.* at 646-47.

    b. **“**School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed ‘deliberately indifferent’ to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.” *Id.* at 648.

    c. **“**Having previously determined that ‘sexual harassment’ is ‘discrimination’ in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute.” *Id*. at 650.

    d. “[F]unding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” *Id.*

    e. “The most obvious example of student-on-student sexual harassment capable of triggering a damages claim would thus involve the overt, physical deprivation of access to school resources.” *Id.*

    f. “Whether gender-oriented conduct rises to the level of actionable ‘harassment’ thus ‘depends on a constellation of surrounding circumstances, expectations, and relationships,’ including, but not limited to, the ages of the harasser and the victim and the number of individuals involved[.]” *Id.* at 651.

Trial Court Decisions

1. *New York v. U.S. Department of Education*, no. 20-cv-4260-JGK, at *24 (S.D.N.Y. Aug. 9, 2020) (denying the state’s motion for preliminary injunction, or in the alternative, stay the 2020 Title IX Regulations because state failed to establish a likelihood of success on the merits and that they

were likely to suffer substantial irreparable harm): "The [2020] Rule also provides that quid pro quo harassment, as well as sexual assault, dating violence, domestic violence, and stalking, as defined under the Clery Act and the [Violence Against Women Act (VAWA)], all constitute harassment without regard to whether such action is 'severe, pervasive, and objectively offensive' or denies a person equal access to the education program or activity."

2. *Pennsylvania v. DeVos*, no. 1:20-cv-01468-CJN, at *14 (D.D.C. Aug. 12, 2020) (denying the state's motion for preliminary injunction to enjoin the implementation of the 2020 Title IX Regulations because the state failed to establish a likelihood of success on the merits and that they were likely to suffer substantial irreparable harm):

    a. "[B]y aligning the hostile environment prong with the Davis standard and adding a separate sexual violence prong, the Department [of Education] exercised its authority to address 'the tension between student and faculty freedom of speech[] and regulation of speech to prohibit sexual harassment while prohibit[ing] harassing and assaultive physical conduct.' 85 Fed. Reg. at 30,164." *Id.*

    b. "[I]n balancing Title IX and free speech considerations, the Department reasonably concluded that it need not follow Title VII's definition of sexual harassment because of key differences between the workplace and schools." *Id.*

    c. "The Department reasoned its definition should 'allow[] for the social and developmental growth of young students learning how to interact with peers in the elementary and secondary school context [and] foster robust exchange of speech, ideas, and beliefs in a college setting.' 85 Fed. Reg. at 30,151." *Id.*

Summary

The current regulation's definition of sexual harassment is based on language from the 1999 Supreme Court decision, *Davis v. Monroe*.

Recommendation

The existing regulatory definition at Section 106.45 should be retained.

Memorable Quote

Davis v. Monroe County Board of Education, 526 U.S. 629, 650 (1999) (reversing the 11th Circuit's decision dismissing the case for failure to state a claim because a relevant Title IX claim exists): "[F]unding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."

---

4. Formal Complaint

Introduction

The filing of a formal complaint initiates the process of a legally mandated institutional response.

Regulatory Language

Section 160.30: At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.... A complainant is "an individual who is alleged to be the victim of conduct that could constitute sexual harassment."

Trial Court Decisions

1. *New York v. U.S. Department of Education*, no. 20-cv-4260-JGK, at *30 (S.D.N.Y. Aug. 9, 2020) (denying the state's motion for preliminary injunction, or in the alternative, stay the 2020 Title IX Regulations because state failed to establish a likelihood of success on the merits and that they were likely to suffer substantial irreparable harm): "[T]he [2020] Rule allows recipients to consolidate formal complaints that arise out of the same facts or circumstances."

2. *Pennsylvania v. DeVos*, no. 1:20-cv-01468-CJN, at *20 (D.D.C. Aug. 12, 2020) (denying the state's motion for preliminary injunction to enjoin the implementation of the 2020 Title IX Regulations because the state failed to establish a likelihood of success on the merits and that they were likely to suffer substantial irreparable harm): "[T]he Department of Education explained that it retained the formal complaint requirement to allow victims to maintain their autonomy and accommodated the dynamics of the K-12 environment by allowing parents or guardians of minors or students with disabilities to file complaints on students' behalf."

3. *Montague v. Yale University*, no. 3:16-cv-00885 (D. Conn. Mar. 29, 2019) (denying in part the university's motion for summary judgment because there is a genuine issue of fact demonstrating breach of contract, fundamental fairness, and tort violations):

    a. "Yale's Title IX leadership violated the duty of impartiality, when they met and decided that they should pursue a formal complaint and by inducing Roe to file a formal complaint against [Montague]." *Id.* at *34.

    b. "[T]here is a genuine issue of material fact as to . . . [University Wide Committee on Sexual Misconduct member] Post's participation in that meeting motivated Roe to change her informal complaint into a formal complaint. *Id.* at *40

4. *Neal v. Colorado State Univ.-Pueblo*, D. Colo. No. 16-CV-873-RM-CBS, 2017 WL 633045, at *2 (D. Colo. Feb. 16, 2017) (denying MTD for failure to state a Title IX claim): "Complainant made the allegations without informing Ms. Doe or Plaintiff. Her allegations were based upon a conversation she had with Ms. Doe on October 26, occasioned by Complainant noticing a 'hickey' on Ms. Doe's neck. The athletic training program prohibits trainers (such as Ms. Doe) from 'fraterniz[ing] with athletes, and ... doing so could result in severe consequences including removal from the Athletic Training Program.' Ms. Doe allegedly had 'described the encounter [in which she received the hickey] to Complainant in a manner that would conceal her relationship

with Plaintiff, while also protecting her position in the program.' By sometime on October 27, 2015, [Director of Athletic Programs] reported the alleged incident to his wife … another faculty member in the program and to … CSU–Pueblo director of the office of equal opportunity/affirmative action and Title IX coordinator. On October 27, 2015, Mr. Wilson began investigating the allegations and met with Ms. Doe . . . Plaintiff alleges that from inception to completion, CSU–Pueblo railroaded him in order to find him guilty of the accused sexual misconduct regardless of the lack of evidence or merit in the allegations. He alleges that CSU–Pueblo did so because of gender bias against accused male athletes, the school's self-interest in its reputation, and the school's financial interest (*i.e.,* its federal funding) in demonstrating to Federal Defendants that it would discipline accused males. He alleges for instance that:

a. Wilson failed to consider Jane Doe's motivation for insinuating to Complainant that something improper may have occurred, when Complainant confronted Jane Doe about the hickey on her neck. Namely, recognizing the potential consequences of being disciplined for engaging in a relationship with a football player, Jane Doe described the encounter to Complainant in a manner that would conceal her relationship with Plaintiff, while also protecting her position in the program.

b. In fact, at no time did Jane Doe tell Defendant Wilson that she was involved in non-consensual sex with Plaintiff. To the contrary, at her meeting with Defendant Wilson on October 27, Jane Doe informed Mr. Wilson: 'our stories are the same and he's a good guy. He's not a rapist, he's not a criminal, it's not even worth any of this hoopla!'

Nonetheless, CSUP pursued an investigation calculated to lead to the foregone conclusion that Plaintiff was responsible for the misconduct alleged."

5. *Faiaz v. Colgate Univ.*, 64 F. Supp 3d 336, 341 (N.D.N.Y. Nov. 24, 2014) (denying defendant's motion for partial judgment as to plaintiff's cause of action for false imprisonment and *respondeat superior* because the accuser was not the one allegedly harmed by the plaintiff): "Plaintiff alleges that ultimately, defendants determined to investigate the incident between plaintiff and Ms. Karashel, even though she did not personally make the complaint."

Summary

As confirmed by five trial court decisions, the regulatory provisions at Section 160.30 are essential for upholding students' statutory and common law rights because they indicate when Title IX grievance procedures become lawfully required or permitted. When universities take action against a respondent without first receiving a complaint from the complainant - as in *Neal v. Colorado State Univ.* where the university relied instead on a third party complaint - such actions can violate Title IX.

Recommendation

The regulatory provision that impliedly requires that recipient schools first receive a complaint before initiating the grievance process should be retained. The revised regulation should further state explicitly

that a complainant must make a formal complaint before discipline is imposed, and that complaints made by students on behalf of other students will not be considered.

Memorable Quote

Faiaz v. Colgate Univ., 64 F. Supp 3d 336, 341 (N.D.N.Y. Nov 24, 2014) (denying defendant's motion for partial judgment as to plaintiff's cause of action for false imprisonment and *respondeat superior* because the accuser was not the one harmed by the plaintiff): "Plaintiff alleges that ultimately, defendants determined to investigate the incident between plaintiff and Ms. Karashel, even though she did not personally make the complaint."

---

5. Supportive Measures

Introduction

Victims of sexual assault often require supportive measures to continue their educational experience.

Regulatory Language

Section 160.44(a): "The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures...; consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint."

Trial Court Decision

1. *Doe v. Elson S Floyd College of Medicine at Washington State University*, No. 2:20-CV-00145-SMJ, 2020 WL 4043975, at *8 (E.D. Wash. July 17, 2020) (granting Doe a preliminary injunction for violations of due process and disability rights): "Although these assertions are generally vague as to how Plaintiff raised and documented her disabilities, there is sufficient information to raise serious questions as to whether Plaintiff's conversation with [the investigator] Burch-Windrem was sufficient to trigger Defendant's responsibilities to provide core services under Revised Code of Washington § 28B.10.912. Thus, Plaintiff has shown serious questions going to the merits of her claims for disability rights violations."

Summary

As shown in *Doe v. Elson S Floyd College of Medicine at Washington State University*. schools can violate Title IX by failing to provide supportive measures to complainants, including male complainants.

Recommendation

Section 160.44(a)'s requirement for access to supportive measures should be retained.

Memorable Quote

Doe v. Elson S Floyd College of Medicine at Washington State University, No. 2:20-CV-00145-SMJ, 2020 WL 4043975, at *8 (E.D. Wash. July 17, 2020) (granting Doe a preliminary injunction for violations of due process and disability rights): "Although these assertions are generally vague as to how Plaintiff raised and documented her disabilities, there is sufficient information to raise serious questions as to whether Plaintiff's conversation with [the investigator] Burch-Windrem was sufficient to trigger Defendant's responsibilities to provide core services under Revised Code of Washington § 28B.10.912. Thus, Plaintiff has shown serious questions going to the merits of her claims for disability rights violations."

---

6. Emergency Removals

Introduction

In certain situations, the respondent needs to be removed from campus on an emergency basis.

Regulatory Language

Section 160.44(c): "Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis…" [provided that such removal does not violate the Americans with Disabilities Act or Individuals with Disabilities Education Act]

Trial Court Decisions

1. *Stiles v. Brown University*, No. 1:21-cv-00497, at *5 (D.R.I. Jan. 25, 2022) (granting Stiles' motion for preliminary injunction restraining and enjoining Brown University because the university violated Stiles' contractual rights during his Title IX investigation): "The Sexual Misconduct Procedure permits the 'interim actions' of emergency removal from campus and suspension pending resolution of a complaint if there is reasonable cause to believe that the 'Prohibited Conduct is likely to continue and/or the Respondent poses a significant threat of harm to the health, safety, and welfare of others or the University community' . . . [the] Threat Assessment Team failed to afford him a presumption that he was not responsible for the misconduct alleged and thus that 'the university has failed to meet [the student's] reasonable expectations' of the terms of the relevant contract."

2. *John Doe v. Trustees of the California State University, et al.,* No. BS167261 (Cal. Super. Ct. May 30, 2018) at *2 (overturning Doe's expulsion because Doe's due process rights were violated): "[T]he Court granted the petition and ordered that a writ will issue directing Respondent to set aside findings and Petitioner's expulsion, and accord him a new hearing or take such other action in its discretion that is consistent with the Court's decision[.]"

3. *John Doe v. George Washington University*, No. 1:11-cv-00696 (D.D.C. Apr 08, 2011) (permitting a breach of contract claim):

    a. "This Court finds it necessary to maintain the status quo based on Plaintiff's preliminary showing of a likelihood of success on the merits on his breach of contract claim, as well

as the potential for irreparable harm to Plaintiff if he is suspended from the University and evicted from campus housing." *Id.* at *1.

b. "Moreover, the balance of hardships tips in favor of Plaintiff, who apparently would suffer substantial disruptions to his housing and academic program without an order maintaining the status quo, while Defendant, on the other hand, would suffer minimal to no hardship." *Id.* at *1-2.

Summary

While emergency removals are permitted in Section 160.44(c), such removals cannot amount to summary expulsions from campus as in *Marshall v. Indiana Univ.*. Courts have treated such "removals" with skepticism when the removals are indefinite or do not provide the accused with any opportunity to contest the evidence against him, evidenced by the three trial court decisions.

Recommendation

The revised regulation should continue to allow recipients to remove respondents on an emergency basis, but clarify that such removals must allow for the respondent to meaningfully contest the removal in a reasonably short period of time.

Memorable Quote

John Doe v. George Washington University, No. 1:11-cv-00696 (D.D.C. Apr 08, 2011) (permitting a breach of contract claim): "This Court finds it necessary to maintain the status quo based on Plaintiff's preliminary showing of a likelihood of success on the merits on his breach of contract claim, as well as the potential for irreparable harm to Plaintiff if he is suspended from the University and evicted from campus housing." *Id.* at *1.

---

7. Impartial Investigations

Introduction

An impartial and fair investigation is the foundation of an equitable adjudication. In a recent guidance, the Office for Civil Rights stated, "The school must conduct an adequate, reliable, and impartial investigation that provides the parties with an equal opportunity to present witnesses and other evidence."[7]

Regulatory Language

Section 106.45 (b)(1):

"A recipient's grievance process must—

[7] Office for Civil Rights Question (May 13, 2021). Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment. Question 26. https://www2.ed.gov/about/offices/list/ocr/docs/qa-reopening-202105.pdf

(i) Treat complainants and respondents equitably,
(ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence,
(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, or decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any persons who facilitate an informal resolution process, receive training on….. how to serve impartially, including avoiding prejudgment of the facts at issue, conflicts of interest, and bias… recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;"

Appellate Court Decisions

1. *Alexander M. v. Cleary* (SUNY-Albany), 188 A.D.3d 1471, 1476 (N.Y. App. Div. Nov. 25, 2020) (reversing the denial of a motion for discovery under fairness and procedural due process grounds): "An impartial investigation performed by bias-free investigators is the substantive foundation" of a legal proceeding.

2. *Schwake v. Arizona Bd. of Regents*, 967 F.3d 940, 951 (9th Cir. July 29, 2020) (reversing district court's dismissal of Title IX action for failure to state a claim): "Schwake's allegations of the University's one-sided investigation support an inference of gender bias. According to Schwake, the University [among other things] . . . failed to consider his version of the alleged assault or to follow up with the witnesses and evidence he offered in his defense . . . [and] promised him that it would only consider 'one accusation at a time' but then suspended him based on additional violations of the Student Code to which he was not given an opportunity to respond[.]"

3. *Doe v. Oberlin College*, 963 F.3d 580, 586-87 (6th Cir. June 29, 2020) (reversing and remanding the district court's order granting the university's MTD because Doe stated a plausible Title IX erroneous outcome claim): "The College's own Policy states that usually its investigation will be completed in 20 days, and the matter as a whole will be resolved in 60. But here the investigation alone took 120 days[.]"

4. *Doe v. Univ. of Scis.*, 961 F.3d 203, 210 (3d Cir. May 29, 2020) (denying defendant's MTD because Doe plausibly stated Title IX, breach of contract, and procedural due process claims): "As for Roe 2, Doe alleges that USciences '[e]ngaged in selective investigation and enforcement of [its] policies by failing to consider [Doe's] alcohol consumption and whether [Roe] 2 should have been charged with violations of [the Policy] if [Doe] was intoxicated when they had sex[.]' According to the investigator's report, Roe 2 and Doe consumed between three and five drinks each. Doe further alleges that '[a]lthough both [he] and [Roe] 2 had been drinking [during the

party], [USciences] identified [Doe] as the initiator of sexual activity, notwithstanding the comparable intoxication of both participants.'"

5. *Velez-Santiago v. State University of New York at Stony Brook*, 170 A.D.3d 1182, 1183 (N.Y. App. Div. Mar. 27, 2019) (Article 78 proceeding; ruling in favor of the petitioner due to lack of substantial evidence supporting finding of responsibility, annulling Stony Brook's determination of guilt and expunging the matter from Petitioner's school record): "The record reflects that the complainant did not report to investigators that the petitioner engaged in the act which formed the basis for the hearing panel's conclusion that the petitioner violated the aforementioned Conduct Code sections and made no allegation at the hearing that such conduct occurred… The hearing panel's conclusion that the conduct occurred and was nonconsensual was based on no evidence and, thus, comprised of nothing more than 'surmise, conjecture, [or] speculation.'"

6. *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 137 (Cal. Ct. App. Jan. 4, 2019) (reversing the trial court's judgment against Doe with directions to grant Doe' petition for writ of administrative mandate and set aside the findings that Doe violated the University's sexual assault policy because Doe was denied fundamental fairness throughout his sexual assault allegation): "[Investigator and Adjudicator] Dr. Allee failed to check with the athletic department to determine its policies and practices regarding sexual relations between student trainers and athletes, let alone ascertain the existence of the agreement [the accuser] Roe purportedly signed [to not have any sexual relations with athletics after she was caught doing so]."

7. *Doe v. Miami University*, 882 F.3d 579 (6th Cir. Feb. 9, 2018) (reversing the district court's MTD order of Doe's claims because Doe plausibly claimed a possible Title IX violation):

    a. "John incorporated an affidavit from an attorney who represents many students in Miami University's disciplinary proceedings, which describes a pattern of the University pursuing investigations concerning male students, but not female students." *Id.* at 593.

    b. "John points to his own situation, in which the University initiated an investigation into him but not Jane, as evidence that Miami University impermissibly makes decisions on the basis of a student's gender." *Id.* at 593-94.

    c. "John contends that Miami University was facing pressure to increase the zealousness of its "prosecution" of sexual assault and the harshness of the sanctions it imposed because it was a defendant in a lawsuit brought by a student who alleged that she would not have been assaulted if the University had expelled her attacker for prior offenses." *Id*. at 594.

Trial Court Decisions

1. *Doe v. University of Mississippi, et al.*, No. 3:21-cv-00201 (S.D. Miss. Mar. 15, 2022) (denying the university's motion to dismiss because Doe plausibly stated a Title IX claim):

    a. "Katie McClendon, the Title IX Investigator . . . declined to interview any of Plaintiff's witnesses[.]" *Id.* at *4.

b. "Roe appeared by video, flanked by a UMMC advisor and McClendon, who acted as Roe's 'personal protector, advocate, and prosecutor.'" *Id.* at *4-5.

2. *Doe v. Purdue University*, No. 4:18-cv-00089 (N.D. Ind. Jan. 13, 2022), ECF No. 72 (denying the university's motion for summary judgment because a reasonable jury could find the university violated Nancy Roe's rights protected under Title IX and the 14th Amendment's equal protection clause and due process clause):

   a. "[The Dean of Students] Sermersheim's definition [of incapacitation] does not comport with the official Purdue definition of incapacitation for purposes of its anti-harassment policy. Indeed, her definition requires a much lower degree of functioning for the alleged victim to be considered incapacitated and therefore unable to consent. Roe's definition is closer to Purdue's definition. If Sermersheim applied her definition when making her decision as to Roe's incapacity, a jury could find that her conclusion was inconsistent with Purdue's stated policy. If Roe was held to a different standard than Purdue's stated policies described, a jury could determine that the investigative process was unreasonable." *Id.* at *14-15.

   b. "[I]f Sermersheim applied the wrong standard to reports in which incapacity was an issue, the process itself may have been fundamentally flawed. In that situation, a jury could find the flaws in the process equate to deliberate indifference and punishing reporters for those reports would be an intentional response." *Id.* at *15.

3. *Doe v. University of Texas Health Science Center at Houston*, no. 4:21-cv-01439, at *19 (S.D. Tex. Dec. 13, 2021) (denying defendant's motion to dismiss because Doe plausibly alleged a Title IX erroneous outcome claim against the university and a due process claim against the individual defendants): "Doe alleges that committee members joked and gossiped about his 'problems with women' and failed to protect his confidentiality throughout the disciplinary process."

4. *Doe v. Embry-Riddle Aeronautical University*, no. 6:20-cv-1220-WWB-LRH, at *15 (M.D. Fla. Nov. 4, 2021) (denying in part the university's motion to dismiss because Doe plausibly presented Title IX selective enforcement and breach of contract violations): "Additionally, both Plaintiff and the counsel that represented him in the proceedings have provided statements from which a reasonable jury could conclude that [Embry-Riddle Aeronautical University] officials did not treat Plaintiff in an impartial manner during and in connection with its investigation. For example, Jane Roe explicitly requested that [investigator] Meyers-Parker not contact any witnesses on her behalf, including her suitemate because they 'no longer g[o]t a long [sic],' and her request was honored. However, when Jane Roe pointed out that Plaintiff had failed to list his roommate as a witness, Meyers-Parker independently contacted that individual for his statement. A reasonable jury could infer this was done in an effort to avoid learning damaging information regarding Jane Roe's claim while seeking evidence to support a finding of guilt by Plaintiff, which would certainly indicate that the investigation was not impartial."

5. *Moe v. Grinnell College*, No. 4:20-cv-00058-RGE-SBJ, at *27-28 (S.D. Iowa Aug. 23, 2021) (denying the college's motion for summary judgment because Moe plausibly states a Title IX claim and breach of contract claim): "Moe provides evidence that the following deviations occurred during the Title IX process . . . the investigator received no training on 'how to conduct Title IX

investigation pursuant to [Grinnell College's] Title IX policy,' despite the Policy requiring investigation by 'a trained investigator[.]'"

6. *Doe v. Columbia University*, Case 1:20-cv-06770-GHW, at *55 (S.D.N.Y. Aug 1, 2021) (denying the University's MTD Doe's Title IX erroneous outcome claim in imposing interim suspension, Title IX selective enforcement claim in the Jane Doe 1 proceeding, Title IX erroneous outcome claim in the Jane Doe 4 proceeding, and Title IX erroneous outcome claim in the Jane Doe 3 proceeding because he plausibly stated the claims listed above): "[John Doe] alleges that Columbia ignored evidence contradicting Jane Doe 1's version of events, such as the photographic evidence Jane Doe 1 herself submitted. Compl. ¶ 157. He also alleges that Columbia refused to investigate his claim regarding Jane Doe 1's sexual misconduct or consider evidence indicating that she and Jane Doe 3 were attempting to work together to prevent Plaintiff from graduating . . . [this] support[s] an inference that Columbia was biased against Plaintiff."

7. *Doe v. Washington & Lee Univ.*, No. 6:19-CV-00023, 2021 WL 1520001, at *16 (W.D. Va. Apr. 17, 2021) (denying the University's motion for summary judgment because Doe adequately claimed a Title IX violation): "Doe argues that [psychologist] Dr. Boller's presentation to [adjudication committee] HSMB members 'explain[ed] that different rules apply to victims, for whom memory gaps as well as inconsistent and evolving testimony demonstrate veracity.'…Doe argues that this was 'biased training,' which rested upon 'questionable 'trauma-informed' theories.'"

8. *Doe v. American University*, No. 19-CV-03097 (APM), 2020 WL 5593909, at *14 (D.D.C. Sep. 18, 2020) (denying the university's MTD under Title IX and breach of contract grounds): "As evidence of a deficient investigation, Plaintiff points to three examples of things that were not 'thorough and impartial' about Quasem's investigation: (1) she 'failed to ask Ms. Roe and H.S. simple and obvious follow-up questions when the answers would have undermined Ms. Roe's allegations'; (2) she 'failed to interview at least three people to whom Ms. Roe gave contemporaneous accounts of the events of that night'; and (3) she 'withheld information and evidence gathered in the investigation of H.S. regarding the same set of events.' Pl.'s Opp'n at 33–34; *see also* Compl. ¶ 272."

9. *Doe v. Elson S Floyd College of Medicine at Washington State University*, No. 2:20-CV-00145-SMJ, 2020 WL 4043975, at *6 (E.D. Wash. July 17, 2020) (granting Doe a preliminary injunction for violations of due process and disability rights): "However, at this stage, it appears to be a question of fact whether [the investigators'] relationships with the students involved in the events [the adjudicative board] SEPAC was meeting to review amounted to a personal interest 'that might impair, or reasonably appear to an objective, outside observer to impair, a person's independent unbiased judgment in the discharge of their official responsibilities.' Wash. Admin. Code § 504-26-125(4). Thus, Plaintiff has shown serious questions going to the merits of whether these SEPAC members' failure to recuse themselves violated her due process rights."

10. *Doe v. Purdue University*, 464 F. Supp. 3d 989, 995 (N.D. Ind. June 1, 2020) (finding that Purdue discriminated against Doe on the basis of sex, warranting a Title IX claim): "During the interview, Defendants Wright and Rooze were uninterested in any exculpatory evidence. Rather, Defendants Wright and Rooze were interested in supporting Jane Roe's allegations. Defendants Wright and Rooze rejected the Plaintiff's request to observe security camera film which would

have undermined the credibility of Jane Roe and other witnesses. Defendants Wright and Rooze also refused to provide the Plaintiff with exculpatory evidence such as the audio recordings of the interviews with Jane Roe and other witnesses. Some point thereafter, Defendants Wright and Rooze issued a 'Preliminary Report.' Purdue University denied the Plaintiff's repeated requests for a copy of the Preliminary Report. Purdue University also denied the Plaintiff's requests for copies of the audio recordings, documents, and other information gathered during the investigation. Instead, Purdue University only allowed the Plaintiff to review a copy of the Preliminary Report from a secure location. The Plaintiff took handwritten notes regarding the information in the Preliminary Report. Thereafter, Defendants Wright and Rooze submitted the Preliminary Report to administrators at Purdue University. However, these Defendants refused to include exculpatory evidence within the Preliminary Report."

11. *Doe v. Colgate University,* 457 F. Supp. 3d 164 (N.D.N.Y. Apr. 30, 2020), *reconsideration denied*, No. 517CV1298FJSATB, 2020 WL 3432827 (denying University's motion for summary judgment because Doe plausibly states Title IX claims):

    a. "Plaintiff contends that [Title IX Investigator] was not an impartial factfinder because her investigation was entangled with [NY State Police Officer's] criminal investigation and because she did not thoroughly investigate inconsistencies in Roe's accounts. The evidence supports Plaintiff's contentions." *Id.* at 171-72.

    b. "[A]fter Roe reported the incident to [Title IX Investigator] and stated that she wanted to file a criminal complaint, [Title IX Investigator] called [NY State Police Officer's] on his cell phone and put him in touch with Roe. Next, [NY State Police Officer's] asked [Title IX Investigator] to make a room on Defendant's campus available to him to interview witnesses, including Plaintiff; and he ultimately used that room to make the controlled phone call between Roe and Plaintiff and to 'interrogate' Plaintiff." *Id.* at 172.

    c. "Additionally, the evidence shows that [Title IX Investigator] failed to probe Roe regarding various internal inconsistencies raised in her accounts of what happened and countered by available, objective evidence. For example, Roe claimed that she accompanied Plaintiff back to his room around 12:30 or 1:00 a.m.; however, Plaintiff did not swipe his gate card to his residence hall until 2:03 a.m. Similarly, Roe maintained that she left Plaintiff's room at 4:30 a.m., but Defendant's records indicate that she did not return to her residence hall until 6:12 a.m." *Id.*

    d. "Furthermore, [Title IX Investigator] did not ask Roe to respond to Plaintiff's version of the events, even though Plaintiff responded to Roe's version of the events in order to defend himself from her allegations. For instance, Plaintiff claimed that they changed positions during the third act of intercourse, thus putting Roe on top and giving her 'ample opportunity to stop at any point[.]' Roe complained that she 'tried to push [Plaintiff] off of her and to squirm away, but she couldn't because [he] had his hands on her hips and kept holding her hips down' and that she 'thought to herself that she should "suck it up"' so that she could leave. Yet, despite these blatant inconsistencies, there is no indication that Brogan tried to reconcile Roe's and Plaintiff's versions of the incident." *Id.*

12. *Doe v. Rollins College*, no. 6:18-cv-01069-Orl-37LRH, at *28 (M.D. Fla. Mar. 9, 2020) (granting in part Doe's partial motion for summary judgment because the university breached its contract with Doe regarding the university's sexual assault policy and denying in part the university's partial motion for summary judgment because Doe plausibly stated an issue of genuine fact regarding fundamental fairness): "Doe presented evidence Rollins [College] didn't treat him fairly or equitably—deciding he was responsible before hearing his side of the story and failing to follow procedures mandated by the Policy and Responding Party Bill of Rights."

13. *Doe v. Syracuse University*, 440 F. Supp. 3d 158, 179 (N.D.N.Y. Feb. 21, 2020) (denying the University's motion for summary judgment because Doe's allegations plausibly state a Title IX selective enforcement claim): "The university trained its investigators that inconsistency in the alleged female victim's account [is] evidence that her testimony is truthful, because of alleged trauma….Plaintiff alleges that the investigation relied on 'trauma informed techniques' that 'turn unreliable evidence into its opposite,' such that inconsistency in the alleged female victim's account. . .becomes evidence that her testimony is truthful."

14. *Doe v. University of Maine System*, no. 1:19-cv-00415-NT (D. Me. Feb. 20, 2020) (denying the university's motion to dismiss because Doe plausibly claim Title IX violations and a procedural due process violation):

    a. "There may be an argument that Doe's report of these details—which occurred after the Settlement Agreement—was a new starting point for assessing how [the University of Maine System (UMS)] responded to his allegations. If so, any failure by UMS to investigate those allegations, while actively investigating the complaints against Doe, could potentially be a new act of selective enforcement or could have contributed to a hostile environment for Doe." *Id.* at *17.

    b. "The Plaintiff alleges that UMS had a 'retaliatory motive' when it took several adverse actions against him. *See Compl*. ¶¶ 137–43. Those adverse actions appear to be complete. *See Compl*. ¶ 140 (actions include barring Doe from his employment, suspending Doe, making public statements about Doe's Title IX case, providing Doe's Title IX case files to the press and others, and failing to disclose that Doe's disciplinary proceedings had been dismissed for exculpatory reasons)." *Id.* at *26.

15. *Bisimwa v. St. John Fisher College, et al.*, E2019005959, at *6-7, (N.Y. Sup. Ct. Nov. 20, 2019) (denying the school's MTD because Bisimwa plausibly states breach of contract and defamation claims): "[Dean of Students and Residential Life and Investigator] Travaglini's response [to the adjudicative committee] was not complete and gave only a partial picture of the entire disciplinary history as the cited new criminal trial evidence and favorable expungement were not mentioned."

16. *Harnois v. Univ. of Massachusetts at Dartmouth*, No. CV 19-10705-RGS, 2019 WL 5551743 (D. Mass. Oct. 28, 2019) (denying UMass's 12(b)(6) motion on nine counts, including Title IX, due process, and fairness):

    a. "During its investigation, UMass Dartmouth's Title IX office asked two female students in Harnois's graduate program to file complaints against Harnois but both refused to do so.

Eventually, the Title IX investigator contacted every female student in Harnois's classes in search of derogatory information." *Id.* at *3.

b. "Harnois alleges that during his Title IX investigation, Gomes did not interview any of Harnois' witnesses, and failed to consider potentially exculpatory evidence - such as, for instance, Harnois' discovery and reporting of a cheating scandal, which might have given several individuals a motive to disparage him." *Id*. at *6.

17. *Doe v. Westmont College*, 34 Cal. App. 5th 622, 625 (Cal. Ct. App. Apr. 23, 2019) (affirming the trial court's writ of mandate setting aside Westmont's determination and sanctions against Doe because of fairness issues): "Westmont's investigation and adjudication of Jane's accusation was fatally flawed."

18. *Noakes v. Syracuse University*, no. 5:18-cv-00043-TJM-ML, at *27 (N.D.N.Y. Feb. 26, 2019) (denying the university's motion to dismiss because the plaintiff sufficiently established a plausible Title IX erroneous outcome claim): "Plaintiff points to '[p]articular circumstances' he claims demonstrate bias, such as . . . using 'biased or negligent investigatory techniques;' and failing to correct improper investigatory methods."

19. *Doe v. University of Mississippi*, 361 F.Supp.3d 597 (S.D. Miss. Jan. 16, 2019) (holding that Doe successfully pleaded plausible claims of sex bias and procedural due process):

    a. "Defendant Ussery's written report did not address or summarize the statements made by Bethany Roe to her physician or the police despite these statements containing highly exculpatory information. The report did not evidence any attempt by Ussery to interview the responding officers, persons who attended the pre-game party with Roe and Doe, or persons who the couple spent time with at the party. Furthermore, the cab driver who took Roe and Doe to the fraternity party and back to Doe's apartment was not interviewed and there was no assessment of any text messages or phone calls between Roe, Doe, the cab driver, or Roe's roommates." *Id.* at 607.

    b. "The report did not address nor contain Roe's medical record which clearly indicated that Roe did not believe she was raped." *Id*.

    c. "But the presence of an allegedly biased panel member raises a due-process problem. A biased decision maker is constitutionally unacceptable." *Id*. at 611.

20. *Doe v. Rollins College*, 352 F. Supp. 3d 1205, 1212 (M.D. Fla. Jan. 16, 2019) (denying the university's motion to dismiss because Doe plausibly alleged college acted out of gender bias, violating Title IX, and college violated various provisions in sexual misconduct policy, warranting breach of contract): "Rollins [College] used a biased investigator who assessed Jane Roe's account as credible over Plaintiff's [because Jane Roe is a woman] [.]"

21. *Powell v. Montana State Univ.*, No. CV 17-15-BU-SEH, 2018 WL 6728061, at *7 (D. Mont. Dec. 21, 2018) (finding that Doe has raised a valid Title IX claim): "Issues of material fact continue to be present regarding Shaffer's conduct in the selection of Sletten as investigator and in the conduct of the investigation by Sletten without prejudgment of the issue of Powell's guilt. Correspondence and exchanges between Sletten, Shaffer, Perry, and Assistant Dean of Students

Grusonik, viewed in the light most favorable to the Plaintiff, establish that questions of material fact remain as to whether Sletten's investigation was impartial and whether Shaffer unfairly prejudged OIE's investigation against Powell. Moreover, MSU's imposition of sanctions against Powell before any decision on the merits of Perry's complaint had been reached clearly calls into question whether MSU itself inappropriately prejudged the case."

22. *Doe v. George Washington University*, no. 1:18-cv-00553-RMC, at *15 (D.D.C. Dec. 20, 2018) (denying in part the university's motion to dismiss because Doe plausibly stated a Title IX violation, breach of contract violation, and a D.C. human rights' law violation): "According to the texts, A.C. had no recollection of talking to Ms. Roe either during the Uber ride or in the bathroom of the dorm after Ms. Roe returned. Without explanation, the Appeals Panel found that this evidence 'generally corroborate[d]' Ms. Roe's statements that she had spoken with someone on the phone during the Uber ride and that she had spoken to A.C. about the assault when she got back to the dorm. This conclusion is divorced from the evidence and not explained[.]"

23. *Doe v. The University of Mississippi*, No. 3:16-CV-63-DPJ-FKB, 2018 WL 3560229, at *11 (S.D. Miss. July 24, 2018) (denying MTD for Plaintiff's Title IX claim because Doe stated a plausibly Title IX claim) "Turning then to Doe's arguments regarding Ussery, he says her investigation was biased and flawed, that it resulted in an unfair report that was presented to the Judicial Council as the official report of the Title IX Coordinator, and that the panel itself had been trained in a way that prejudiced Doe's ability to be heard. As to that training, Doe makes the following points: (1) the training material "advises that a 'lack of protest or resistance does not constitute consent, nor does silence,'" (2) it "advise[s] the panel members that 'victims' sometimes withhold facts and lie about details, question if they've truly been victimized, and 'lie about anything that casts doubt on their account of the event,'" and (3) it explains that "when Complainants withhold exculpatory details or lie to an investigator or the hearing panel, the lies should be considered a side effect of an assault.""

24. *Schaumleffel v. Muskingum University*, no. 2:17-cv-000463-SDM-KAJ, at *23 (S.D. Ohio Mar. 6, 2018) (denying the University's motion to dismiss because plaintiff plausibly stated a Title IX erroneous outcome claim, promissory estoppel claim, negligence claim, and breach of contract): "[T[he Community Standards Board [adjudicative body] was comprised of: Muskingum [University] administrator Stacey Allan (Chair), and Muskingum faculty members Kenneth Blood, Hallie Baker, and Peter Gosnell. According to Muskingum's Student Handbook, for all cases resolved through the Community Standards Board process, the Community Standards Board shall be composed as follows: 'The [Community Standards] board is composed of students, staff and faculty members. Their responsibilities include determining whether an alleged is responsible or not responsible for violations of the Code of Student Conduct and recommending sanctions to the board chair....'(Doc. 1-17, Student Handbook at 50). The Student Handbook further specifies the following quorum requirement for proceedings of the Community Standards Board: 'Five members, with at least three students and two faculty/staff members will constitute a quorum.' (*Id*.). Plaintiff has sufficiently alleged a provision of the Student Handbook that Muskingum has not complied with."

25. *Doe v. Rider Univ.*, 2018 U.S. Dist. LEXIS 7592, 2018 WL 466225, at *38 (D.N.J. Jan. 17, 2018) (finding that Doe had pled a plausible claim under breach of contract and Title IX): "In addition, Plaintiff alleges Defendant breached a provision of the Policy stating, 'The Board will be

composed of three (3) impartial and trained, professional staff members of the University community appointed by the Title IX Coordinator (or designee).' Specifically, he alleges: 'Just days before the December 4 formal hearing, [he] learned that the three designated Board members all reported, either directly or through others, to Dean Campbell. This was a clear conflict of interest. It was Dean Campbell who had urged Jane Roe and Jane Roe 2 to make a report to the [Police Department]. It was Dean Campbell who had suspended [Plaintiff] on October 19, 2015. It was Dean Campbell who had summarily declared that he was 'going against' [Plaintiff]. And, on information and belief, it was Dean Campbell who had directed the community standards panel to continue [Plaintiff's] interim suspension.' Despite this clear conflict of interest, [Defendant] failed to recuse any of the Board members.

26. *Doe v. Ainsley Carry et al*., Case No. BS163736, at *13 (Cal. Sup. Ct. Dec. 20, 2017) (holding that USC did not provide a fair, neutral, and impartial investigation): "Respondents claim that their investigation was thorough, despite failing to obtain a statement from the only individual - J.S. - to purportedly see Roe immediately after the incident. Respondents argue that interviewing J.S. was not appropriate and that J.S. was not available to be interviewed... However, a statement from J.S. was appropriate in the instant case, as a material disputed fact existed."

27. *In the Matter of John Doe v. Rensselaer Polytechnic Institute*, No. 254952, at *12 (N.Y. Sup. Ct. Nov. 6, 2017) (granting New York state law Article 78 order annulling Respondent's initial determination that Petitioner violated RPI's Student Sexual Misconduct Policy): "Before the meeting began, the interviewers informed Petitioner that he was the subject of a sexual misconduct complaint, and gave Petitioner a number of important documents relating to the investigation and his rights, and only gave him moments to consider them. The Court finds that the conduct demonstrated by Respondents towards Petitioner during the initial course of this investigation was a clear violation of his constitutional rights."

28. *Rolph v. Hobart & William Smith Colleges,* 271 F. Supp. 3d 386, 401-02 (W.D.N.Y. Sep. 20, 2017) (denying defendant's MTD regarding plaintiff's Title IX erroneous outcome claim because he plausibly stated a claim): "Here, Plaintiff has adequately alleged facts that plausibly support at least a minimal inference of gender bias on the part of HWS. The allegations which support that inference include the following . . . failed to . . . conduct any follow-up interviews to resolve inconsistencies between witnesses' statements."

29. *Doe v. The Trustees of the Univ. of Pennsylvania*, 270 F. Supp. 3d 799, 816–17 (E.D. Pa. Sep. 13, 2017) (holding that Defendant violated Title IX under an erroneous outcome theory and procedural due process):

    a. "Specifically, the Complaint alleges that officials who handled Plaintiff's case were trained with, among other materials, a document called 'Sexual Misconduct Complaint: 17 Tips for Student Discipline Adjudicators.' That document warns against victim blaming; advises of the potential for profound, long-lasting, psychological injury to victims; explains that major trauma to victims may result in fragmented recall, which may result in victims 'recount[ing] a sexual assault somewhat differently from one retelling to the next'; warns that a victim's 'flat affect [at a hearing] does not, by itself, show that no assault occurred'; and cites studies suggesting that false accusations of

rape are not common. At the same time, the document advises that the alleged perpetrator may have many 'apparent positive attributes such as talent, charm, and maturity' but that these attributes 'are generally irrelevant to whether the respondent engaged in non consensual sexual activity.' It also warns that a 'typical rapist operates within ordinary social conventions to identify and groom victims' and states that 'strategically isolating potential victims can show the premeditation' commonly exhibited by serial offenders. The Complaint asserts that such guidance 'encourage[s] investigators and adjudicators to believe the accuser, disregard weaknesses and contradictions in the accuser's story, and presume the accused's guilt.'" *Id.* at 816-17.

b. The university's training document "warns against victim blaming; advises of the potential for profound, long-lasting, psychological injury to victims; explains that major trauma to victims may result in fragmented recall, which may result in victims 'recount[ing] a sexual assault somewhat differently from one retelling to the next'; warns that a victim's 'flat affect [at a hearing] does not, by itself, show that no assault occurred'; and cites studies suggesting that false accusations of rape are not common….In light of these same allegations, we also conclude that the Complaint plausibly alleges that the investigators were not 'appropriately trained as investigators in handling sexual violence cases.'" *Id.* at 817.

30. *John Doe v. Pennsylvania State University*, 276 F. Supp. 3d 300, at 313 (M.D. Pa. Aug. 18, 2017) (granting Doe's motion for a temporary restraining order against the university because Doe demonstrated likelihood of success on merits of due process claim): "I specifically note that, during the hearing, [Title IX Compliance Specialist] Ms. Matic stated repeatedly that her ultimate role is 'be impartial and objective to both parties' and that is this goal necessitates that she redact information provided. I preliminarily find that those statements to be in conflict and may work to violate Doe's due process."

31. *Mancini v. Rollins Coll.*, M.D. Fla. No. 616CV2232ORL37KRS, 2017 WL 3088102, at *5 (M.D. Fla. July 20, 2017) (denying MTD on procedural due process grounds): "The Court agrees with Plaintiff that one may plausibly infer that the Decision was erroneous 'given the pleaded facts' that: [] two 'esteemed Rollins' Wellness Center members expressed serious concerns about the integrity of the Investigator and the investigation.

32. *Tsuruta v. Augustana University*, No. CIV. 4:16-4107-KES, 2017 WL 11318533, at *3 (D.S.D. June 16, 2017) (denying defendant's MTD because plaintiff plausibly states a breach of contract claim and negligence claim): "[T]he complaint states the investigator failed to interview relevant witnesses and detect exculpatory emails deleted before the complainant gave the emails to the investigator."

33. *Doe v. Amherst College*, no. 3:15-cv-30097-MGM, at *32 (D. Mass. Feb. 28, 2017) (denying the university's motion for judgment on the pleadings because Doe plausibly stated breach of contract, national origin discrimination, and Title IX violations): "[A] jury could reasonably infer [Amherst] College acted in a manner that prevented [Doe] from receiving the 'thorough, impartial and fair' investigation promised in the Student Handbook and thereby also denied him a fair adjudication of the complaint against him."

34. *Matter of Doe v. Cornell University*, EF2016-0192. 2017 NY Slip Op 30142(U) at *3 (N.Y. Sup. Ct. Jan. 20, 2017) (denying Cornell's MTD due to Doe's plausible Title IX claim): "The Court concludes that Respondents' determination to defer investigation of the Petitioner's Policy 6.4 is arbitrary and capricious and without a rational basis. Once Respondents promulgated policies and procedures for the adjudication of complaints of misconduct, they are not permitted to ignore them for administrative, procedural or any other reason. The Court concludes that Respondents improperly deferred investigation into Petitioner's claim of sex discrimination in contravention of their established policies and procedures."

35. *Collick v. William Paterson Univ.*, D.N.J. No. 16-471 (KM) (JBC), 2016 WL 6824374, at *11 (D.N.J. Nov. 17, 2016), *adhered to on denial of reconsideration*, D.N.J. No. CV 16-471 (KM) (JBC), 2017 WL 1508177 (D.N.J. Apr. 25, 2017), and *aff'd in part, remanded in part*, 699 Fed. Appx. 129 (3d Cir. 2017) (denying MTD on Count 1 for failure to state a Title IX claim because plaintiff plausibly states a Title IX claim): "The Complaint [alleges] that '[a]s a purported female victim, the Accuser's allegations against the male plaintiffs were accepted as true without any investigation being performed and without the development of any facts or exculpatory evidence.' And the Complaint does allege that Collick and Williams were not given the opportunity to respond or explain themselves, did not receive proper notice of the specific charges, were not permitted to confront or cross-examine their accuser, were not given a list of witnesses against them, and more generally were not afforded a thorough and impartial investigation."

36. *Doe v*. *Brown University*, 210 F. Supp. 3d 310, 339 (D.R.I. Sep. 28, 2016) (granting a preliminary injunction against defendant for breach of contract): "[Investigator] Perkins' assessment that there was insufficient evidence to support [accused student] Doe's fabrication claim was particularly problematic given that she had refused to ask for evidence that might have proven it so and been exculpatory to Doe. …The problem here was that Perkins made the initial decision to include the conspiracy claim and corresponding character evidence, but then chose not to complete the evidence-gathering, and went on to say that there was insufficient evidence to support Doe's fabrication claim. Because of this, her failure to request the text messages between Ann and Witness 9 was a violation of Doe's right '[t]o be given every opportunity to . . . offer evidence before the hearing body or officer.'"

37. *Ritter v. Oklahoma City Univ*., W.D. Okla. No. CIV-16-0438-HE, 2016 WL 3982554, at *2 (W.D. Okla. July 22, 2016) (denying MTD for failure to state a Title IX claim because plaintiff plausibly stated a Title IX claim): "[C]onsidering all the allegations in the amended complaint, including the asserted facts underlying plaintiff's alleged offense, the alleged manner in which the investigation and disciplinary process were conducted, the allegation that females facing comparable disciplinary charges have been treated more favorably than plaintiff and the assertion that, because of his gender, the sanctions imposed on plaintiff were disproportionate to the severity of the charges levied against him, the court concludes plaintiff has stated a selective enforcement claim."

38. *Doe v. Weill Cornell Univ. Med. School*, 1:16-CV-03531 (S.D.N.Y. May 20, 2016) (granting Doe a TRO for fairness issues): "the investigative report dismissed any inconsistencies as attributable to the complainant's anxiety."

39. *Doe v*. *Ohio State University*, No. 2:15-CV-2830, 2016 WL 1578750, at *3 (S.D. Ohio Apr. 20, 2016) (granting a preliminary injunction against the University for fairness and procedural due process issues): "Plaintiff has introduced evidence that has given this Court significant pause as to many of the practices that the university employs and the rules it has established to govern its investigative and disciplinary hearing process."

40. *Doe v*. *Rector & Visitors of George Mason University*, 149 F. Supp. 3d 602, 619 (E.D. Va. Feb. 25, 2016) (granting summary judgment for Doe on Title IX grounds) "The undisputed record facts reflect that, as of the time plaintiff was allowed to present his defense before [university investigator] Ericson, Ericson admits that he had 'prejudged the case and decided to find [plaintiff] responsible' for sexual assault."

41. *Doe v. Georgia Board of Regents*, No. 1:15-cv-04079-SCJ, at *37-38 (N.D. Ga. Dec. 16, 2015) (violating Doe's procedural due process rights because of an impartial investigation): "To put it bluntly, [investigator] Paquette's testimony at the preliminary injunction hearing about the course of the investigation and the manner in which he made certain investigatory decisions was very far from an ideal representation of due process. (Pg. 37)…Much remains for the Court's consideration as to whether Mr. Paquette's investigation veered so far from the ideal as to be unconstitutional."

42. *Doe v. Salisbury University*, no. 1:15-cv-00517-JKB, at *21 (D. Md. Aug. 21, 2015) (denying the university's motion to dismiss because Doe plausibly claimed an erroneous outcome Title IX violation and a negligence violation): "[Assistant Vice President of Student Affairs, Dean of Students, and Title IX Coordinator] Randall-Lee and [Student Conduct Administrator] Hill presented "false information" to the [Community] Board [or the adjudicative body]."

43. *Doe v. Washington and Lee University*, No. 6:14-CV-00052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015) (denying the University's MTD because Doe's allegations plausibly support a Title IX claim)

    a. "In the course of the investigation, Ms. Kozak and Mr. Rodocker ultimately interviewed at least nine people. These witnesses included two of Plaintiff's four recommended witnesses and at least eight witnesses recommended by Jane Doe…When Plaintiff questioned why two of his suggested witnesses were not interviewed, Ms. Kozak stated that the interviews would not be necessary, as they already had enough facts." *Id.* at *4.

    b. "During discovery, W&L produced a summary of ten years' worth of HSMB panel findings, between the 2008-09 and 2018-19 academic years. Out of 35 total allegations, 27 included male respondents. Of those 27, 14 claims proceeded to a hearing. Of those 14 cases that went to a hearing against male respondents, 9 male respondents were found responsible and 5 were found not responsible. One case had a male complainant and male respondent; four cases had both female complainants and respondents." *Id*. at *11.

Summary

Seven appellate and 43 trial court decisions have articulated deficiencies in the conduct of impartial investigations, making this regulatory provision one of the most salient in the eyes of the judiciary. The legal basis for most of the decisions was a violation of Title IX.

Recommendation

The revised Title IX regulation needs to retain and strengthen the existing regulatory requirements for impartial investigations. Many universities utilize guilt-presuming investigative methods known as "trauma-informed," "victim-centered," or "Start by Believing." The use of such approaches needs to be discouraged.

Memorable Quote

Powell v. Montana State Univ., No. CV 17-15-BU-SEH, 2018 WL 6728061, at *7 (D. Mont. Dec. 21, 2018) (finding that Doe has raised a valid Title IX claim): "Issues of material fact continue to be present regarding Shaffer's conduct in the selection of Sletten as investigator and in the conduct of the investigation by Sletten without prejudgment of the issue of Powell's guilt. Correspondence and exchanges between Sletten, Shaffer, Perry, and Assistant Dean of Students Grusonik, viewed in the light most favorable to the Plaintiff, establish that questions of material fact remain as to whether Sletten's investigation was impartial and whether Shaffer unfairly prejudged OIE's investigation against Powell. Moreover, MSU's imposition of sanctions against Powell before any decision on the merits of Perry's complaint had been reached clearly calls into question whether MSU itself inappropriately prejudged the case."

---

8. Evidence Evaluation

Introduction

Equitable procedures require that all pertinent evidence be carefully considered.

Regulatory Language

Section 160.45(b)(1)(ii): "Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence."

Appellate Court Decisions

1. *Doe v. Regents of the University of California* (UCLA), No. 20-55831, at *21 (9th Cir. Jan. 11, 2022) (reversing and vacating the order and judgment of the District Court of the Central District of California dismissing a Title IX action brought by Doe because Doe plausibly stated a Title IX claim against the Regents): "[I]rregular proceedings during the appeal hearing itself, [included] . . . (1) the burden was placed on Doe, not the University; (2) Doe was not permitted to speak at the appeal hearing; (3) fact witness testimony supporting Doe's account of the events was discounted, while witness testimony supporting Roe's account was accepted without the need for an independent interview by the appeal panel[.]"

2. *Doe v. University of Denver,* No. 19-1359, at *23 (10th Cir. June 15, 2021) (reversing the district court's order granting the University summary judgment because Doe satisfies the requirements of the *McDonnell Douglas* test through a Title IX claim to overcome summary judgment): "The Final Report does not mention any of [the] inconsistencies [Jane told to investigators]."

3. *Doe v. Univ. of Arkansas - Fayetteville*, 974 F.3d 858, 864–65 (8th Cir. Sep. 4, 2020) **(**reversing the district court's granting of university's motion to dismiss a Title IX Claim because Doe plausibly stated a Title IX claim): "According to the complaint … the panel's finding against Doe was tied to its conclusion that Roe was incapacitated. The panel's finding that Roe became incapacitated at Doe's residence, however, is against the substantial weight of the evidence set forth in the complaint. Farrar, the Title IX coordinator, allegedly found that Roe's consumption of alcohol 'had not substantially impacted her decision-making capacity, awareness of consequences, and ability to make fully informed judgments.' He noted her 'clear ability to communicate with John Doe via text message and coordinate her efforts to leave the party so that she arrived at his residence shortly after he arrived.' He observed that Roe was 'cognizant of her physical location…' Farrar also found no evidence to suggest that Roe drank alcohol at Doe's residence or that she consumed a significant amount of alcohol just prior... The complaint does not recount any findings of the hearing panel about alcohol use that would supersede those made by Farrar. Based on the present record, therefore, the panel's finding about Roe's incapacitation is unexplained and against the substantial weight of the evidence as detailed in the complaint."

4. *Schwake v. Arizona Bd. of Regents*, 967 F.3d 940, 951 (9th Cir. July 29, 2020) (denying university MTD on Title IX claim because plaintiff plausibly stated a Title IX claim): "Schwake's allegations of the University's one-sided investigation support an inference of gender bias. According to Schwake, the University [among other things]... ultimately found him responsible for the charges without any access to evidence or considering his exculpatory evidence."

5. *Doe v. Purdue University*, 928 F.3d 652, 664, 669 (7th Cir. June 28, 2019) (holding that Doe had a constitutionally protected liberty interest in his pursuit of a Navy career): "But their failure to even question Jane or John Doe's roommate to probe whether this evidence was reasonable to disbelieve Jane was fundamentally unfair to John."

6. *Doe v. Carry*, Cal. Ct. App. No. B282164, 2019 WL 155998, at *10 (Cal. Ct. App. Jan. 8, 2019) (reversing trial court denial of administrative mandate challenging expulsion because the court did not adequately address witness credibility): "[T]he determination of the charges of sexual misconduct principally turned on witness credibility. At issue was whether Jane was so intoxicated she lacked the capacity to consent to sex and, if so, whether John knew or reasonably should have known that she lacked that capacity. Dr. Allee interviewed 15 third-party witnesses and reviewed other evidence (including video evidence depicting Jane's conduct shortly after

leaving the apartment at Gateway). The evidence regarding the question of Jane's capacity to consent, and whether (if she lacked that capacity) John reasonably should have known it, was in substantial conflict, and reasonable minds could draw different conclusions."

7. *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 137 (Cal. Ct. App. Jan. 4, 2019) (reversing the trial court's judgment against Doe with directions to grant Doe' petition for writ of administrative mandate and set aside the findings that Doe violated the University's sexual assault policy because Doe was denied fundamental fairness throughout his sexual assault allegation): "[Investigator and Adjudicator] Dr. Allee failed to check with the athletic department to determine its policies and practices regarding sexual relations between student trainers and athletes, let alone ascertain the existence of the agreement [the accuser] Roe purportedly signed [to not have any sexual relations with athletics after she was caught doing so]."

8. *John Doe v. Trustees of Boston College*, 892 F.3d 67, 78 (1st Cir. June 8, 2018) (reversing the district court's order granting the college summary judgment because of procedural due process/fairness issues and breach of contract regarding the disciplinary proceedings): "The Board refused to let Doe's private investigator, Kevin Mullen, testify about a phone conversation he listened to between Doe and J.K., or about Mullen's own interview with J.K., because Mullen had not been a witness of the alleged sexual assault."

Trial Court Decisions

1. *Doe v. Syracuse University*, No. 5:18-cv-01100, at *25 (N.D.N.Y. Mar. 16, 2022) (denying in part the university's motion to dismiss because Doe plausibly stated a Title deliberate indifference claim): "[Syracuse] University 'completely and willfully ignored the Plaintiff's report on Student X's sexual assault' and otherwise failed to investigate Plaintiff's the alleged assault. A complete failure to respond to a complaint of harassment can constitute deliberate indifference."

2. *Doe v. University of Mississippi, et al.*, No. 3:21-cv-00201, at *4 (S.D. Miss. Mar. 15, 2022) (denying the university's motion to dismiss because Doe plausibly stated a Title IX claim): "Katie McClendon, the Title IX Investigator . . . declined to interview any of Plaintiff's witnesses[.]"

3. *Doe v. Texas A&M University – Kingsville, et al.*, no. 2:21-cv-00257, at *3 (S.D. Tex. Nov. 5, 2021) (granting Doe's motion for a temporary restraining order and preliminary injunction to preserve the status quo because Doe was denied due process): "[Doe] was further prevented from offering evidence that the grand jury had no-billed the criminal complaint against him resulting from the same incident."

4. *Doe v. Lincoln-Sudbury Regional School Committee*, No. 1:20-cv-11564-FDS, at *16 (D. Mass. Aug. 27, 2021) (denying the school's motion to dismiss because Doe plausibly stated a due process claim): "The complaint alleges that the retraction letter violated plaintiff's right to due process because, among other reasons, defendants . . . did not provide him a meaningful opportunity to be heard before issuing that retraction. (See, e.g., Compl. ¶ 154(j)-(p)). The complaint therefore plausibly alleges a claim for a violation of plaintiff's due-process rights as to the 2017 retraction letter."

5. *Moe v. Grinnell College*, No. 4:20-cv-00058-RGE-SBJ, at *24 (S.D. Iowa Aug. 23, 2021) (denying the college's motion for summary judgment because Moe stated a plausible Tiitle IX claim and

breach of contract claim): "Moe provides evidence demonstrating the investigator failed to interview witnesses that could have corroborated aspects of his testimony[.]"

6. *Doe v. Columbia University*, Case 1:20-cv-06770-GHW (S.D.N.Y. Aug 1, 2021) (denying the University's MTD Doe's Title IX erroneous outcome claim in imposing interim suspension, Title IX selective enforcement claim in the Jane Doe 1 proceeding, Title IX erroneous outcome claim in the Jane Doe 4 proceeding, and Title IX erroneous outcome claim in the Jane Doe 3 proceeding because Doe plausibly stated the claims listed above):

    a. "Columbia relied solely on the allegations by Jane Does 1–3, some of which 'ultimately would not be sustained,' and failed to consider that Plaintiff was a complainant in cases against Jane Does 1 and 2." *Id.* at *44.

    b. "[John Doe] alleges that Columbia ignored evidence contradicting Jane Doe 1's version of events, such as the photographic evidence Jane Doe 1 herself submitted. Compl. ¶ 157. He also alleges that Columbia refused to investigate his claim regarding Jane Doe 1's sexual misconduct or consider evidence indicating that she and Jane Doe 3 were attempting to work together to prevent Plaintiff from graduating . . . [this] support[s] an inference that Columbia was biased against Plaintiff." *Id.* at *55.

    c. "Columbia ignored the fact that the 'text messages between [Plaintiff] and [Jane Doe 4] indicate that [Plaintiff] "ceased the idea" of having sex that morning, which means [they] never had it.' Plaintiff also alleges that Columbia held him and Jane Doe 4 to different standards in evaluating the evidence: 'Columbia . . . left Jane Doe 4's numerous assumptions about facts unexamined, whereas they ensured everything John Doe said was corroborated or documented. Columbia also included hearsay and gossip under the guise of testimony.' Those facts are sufficient to cast some articulable doubt on the outcome of the disciplinary proceeding."*Id.* at *56.

7. *Harnois v. Univ. of Massachusetts at Dartmouth*, No. CV 19-10705-RGS, 2019 WL 5551743 at *3 (D. Mass. Oct. 28, 2019) (denying UMass's 12(b)(6) motion on nine counts, including Title IX, due process, and fairness): "Harnois was not informed of his accusers or the details of the allegations. The interview was conducted in an adversarial manner with questions often so vague - for example, 'did you ever deny helping someone with their homework' - that Harnois was unable to answer them. In total, Gomes asked Harnois approximately 15-20 questions, addressing generally 'innocuous behavior.' Harnois' request for a written copy of the questions was denied."

8. *Doe v. Grinnell College*, 473 F. Supp. 3d 909, 927 (S.D. Iowa July 9, 2019) (denying defendant's MSJ because Doe plausibly stated Title IX and breach of contract claims): "As for the determination in Complainant #2's case, Doe argues, among other inaccuracies, the determination of responsibility wrongfully found Complainant #2 was coerced into having sex with Doe without analyzing evidence in the record showing her choice to have sex was voluntary."

9. *Montague v. Yale University*, no. 3:16-cv-00885, at *41 (D. Conn. Mar. 29, 2019) (denying in part the university's motion for summary judgment because there is a genuine issue of fact demonstrating breach of contract, fundamental fairness, and tort violations): "[Yale University]

failed to seek exculpatory evidence, cast Roe's inconsistencies as consistencies, placed unfair weight on a supposed inconsistency in Montague's recollections, failed to probe Roe's motive, and transformed and obliterated undisputed evidence to remove facts which raised questions about whether Roe consented."

10. *Noakes v. Syracuse University*, no. 5:18-cv-00043-TJM-ML (N.D.N.Y. Feb. 26, 2019) (denying the university's motion to dismiss because the plaintiff sufficiently established a plausible Title IX erroneous outcome claim):

    a. "[I]nvestigators ignored evidence [plaintiff] presented which would have made it impossible for him to have attacked Roe. Such allegations cast an articulable doubt on the outcome of the disciplinary proceeding and are sufficient to state a claim in that respect." *Id.* at *27

    b. "[T]he University Conduct Board, the Appeals Board, and other Syracuse officials ignored any evidence or contradictions in Roe's story and refused to investigate any evidence that supported Plaintiff's version of events." *Id*. at *29.

11. *Jia v. University of Miami et al*, no. 1:17-cv-20018-DPG, at *9-10 (S.D. Fla. Feb. 12, 2019) (denying the university's motion to dismiss because plaintiff sufficiently established a plausible Title IX claim and a defamation claim): "[Irregularities in the investigation process] include: (1) allowing witnesses without first-hand knowledge to testify for Cameron [and] (2) failing to call Plaintiff's available witness . . . [which] could plausibly affect its disciplinary proceedings against Plaintiff."

12. *Doe v. George Washington University*, no. 1:18-cv-00553-RMC (D.D.C. Dec. 20, 2018) (denying in part the university's motion to dismiss because Doe plausibly stated a Title IX violation, breach of contract violation, and a D.C. human rights' law violation):

    a. "The Hearing Panel's decision gave significant credit to E.E.'s testimony regarding Ms. Roe's state of notable intoxication during the Uber ride. The totality of the evidence before the Appeals Panel indicates that E.E. never spoke to Ms. Doe; certainly, a one-minute or unanswered call to A.C. does not corroborate E.E.'s testimony. The Appeals Panel excused the failure of evidence as a mere memory lapse by Ms. Roe, who, it concluded (contrary to the Hearing Panel), may have been confused about whom she called from the Uber. However, there is no evidence that Ms. Roe had any recollection of talking to anyone during the Uber ride, at least not prior to the hearing when she heard E.E.'s statements asserting that E.E. had talked with Ms. Roe. *Id.* ¶ 143." *Id*. at *13.

    b. "[T]he Appeals Panel only decided that [toxicologist] Dr. Milman's assumptions were incorrect because Ms. Roe was permitted to submit supplemental statements in response to Mr. Doe's appeal . . . this apparent irregularity is glaring." *Id.* at *14.

    c. "According to the texts, A.C. had no recollection of talking to Ms. Roe either during the Uber ride or in the bathroom of the dorm after Ms. Roe returned. Without explanation, the Appeals Panel found that this evidence 'generally corroborate[d]' Ms. Roe's statements that she had spoken with someone on the phone during the Uber ride and that she had spoken to A.C. about the assault when she got back to the dorm. This conclusion is divorced from the evidence and not explained[.]" *Id*. at *15.

13. *Doe v. Syracuse University*, 341 F. Supp. 3d 125, 138 (N.D.N.Y. Sep. 16, 2018) (denying the university's motion to dismiss because Doe plausibly stated a Title IX claim under the erroneous outcome theory and a Title IX claim under the selective enforcement theory): · "Syracuse failed to adequately investigate and question [the accuser] Roe's credibility; that Syracuse limited questions and commentary of investigatory findings to Roe's emotional state and interactions with friends and family in the days and weeks after the alleged incident . . . [these allegations, among others,] meet Plaintiff's minimal burden of casting some articulable doubt on the accuracy of the outcome of the disciplinary proceeding."

14. *Doe v. University of Mississippi*, No. 3:16-CV-63-DPJ-FKB, 2018 WL 3570229, at *5 (S.D. Miss. July 24, 2018) (denying defendant's MTD because Doe plausibly stated a Title IX claim and a due process claim): "Under the University's Title IX policies, [investigator] Ussery was charged with investigating the allegation and "compil[ing] *all evidence*, including the testimony of various witnesses, into a report." Sexual Misconduct Policy [7-17] at 8 (emphasis added). Yet the Amended Complaint catalogs exculpatory evidence Ussery excluded[.]"

15. *Doe v. University of Oregon*, No. 6:17-CV-01103-AA, 2018 WL 1474531, at *15 (D. Or. Mar. 26, 2018) (denying defendant's MTD because Doe plausibly stated a due process claim and a 14th Amendment equal protection claim): "Plaintiff alleges significant and pervasive flaws in the procedures used to investigate and adjudicate Roe's allegations, including that the University . . . allowed Roe (but not plaintiff) to add new evidence to the record after the hearing . . . and rendered a decision unsupported by the weight of the evidence."

16. *Gonzalez-Riano v. The Florida State University*, No. 2017 AP 6, at *2 (Fla. 2d Cir. Ct. Jan. 19, 2018) (granting plaintiff's writ of certiorari because defendant violated plaintiff's procedural due process rights): "The evidence was undisputed that Petitioner and Accuser had engaged in previous consensual sex . . . [t]hat evidence should have been considered by the Hearing Officer according to the 2015 [Student Conduct] Code, but was not because [the 2016 Code contains a provision saying past consensual activity does not imply consent to future sexual activity]."

17. *Saravanan v. Drexel Univ.*, E.D. Pa. No. CV 17-3409, 2017 WL 5659821, at *5 (E.D. Pa. Nov. 24, 2017) (denying MTD because plaintiff plausibly stated a Title IX claim): "Referring to the statements of witnesses Mr. M.L. and Mr. G.R., Mr. Saravanan alleges [University Official] 'asked gender biased questions' including if M.L. 'had ever done anything like this to other women' and if Mr. G.R. and Mr. Saravanan 'generally assaulted women.' He claims [University Official] asked him, 'why was your penis erect then? Doesn't that mean that you enjoyed it?' when he reported the assault. He alleges [University Official] asked Mr. M.L. 'if he agreed that [Complainant] was the victim.' Mr. Saravanan claims [University Official] also 'took out, omitted, or otherwise failed to investigate and record the information that Mr. M.L. and Mr. G.R. told [University Official] to be put into the report; this information favored [him] and disfavored [Complainant].'"

18. *Painter v. Adams*, W.D.N.C. No. 315CV00369MOCDCK, 2017 WL 4678231, at *7 (W.D.N.C. Oct. 17, 2017) (citations omitted) (denying defendant's MSJ; genuine issue of material fact as to adequacy of University proceedings): "It is, however, troubling that an accused person could not place the actual texts in front of the tribunal, which raises a genuine issue of material fact as to whether plaintiff was denied Due Process. School disciplinary procedures satisfy procedural due process requirements where the accused student had adequate notice of the charges against

him, he had an opportunity to be heard by disinterested parties, he was confronted by his accusers, and he had the right to have a record of the hearing reviewed by a student appellate body. Here, defendants maintain in their Memorandum in Support of summary judgment that 'plaintiff presented no documentary evidence' at the disciplinary hearing. However, it appears that he presented no documentary evidence because he was prevented from doing so. The evidence, viewed in a light most favorable to the party resisting summary judgment, shows that he was prevented from placing into the record exculpatory physical evidence, which raises a concern as to whether plaintiff was denied Due Process."

19. *Richmond v. Youngstown State University*, No. 4:17CV1927, 2017 WL 6502833, at *1 (N.D. Ohio Sep. 14, 2017) (granting plaintiff's TRO because of a plausible Title IX claim and breach of contract claim): "Plaintiff's Title IX claim is viable for reasons made known on the record . . . [t]he expedited discovery [on campus] appears targeted to address this claim, and further develop its merits."

20. *John Doe v. Pennsylvania State University*, 276 F. Supp. 3d 300, at 309 (M.D. Pa. Aug. 18, 2017) (granting Doe's motion for a temporary restraining order against the university because Doe demonstrated likelihood of success on merits of due process claim): "Penn State's failure to ask the questions submitted by Doe may contribute to a violation of Doe's right to due process as a 'significant and unfair deviation' from its procedures [regarding cross examination]."

21. *Mancini v. Rollins Coll.*, M.D. Fla. No. 616CV2232ORL37KRS, 2017 WL 3088102, at *5 (M.D. Fla. July 20, 2017) (granting plaintiff opportunity to replead because plaintiff made a plausible Title IX claim): "The Court agrees with Plaintiff that one may plausibly infer that the Decision was erroneous 'given the pleaded facts' that: [] the Accuser initiated kissing with him, and the morning after the Incident, the Accuser confessed to Plaintiff and [her roommate] that she was responsible for the Incident."

22. *Doe v. Amherst College*, no. 3:15-cv-30097-MGM, at *28 (D. Mass. Feb. 28, 2017) (denying the university's motion for judgment on the pleadings because Doe plausibly stated breach of contract, national origin discrimination, and Title IX violations): "[Doe] asserts that a student reading [Amherst College's] Policy and Procedures [on sexual misconduct] would expect the College to conduct its investigation and fact-finding process in such a manner that potentially exculpatory information would be obtained and presented to the Hearing Board in the same manner as inculpatory information, and that this was not done in his case."

23. *Doe v. Alger*, 228 F. Supp. 3d 713, 730 (W.D. Va. Dec. 23, 2016) (granting Doe summary judgment on his procedural due process claim because his due process rights were violated): "[T]he appeal board effectively reversed the decision of the hearing board . . . [without] considering additional evidence[.]"

24. *Doe v. Brown University*, 210 F. Supp. 3d 310, 339 (D.R.I. Sep. 28, 2016) (granting a preliminary injunction against defendant for breach of contract): "[Investigator] Perkins made the initial decision to include the conspiracy claim and corresponding character evidence, but then chose not to complete the evidence-gathering and went on to say that there was insufficient evidence to support Doe's fabrication claim. Because of this, her failure to request the text messages between Ann and Witness 9 was a violation of Doe's right '[t]o be given every opportunity to ... offer evidence before the hearing body or officer.'"

25. *Doe v. Brown University*, 166 F. Supp. 3d 177, 185 (D.R.I. Feb. 22, 2016) (denying Brown's MTD under Title IX and breach of contract grounds): "Taking the facts in Doe's Complaint as true and drawing all reasonable inferences in his favor, Brown ignored exculpatory evidence, including the victim's own testimony in the Oct. 18 Complaint that she had in fact articulated consent."

26. *Prasad v. Cornell Univ.*, N.D.N.Y. No. 5:15-CV-322, 2016 WL 3212079, at *15 (N.D.N.Y. Feb. 24, 2016) (denying MTD because plaintiff plausibly stated a Title IX claim): "Plaintiff alleges a host of facts demonstrating particular evidentiary weaknesses in the case against him. These include allegations that the investigators failed to question certain witnesses about Doe's outward signs of intoxication; accepted the victim's account of her level of intoxication despite numerous statements to the contrary; misconstrued and misquoted witnesses' statements; used an on-line BAC calculator and Doe's self-reported weight and alcohol consumption to conclude that Doe was in a state of extreme intoxication; accepted Doe's statement that she allowed Plaintiff to sleep in her bed because of her family's 'sailboat community values;' drew prejudicial conclusions without sufficient evidentiary support; and cast Plaintiff's actions in highly inflammatory terms."

27. *Doe v. Salisbury University*, no. 1:15-cv-00517-JKB, at *20 (D. Md. Aug. 21, 2015) (denying the university's motion to dismiss because Doe plausibly claimed an erroneous outcome Title IX violation and a negligence violation): "Plaintiffs were told that they would 'have an opportunity to ask questions of the Investigator, Complainant and Witnesses' at the [Community] Board's [or the adjudicative body] hearing (ECF No. 83-5), and yet "Plaintiffs were prohibited from asking many critical questions of witnesses[.]'"

28. *King v. DePauw Univ.*, S.D. Ind. No. 2:14-CV-70-WTL-DKL, 2014 WL 4197507, at *13 (S.D. Ind. Aug. 22, 2014) (granting PI enjoining enforcement of King's suspension from university because the university failed to question plaintiff's witnesses): "Also problematic is the fact that the investigation admittedly consisted almost exclusively of interviews of witnesses suggested by J.B.; there was no attempt to use those interviews to ferret out other students who might have additional information. So, too, might the jury find troubling the incomplete nature of the questions the Board asked at the hearing. For example, the Board asked each witness to rate her own and J.B.'s level of intoxication from a scale of 1 to 10, but did not ask the witnesses to explain at what point they believed a person becomes incapacitated. Some witnesses may have believed that a person was incapacitated at a 5; others at a 7; others at a 10. The Board had no way of knowing what a particular witness's definition of, say, a '6 out of 10' was, because the Board did not ask."

Summary

Eight appellate courts and 28 trial courts have strongly criticized and ruled against universities that refuse to either gather or consider "all pertinent evidence." Failing to gather or consider relevant evidence raises an inference of sex discrimination in violation of Title IX.

Recommendation

The requirement at Section 160.45(b)(1)(ii) to consider "all pertinent evidence" should be retained. The revised regulation should further require recipient schools to gather all pertinent evidence that is

practically accessible, because such a requirement will help eliminate sex discrimination. *See, e.g., Doe v. Purdue* (holding that refusing to gather testimonial evidence, among other things, is sufficient to raise inference of sex discrimination).

Memorable Quote

Doe v. Purdue University, 928 F.3d 652, 664, 669 (7th Cir. June 28, 2019) (holding that Doe had a constitutionally protected liberty interest in his pursuit of a Navy career): "But their failure to even question Jane or John Doe's roommate to probe whether this evidence was reasonable to disbelieve Jane was fundamentally unfair to John."

---

9. Credibility Assessment

Introduction

Many sexual misconduct cases are of the "he said, she said" variety. Resolution of such cases requires objective credibility determinations, both during the investigative and adjudication processes.

Regulatory Language

Section 106.45 (b)(1)(ii): "...and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;"

Appellate Court Decisions

1. *Doe v. Regents of the University of California* (UCLA), No. 20-55831, at *21 (9th Cir. Jan. 11, 2022) (reversing and vacating the order and judgment of the District Court of the Central District of California dismissing a Title IX action brought by Doe because Doe plausibly stated a Title IX claim against the Regents): "[I]rregular proceedings during the appeal hearing itself, [included] . . . (1) the burden was placed on Doe, not the University; (2) Doe was not permitted to speak at the appeal hearing; (3) fact witness testimony supporting Doe's account of the events was discounted, while witness testimony supporting Roe's account was accepted without the need for an independent interview by the appeal panel[.]"

2. *Doe v. Oberlin College*, 963 F.3d 580, 587 (6th Cir. June 29, 2020) (reversing and remanding the district court's order granting the university's MTD because Doe stated a plausible Title IX erroneous outcome claim): "[There was a] failure [by] the hearing panel even to comment on the flat contradiction, expressly noted by Nolan at the hearing, between what Roe told him during his investigation and what she said during the hearing, regarding whether Doe "asked" for oral sex."

3. *Doe v. Purdue Univ.*, 928 F.3d 652, 669 (7th Cir. June 28, 2019) (reversing district court's dismissal for failure to state a Title IX claim because plaintiff plausibly alleged a Title IX violation): "John has alleged [facts raising the inference of sex bias] here, the strongest one being that [Purdue's Dean of Students and a Title IX coordinator] Sermersheim chose to credit Jane's account without hearing directly from her. The case against him boiled down to a 'he said/she said'—Purdue had

to decide whether to believe John or Jane. Sermersheim's explanation for her decision (offered only after her supervisor required her to give a reason) was a cursory statement that she found Jane credible and John not credible. Her basis for believing Jane is perplexing, given that she never talked to Jane. Indeed, Jane did not even submit a statement in her own words to the Advisory Committee. Her side of the story was relayed in a letter submitted by Bloom, a Title IX coordinator and the director of [a university center dedicated to supporting victims of sexual violence]."

4. *Doe v. Westmont College*, 2d Civil No. B287799, at *21 (Cal. Ct. App. Apr. 23, 2019) (affirming the trial court's writ of mandate setting aside Westmont's determination and sanctions against Doe because of fairness issues): "We [the Court] simply hold that where the outcome of a sexual misconduct disciplinary proceeding turns on witness credibility, an adjudicatory body cannot base its credibility determinations on information in its possession that is not made available to the accused."

5. *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 137 (Cal. App. 5th Jan. 4, 2019) (reversing the trial court's judgment against Doe with directions to grant Doe' petition for writ of administrative mandate and set aside the findings that Doe violated the University's sexual assault policy because Doe was denied fundamental fairness throughout his sexual assault allegation): "In [Doe's] first meeting with [Investigator and Adjudicator] Dr. Allee, Doe articulated his theory that [the accuser] Roe had a strong motive to fabricate a charge of rape. Dr. Allee seems to have rejected that theory almost immediately, despite investigative leads—such as statements by E.C. and K.J., and Roe's texts to Mia—that, if pursued, would lend support to Doe's theory, and weaken Roe's credibility."

6. *Doe v. Baum*, 903 F.3d 575, 585 (6th Cir. Sep. 7, 2018) (holding University violated accused student's constitutional due process rights by denying cross-examination): "Doe seeks cross-examination as part of the credibility assessment by the university. That a state court later allowed for cross-examination as a part of its fact-finding after the university had already made its decision is beside the point. If anything, the fact that the state court allowed cross-examination only goes to show just how far removed the university's fact-finding procedures are from the tried-and-true methods invoked by courts."

7. *Doe v. University of Southern California*, 29 Cal. App. 5th 1212, 1234, 241 Cal. Rptr. 3d 146, 164 (Cal. Ct. App. Dec. 11, 2018) (finding that Doe was denied a fair hearing because of due process issues): "There is no question that expulsion from the university was a severe sanction. Given the conflicting witness statements and lack of corroborating evidence, a fair hearing required Dr. Allee as the adjudicator to assess personally the credibility of critical witnesses, including Sarah, Emily, and Andrew, in person or by videoconference or other technological means, which would have provided Dr. Allee an opportunity to observe the witnesses' demeanor during the interview." *Id*. at 167.

8. *Doe v. Miami University*, 882 F.3d 579, 592 (6th Cir. Feb. 9, 2018) (holding that Doe had pled a plausible erroneous outcome claim under Title IX): "This finding of misconduct holds John responsible for non-consenual oral sex only, and not non-consenual penetration. But Jane's statement is internally inconsistent with regard to her description of the oral sex: she states both that 'I said no' and 'I never said no.' The Administrative Hearing Panel does not explain how it resolved this inconsistency."

9. *Arishi v. Washington State University,* 385 P.3d 251, 265 (Wash. Ct. App. Dec. 1, 2016) (finding that Washington State's adjudication proceedings was prejudiced against Doe, thus violating his procedural due process guarantees): "Mr. Arishi makes that showing, demonstrating a probability sufficient to undermine confidence in the outcome. He contends he would have subpoenaed MOS. Perhaps she would have been credible. But the fact that MOS did not testify and was never cross-examined undermines confidence in the outcome. This is particularly so in light of evidence undermining her credibility: she misrepresented her age on Badoo as 19, misrepresented 'Alex's' age to her mother, was going out during the daytime when she was supposed to be doing homework at home, was driving illegally, and had a different version of events when interviewed by Sergeant Chapman than she did when interviewed twice by Detective Dow. Mr. Arishi also contends that, in and of itself, the opportunity for the conduct board to see MOS would have supported his defense that he reasonably believed she was 19."

Trial Court Decisions

1. *Doe v. Purdue University*, No. 4:18-cv-00089 (N.D. Ind. Jan. 13, 2022), ECF No. 73 (denying the university's motion for summary judgment because a reasonable jury could find the university violated Mary Doe's rights protected under Title IX and the 14th Amendment's equal protection clause and due process clause):

    a. "Purdue apparently concluded that Doe's lack of participation after her initial reporting weighed against her credibility, without her being told that she was facing disciplinary action as a result of the investigation into Male Student A's conduct." *Id.* at *12.

    b. "[I]f Doe's credibility was determined without advising her that it was even at issue, the [investigative] process itself could be deemed fundamentally flawed." *Id*. at *15.

2. *Doe v. Texas A&M University – Kingsville, et al.*, no. 2:21-cv-00257, at *3 (S.D. Tex. Nov. 5, 2021) (granting Doe's motion for a temporary restraining order and preliminary injunction to preserve the status quo because Doe was denied due process): "[Doe] was denied a full and fair opportunity to correct his own statement and to test the accuracy of other statements in a matter that is highly dependent on witness credibility."

3. *Moe v. Grinnell College*, No. 4:20-cv-00058-RGE-SBJ, at *24 (S.D. Iowa Aug. 23, 2021) (denying the college's motion for summary judgment because Moe plausibly states a Title IX claim and a breach of contract claim): "The adjudicator relied in part on the inferences she drew about the intent behind Moe's physical actions to assess his credibility. The adjudicator's credibility finding then formed the basis for finding Moe responsible for violations alleged by Complainant 2 and Complainant 3 . . . a reasonable jury could determine the adjudicator's inferences as to Moe were based on stereotypes about male sexual intent."

4. *Doe v. Washington & Lee Univ*., No. 6:19-CV-00023, 2021 WL 1520001 (W.D. Va. Apr. 17, 2021) (finding that W&L discriminated against Doe on the basis of sex in violation of Title IX):

    a. "In its decision, the HSMB expressed no reservations in crediting Roe's "personal rule" and the distinction Roe drew between her willingness to engage in oral and vaginal sex... To be clear, there is nothing problematic in any of that, on its own. The problem arises

because, when Doe drew a distinction between his willingness to engage in oral and vaginal sex with a friend, the HSMB treated that as a source of inconsistency and incredibility." *Id*. at *13.

b. "The HSMB panel's starkly different treatment of these portions of Roe's and Doe's testimony and its credibility determination could lead a reasonable jury to find that (1) the HSMB followed its Policy in accepting that a female student could credibly draw boundaries to the type of sexual conduct she wished to engage in and with whom, but (2) did not follow that same Policy or treated as doubtful the fact that a male student could credibly draw the same boundaries." *Id*.

c. "The record also reflected that earlier that evening Roe had sexual intercourse with Witness A just before she met with Doe. The HSMB panel's decision did not mention Witness A at all. Nor did the panel ask Roe at the hearing whether she was interested in a relationship with Witness A…. The HSMB's refusal to consider Witness A renders even more significant and unexplained its differing assessment of Roe's and Doe's credibility on the issue of how they drew boundaries of how and with whom they would have sex." *Id*. at *14.

5. *Doe v. American Univ.*, No. 19-CV-03097 (APM), 2020 WL 5593909, at *7 (D.D.C. Sep. 18, 2020) (denying MTD for failure to state a Title IX claim because Doe plausibly stated a Title IX claim): "[The court's conclusion that sex was a motivating factor in a university's decision to discipline Plaintiff student] stems from the Title IX investigator's credibility findings, which plausibly reflect bias based on sex. [Investigator] indicated twice in her report that she found Doe not to have been credible. First, she found that Doe's 'claim that [Roe's] behavior was not affected, even in the slightest, by her marijuana consumption decreases the credibility of his account of what occurred on April 22nd.' Second, [Investigator] explained that a text message that Doe sent to H.S. stating that Roe 'gave her full consent every time I asked, and I asked more than once—Multiple times actually,' 'negatively impacted [Doe's] credibility' because it 'contradict[ed] his statements during the investigation, which only indicate[d] that he asked [Roe] for consent when she moved his head towards her crotch area.' These are arguably minor critiques of Doe's credibility, given that the events in question had occurred more than two-and-a-half years earlier. Whether fair or not, these credibility determinations stand in stark contrast to how Quasem viewed Roe in the report. Roe's testimony presented a raft of potential problems, yet Quasem made no credibility findings as to Roe at all."

6. *Doe v. Syracuse Univ.*, 440 F. Supp. 3d 158, 169 (N.D.N.Y. Feb. 21, 2020) (holding that Defendant failed to provide Plaintiff with adequate notice violating due process): "Jacobson failed to scrutinize evidence weighing on RP's credibility, including 'contradictions between various statements' and the destruction of text messages. In 'an affirmative credibility assessment,' Jacobson concluded, RP is 'credible and the information she provides is reliable. Jacobson disregarded and gave no account of inconsistencies in RP's statements, in particular RP's vacillation about sexual contact on November 13, 2016 to which she had consented after claiming that no sexual contact had been consensual on that day.' Jacobson 'also gave no account of RP's vacillation about attempted vaginal sex prior to November 13, 2016, in which she had accused [Plaintiff] of another sexual assault to SPD officer Murphy, contradicting clear statements that the prior two sexual encounters had been consensual.' Jacobson then gave 'only

cursory treatment' to Plaintiff's 'consistent accounts,' but noted that Plaintiff's 'description of events was 'also entirely plausible.'"

7. *Doe v. University of Connecticut*, No. 3:20CV92 (MPS), 2020 WL 406356 (D. Conn. Jan. 23, 2020) (granting Doe's TRO against the university on due process grounds):

    a. "[E]vidence bearing on credibility is critical, and thus the 'probable value' of allowing these witnesses to testify, as an additional procedural safeguard, was substantial. That value easily outweighed any burden on UCONN, since the witnesses were already present at the hearing and willing to testify." *Id.* at *4.

    b. "At the hearing, only Roe testified; the other two female witnesses did not attend. Doe Aff., ECF No. 2-3 ¶ 44. The Plaintiff, therefore, did not have the opportunity at any point in the process to propose any questions for the two female witnesses, Id. ¶ 44, 48, let alone to cross-examine them. But the investigator and the hearing officers relied on the interviews of those witnesses in making their [credibility] determinations." *Id.*

    c. "[UCONN's] disciplinary procedures hampered [Doe's] ability to present a meaningful defense.... Specifically, Doe was prohibited from presenting witnesses who were prepared to offer testimony that would undermine the credibility of Doe's accuser. UCONN also never gave [Doe] an adequate opportunity to respond to or question [his accuser] or the other female witnesses interviewed during the investigation. [G]iven the importance of credibility evidence to this factual dispute, denying [Doe] the opportunity to respond fully to [his accuser] and her witnesses heightened the risk of erroneous deprivation." *Id.* at *10.

8. *Montague v. Yale University*, no. 3:16-cv-00885, at *41 (D. Conn. Mar. 29, 2019) (denying in part the university's motion for summary judgment because there is a genuine issue of fact demonstrating breach of contract, fundamental fairness, and tort violations): "[Yale University] failed to seek exculpatory evidence, cast Roe's inconsistencies as consistencies, placed unfair weight on a supposed inconsistency in Montague's recollections, failed to probe Roe's motive, and transformed and obliterated undisputed evidence to remove facts which raised questions about whether Roe consented."

9. *Doe v. White*, No. BS171704, (Cal. Sup. Ct. Feb. 7, 2019) (finding that the University's administrative proceeding was unfair and the decision and sanction must be set aside): "Here, as Respondents concede, the administrative procedure was unfair under *Allee*. Petitioner was accused of sexual misconduct and faced severe disciplinary sanctions. Petitioner's own credibility was central to the adjudication. In her investigation findings, Reguengo found 'most compelling' Petitioner's statement to her in the prior investigation that he had sex with Roe. Reguengo did not find credible Petitioner's explanation 'that his being 'tired' caused him to make such an intelligible statement.' Thus, Reguengo's findings hinged on a credibility determination that Petitioner made the statement about having sex with Roe. A fair adjudication of the complaint against Petitioner could also turn on the credibility of other witnesses, including Roe (with whom he allegedly had sex), Actor 1 (a percipient witness), and Reguengo (a percipient witness to the alleged statement). *Allee* instructs that these witnesses must be subjected to questioning at a

hearing before a neutral adjudicator. Under *Allee*, Reguengo, as the investigator, could not serve as the neutral adjudicator."

10. *Doe v. The Trustees of the State of California*, No. BS167329, at *9 (Cal. Sup. Ct. Feb. 5, 2019) (granting Doe's writ of mandate for lack of fairness during the adjudicative process): "[T]he [adjudicative] Committee's procedures should have included an opportunity for the Committee to assess Jane's credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee's asking her appropriate questions proposed by John [Doe] or the Committee itself."

11. *Doe v. Rollins College*, 352 F. Supp. 3d 1205, 1212 (M.D. Fla. Jan. 16, 2019) (denying the university's motion to dismiss because Doe plausibly alleged college acted out of gender bias, violating Title IX, and college violated various provisions in sexual misconduct policy, warranting breach of contract): "Rollins [College] used a biased investigator who assessed Jane Roe's account as credible over Plaintiff's [because Jane Roe is a woman] [.]"

12. *Doe v. Syracuse University*, 341 F. Supp. 3d 125, 138 (N.D.N.Y. Sep. 16, 2018) (denying the university's motion to dismiss because Doe plausibly stated a Title IX claim under the erroneous outcome theory and a Title IX claim under the selective enforcement theory): "Syracuse failed to adequately investigate and question [the accuser] Roe's credibility . . . [this allegation, among others,] meet[s] Plaintiff's minimal burden of casting some articulable doubt on the accuracy of the outcome of the disciplinary proceeding."

13. *Roe v. Adams-Gaston*, No. 2:17-CV-945, 2018 WL 5306768, at *10 (S.D. Ohio Apr. 17, 2018) (granting Roe's preliminary injunction on due process grounds since doe was not able to cross examine her witnesses): "To choose between those stories, the hearing officer in this matter needed to, and did, make credibility determinations. But the hearing officer made those credibility determinations without the benefit of observing Roe (or anyone else) cross-examine the complainants—the only individuals present, other than Roe, when the purported sexual misconduct occurred."

14. *Doe v. University of Oregon*, No. 6:17-CV-01103-AA, 2018 WL 1474531, at *15 (D. Or. Mar. 26, 2018) (denying defendant's MTD because Doe plausibly states a due process claim and a 14th Amendment equal protection claim): "Plaintiff also alleges that [Investigator] Millie adopted a method for evaluating credibility that guaranteed that Roe's testimony would be believed; no matter how glaring the inconsistencies between her statements and the evidence, plaintiff alleges Millie would interpret those inconsistencies as proof that Roe had, in fact, been assaulted."

15. *Gonzalez-Riano v. The Florida State University*, No. 2017 AP 6, at *2-3 (Fla. 2d Cir. Ct. Jan. 19, 2018) (granting plaintiff's writ of certiorari because defendant violated plaintiff's procedural due process rights): "[T]he Hearing Officer did not observe the Accuser . . . [w]ithout the benefit of observing [the] Accuser during that testimony, the Hearing Officer concluded [the Accuser was more credible than [the] Petitioner. In my opinion, this constituted a violation of Petitioner's rights."

16. *Doe v. University of Notre Dame*, No. 3:17CV298-PPS/MGG, 2017 WL 7661416, at *10 (N.D. Ind. May 8, 2017) (granting Doe's motion for TRO and preliminary injunction for violations of breach of contract and Title IX): "More generally, the larger texting history, as described in part above, might well have called into question Jane's credibility. She testified that John's communications were unwelcome, their [sexual] contact was non-consensual, and that she felt intimidated or threatened by John. Yet the text messages that have been produced in this litigation but which were not available to the Hearing Panel—text messages showing sleepovers, naps together, invitations to go on trips, and lunch dates—strongly suggest that Jane did not feel threatened or intimidated by John."

17. *Mock v. University of Tennessee at Chattanooga*, No. 14-1687-II, at *14 (Tenn. Ch. Ct. Aug. 4, 2015) (granting Mock injunctive relief reinstating UTC's initial finding of Mock being not guilty of sexual assault on procedural due process grounds): "There is no indication that the [University of Tennessee at Chattanooga] Chancellor gave deference to the [Administrative Law Judge's (ALJ)] credibility finding, let alone substantial deference. He never referred to or discussed the substance of the ALJ's credibility determination [that complainant was not credible]."

Summary

Nine appellate courts and 17 trial courts have criticized situations in which it appears that the university was doing just that; instead of making credibility determinations based on the evidence, these universities made credibility determinations that suggest complainant-bias or outright sex bias.

Recommendation

The revised regulation must preserve Section 106.45 (b)(1)(ii)'s recognition that credibility determinations must be made on an evidentiary basis.

Memorable Quote

Doe v. Purdue Univ., 928 F.3d 652, 669 (7th Cir. June 28, 2019) (reversing district court's dismissal for failure to state a Title IX claim): "John has alleged [facts raising the inference of sex bias] here, the strongest one being that [Purdue's Dean of Students and a Title IX coordinator] Sermersheim chose to credit Jane's account without hearing directly from her. The case against him boiled down to a 'he said/she said'—Purdue had to decide whether to believe John or Jane."

---

10. Bias Towards Complainant or Respondent

Introduction

Fairness requires a process free of bias for both parties.

Regulatory Language

Section 160.45(b)(1)(iii): "recipient officials must not have a bias towards complainants or respondents generally."

Appellate Court Decisions

1. *Doe v. Regents of the University of California* (UCLA), No. 20-55831 (9th Cir. Jan. 11, 2022) (reversing and vacating the order and judgment of the District Court of the Central District of California dismissing a Title IX action brought by Doe because Doe plausibly stated a Title IX claim against the Regents):

    a. "Jason Zeck, UCLA's Respondent Coordinator, advised Doe in July 2017, during the pending Title IX investigation, that 'no female has ever fabricated allegations against an ex-boyfriend in a Title IX setting.' Mr. Zeck's statement suggests that UCLA's Title IX officials held biased assumptions against male respondents during the course of Doe's disciplinary proceeding." *Id*. at *19.

    b. "Associate Dean Rush, the ultimate decisionmaker here, advised Doe that if she were in his shoes, she would have invited Roe into her office during the February 2017 incident. Associate Dean Rush's comment suggests that she did not view Roe as an aggressor, and at the very least raises the question of whether, if the gender roles were reversed, Associate Dean Rush would have made the same recommendation to a female approached by her angry, male ex-fiancé when he showed up unannounced to confront her at her place of employment." *Id.* at *20.

2. *Does 1-2 v. Regents of the Univ. of Minnesota*, No. 19-2552, 2021 WL 2197073 (8th Cir. June 1, 2021) (finding that the Does alleged a plausible Title IX claim of discrimination on the basis of sex):

    a. "On October 11, 2016, Marisam sent emails to JD7-10 requesting they come in for interviews. She did not disclose they were targets of an investigation into suspected misconduct. In contrast with her multiple interactions with Jane, Marisam only met once with each accused Doe for fifteen to thirty minutes. Marisam did not record the Does' statements, allow them to review or respond to Jane's statements or the statements from other witnesses, or allow them to confirm the accuracy of Marisam's summary of their statements. Marisam also contacted JD10's girlfriend, a white hockey player, because she was staying with JD10 on September 2. When JD10's girlfriend did not respond to Marisam's interview request, Marisam did not pursue this lead further, unlike her treatment of the Does who did not initially respond to interview requests. At the EOAA's behest, athletic department officials warned the Does that their scholarships were at risk if they did not cooperate with the investigation." *Id.* at *2.

    b. "The Amended Complaint alleges the EOAA report contained several troubling features. It found Jane more credible by emphasizing minor inconsistencies in the Does' statements, while minimizing or ignoring her inconsistent statements. <u>It did not recommend punishing Jane for having consensual sex with the underage recruit</u> [emphasis added] or for falsely accusing JD6 of sexual assault. It attributed statements to JD11, which he alleges he never made. Finally, the report criticized the Does' purported attempts to conceal evidence from the investigation, while neglecting to mention that

Jane withheld evidence from Marisam, including the results of her sexual assault examination and the video of her, JD1, and the recruit engaging in consensual sex." *Id* at *3.

c. "The district court concluded that a university's bias in favor of the victims of sexual assault does not establish a reasonable inference of bias against male students, citing *Doe v. University of St. Thomas*, 240 F. Supp. 3d 984, 991 (D. Minn. 2017). While the circumstances here also give rise to a plausible inference of bias in favor of sexual assault victims rather than against males, "[s]ex discrimination need not be the only plausible explanation or even the most plausible explanation for a Title IX claim to proceed." *Schwake*, 967 F.3d at 948; *see Columbia Univ.*, 831 F.3d at 57. Thus, we reverse the district court's dismissal of the Does' Title IX discrimination claims." *Id.* at *5.

3. *Doe v. University of Arkansas-Fayetteville*, 974 F.3d 858 (8th Cir. Sep. 4, 2020) (reversing the district court's approval for a motion to dismiss a Title IX Claim):

   a. "Roe personally orchestrated a campus-wide protest after the Title IX coordinator found that Doe was not responsible for sexual assault against her. Roe's actions brought significant media attention to the University's handling of the incident, and prompted a public statement by the University." *Id.* at 865.

   b. "These circumstances, taken together, are sufficient to support a plausible claim that the University discriminated against Doe on the basis of sex. A decision that is against the substantial weight of the evidence and inconsistent with ordinary practice on sanctions may give rise to an inference of bias, although not necessarily bias based on sex." *Id.*

4. *Doe v. Arizona Bd. of Regents*, Ariz. Ct. App. No. 1 CA-CV 18-0784, 2019 WL 7174525 (Ariz. Ct. App. Dec. 24, 2019) at *4 (holding University's sexual misconduct charge against Doe not supported by substantial evidence): "[I]n finding Complainant must have been incapacitated, [University misconduct 'final decision maker'] Rund relied not on the accounts of other witnesses, but instead accepted at face value Complainant's statements that she did not know what was going on and that 'she was too intoxicated to stop [Respondent and Participant] physically or even tell them to stop.' But Complainant's own accounts of what went on in the bedroom disprove her after-the-fact characterizations of her mental and physical state at the time."

5. *Doe v. Purdue University*, 928 F.3d 652, 663 (7th Cir. June 28, 2019) (holding that Doe had a constitutionally protected liberty interest in his pursuit of a Navy career): "At John's meeting with the Advisory Committee, two of the three panel members candidly admitted that they had not read the investigative report, which suggests that they decided that John was guilty based on the accusation rather than the evidence."

6. *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 137 (Cal. Ct. App. Jan. 4, 2019) (reversing the trial court's judgment against Doe with directions to grant Doe' petition for writ of administrative mandate and set aside the findings that Doe violated the University's sexual assault policy because Doe was denied fundamental fairness throughout his sexual assault allegation): "In [Doe's] first

meeting with [Investigator and Adjudicator] Dr. Allee, Doe articulated his theory that [the accuser] Roe had a strong motive to fabricate a charge of rape. Dr. Allee seems to have rejected that theory almost immediately, despite investigative leads—such as statements by E.C. and K.J., and Roe's texts to Mia—that, if pursued, would lend support to Doe's theory, and weaken Roe's credibility."

Trial Court Decisions

1. *Doe v. University of Mississippi, et al.*, No. 3:21-cv-00201, at *4-5 (S.D. Miss. Mar. 15, 2022) (denying the university's motion to dismiss because Doe plausibly stated a Title IX claim): "Roe appeared by video, flanked by a UMMC advisor and McClendon, who acted as Roe's 'personal protector, advocate, and prosecutor.'"

2. *Doe v. Embry-Riddle Aeronautical University*, no. 6:20-cv-1220-WWB-LRH, at *15 (M.D. Fla. Nov. 4, 2021) (denying in part the university's motion to dismiss because Doe plausibly presented Title IX selective enforcement and breach of contract violations): "Additionally, both Plaintiff and the counsel that represented him in the proceedings have provided statements from which a reasonable jury could conclude that [Embry-Riddle Aeronautical University] officials did not treat Plaintiff in an impartial manner during and in connection with its investigation. For example, Jane Roe explicitly requested that [investigator] Meyers-Parker not contact any witnesses on her behalf, including her suitemate because they 'no longer g[o]t a long [sic],' and her request was honored. However, when Jane Roe pointed out that Plaintiff had failed to list his roommate as a witness, Meyers-Parker independently contacted that individual for his statement. A reasonable jury could infer this was done in an effort to avoid learning damaging information regarding Jane Roe's claim while seeking evidence to support a finding of guilt by Plaintiff, which would certainly indicate that the investigation was not impartial."

3. *Doe v. Columbia University*, Case 1:20-cv-06770-GHW (S.D.N.Y. Aug 1, 2021) (denying the University's MTD Doe's Title IX erroneous outcome claim in imposing interim suspension, Title IX selective enforcement claim in the Jane Doe 1 proceeding, Title IX erroneous outcome claim in the Jane Doe 4 proceeding, and Title IX erroneous outcome claim in the Jane Doe 3 proceeding):

    a. "[T]he panel held [John Doe] and Jane Doe 4 to different standards: they were 'quick to criticize' Plaintiff's statements as inconsistent, but 'very forgiving of [Jane Doe 4]'s admitted lack of "independent memory" of events just prior' to the alleged sexual assault." Id. at *57.

    b. "[John Doe] and Jane Doe 3 were held to different standards: when Jane Doe 3 mixed up dates, Columbia said that this was reasonable '[c]onsidering the length of the relationship and number of sexual acts occurring within this period.' But 'this assumption [was] not equally provided to [Plaintiff] for minor discrepancies in [hi]s memory about events leading up to the incident at issue,years after the fact." *Id.* at *58.

4. *Doe v. Hobart and William Smith Colleges,* 6:20-cv-06338 EAW. at *34 (W.D.N.Y. June 23, 2021) (denying Defendant's motion to dismiss for a Title IX erroneous outcome claim): "Providing a client with an answer to a question from an adjudicator that the client then repeats verbatim

goes well beyond 'support and advice' and could plausibly constitute prohibited participation in the proceeding."

5. *Doe v. Embry-Riddle Aeronautical University*, No. 6:20-cv-01220-WWB-LRH, at *6-7 (M.D. Fla. May 28, 2021) (denying defendant's MTD on Doe's Title IX selective enforcement claim and breach of contract claim): "Here, Plaintiff alleges that the evidence collected during ERAU's investigations could have supported a finding that Roe also violated ERAU's Sexual Misconduct Policy but, despite this evidence, ERAU discouraged Plaintiff from filing a formal complaint against Roe, failed to conduct a full and fair investigation against Roe after Plaintiff filed a formal complaint, and failed to remove Roe from her sports team pending investigation of Plaintiff's complaint. At this stage of the proceedings, Plaintiff's allegations are sufficient to allege a selective enforcement claim."

6. *Doe v. New York University*, No. 1:20-cv-01343-GHW, 2021 U.S. Dist. LEXIS 62985, at *11 (S.D.N.Y. Mar. 31, 2021) (denying University's motion to dismiss for failure to state a Title IX claim): "At some point during the investigation process … Plaintiff attempted to file a Title IX complaint against Jane 'due to her physical assaults of John and alienation of John from his friends.' Signor, the Title IX coordinator, advised Plaintiff that 'his complaint would be handled at the end of Jane's Title IX case' so he should wait until the conclusion of Jane's Title IX complaint process before filing his Title IX complaint against Jane."

7. *Doherty v. Bice*, No. 18-CV-10898 (NSR), 2020 WL 5548790, *8 (S.D.N.Y. Sept. 16, 2020) (finding that Plaintiff's allegations of failure to accommodate were sufficient to sustain the ADA claim): "The Amended Complaint specifically alleges that Defendants' did not take into account [Plaintiff's] disability when issuing the no contact orders, nor did they consider whether the no contact orders were being requested in an effort to tease and bully [Plaintiff] because of his disability.'"

8. *New York v. U.S. Department of Education*, no. 20-cv-4260-JGK, at *19 (S.D.N.Y. Aug. 9, 2020) (denying the state's motion for preliminary injunction, or in the alternative, stay the 2020 Title IX Regulations because state failed to establish a likelihood of success on the merits and that they were likely to suffer substantial irreparable harm): "The plaintiffs acknowledge that Title IX provides both complainants and respondents with 'the right to attend school free of sex discrimination.'"

9. *Doe v. Virginia Polytechnic Inst. & State Univ.*, No. 7:19-CV-00249, 2020 WL 1309461 (W.D. Va. Mar. 19, 2020) (holding that Doe had successfully alleged a plausible Title IX claim):

    a. "During the investigation into Doe's charges, Doe reported twice to Polidoro that he had been a victim of domestic abuse by Roe and had submitted an e-mail describing Roe's alleged abuse. Although Doe provided an informal statement alleging that Roe, who holds a black belt, physically attacked Doe while he was sleeping and hit Doe in front of Doe's roommate, Virginia Tech failed to initiate an investigation. On March 30, 2018, defendant Settle explained that Doe's statement regarding Roe's domestic violence was insufficient to trigger an investigation and that Doe would need to file a formal complaint. In April 2018, Doe filed a formal complaint against Roe for domestic abuse. Doe alleges that Virginia Tech opened a 'superficial' investigation into his report. As a part of the investigation, Doe alleges that 'Polidoro was finally forced to interview Doe's

witnesses.' On the same day as Doe's hearing, Virginia Tech held a hearing on Doe's allegations against Roe in which Rose and McCrery again served as hearing officers. Roe was found responsible for 'dating violence' and received probation." *Id.* at *2.

b. "For example, Doe alleged that when he attempted to bring charges against Roe, defendants did not accept his informal complaints 'even though it is both University and Title IX policy that a complaint is to be investigated no matter the form in which it is delivered.' Doe's complaint also describes the roadblocks he encountered during his pursuit of charges against Roe while noting that Polidoro 'went out of her way to help Roe through the process.' In contrast to Roe, who received advice and was encouraged to file a complaint, nobody from the Title IX or student conduct office met with Doe to help him file a complaint or discuss his rights or options under the Title IX process." *Id*. at *8.

c. "Additionally, Doe was treated differently than Roe throughout their investigations and hearings. While Doe received a 'no-contact' order prohibiting him from contacting Roe, defendants did not issue the same order to Roe in response to Doe's allegations. Doe was also prevented from presenting evidence that supported his position in both cases, including evidence that the criminal charges against him had been dropped. Moreover, Doe alleges that although the evidence showed he engaged in verbal altercations with Roe, the evidence against Roe—including her own admission—indicated that she physically assaulted, threatened, and manipulated Doe. Yet, Roe was found responsible for the lesser charge of dating violence and was sanctioned only with probation." *Id*.

d. "The allegations indicate that Roe engaged in similar if not more egregious behavior than Doe, while Doe received disproportionate charges and sanctions. Given these differences in treatment, a reasonable fact finder could plausibly determine that Doe was wrongly found responsible for domestic violence and that the finding was motivated by gender bias." *Id*.

10. *Doe v. Rollins College*, no. 6:18-cv-01069-Orl-37LRH, at *28 (M.D. Fla. Mar. 9, 2020) (granting in part Doe's partial motion for summary judgment because the university breached its contract with Doe regarding the university's sexual assault policy and denying in part the university's partial motion for summary judgment because Doe plausibly stated an issue of genuine fact regarding fundamental fairness): "Doe presented evidence Rollins [College] didn't treat him fairly or equitably—deciding he was responsible before hearing his side of the story and failing to follow procedures mandated by the Policy and Responding Party Bill of Rights."

11. *Feibleman v. Trustees of Columbia University in City of New York*, No. 19-CV-4327 (VEC), 2020WL 882429, at *9 (S.D.N.Y. Feb. 24, 2020) (denying the university's MTD on Title IX and breach of contract grounds): "In terms of procedural irregularities, Feibleman claims that Columbia gave Jane Doe preferential treatment by delaying the issuance of a no-contact order after he filed his complaint against Doe, discouraging him from retaining an attorney (even though Doe was also represented by counsel), refusing to investigate Doe's retaliatory behavior, declining to prevent Doe from talking to witnesses about the incident, ignoring evidence contradicting Doe's version of events, and finding him less credible than Doe, even though he had corroborating evidence while Doe had limited recall . . . [t]hus, the alleged irregularities in this case, when viewed in

Plaintiff's favor as this Court must, plausibly suggest that Columbia may have been biased against Feibleman."

12. *Doe v. Rensselaer Polytechnic Inst.,* No. 1:20-CV-1185, at *6 (N.D.N.Y. Oct. 16, 2020): (showing of adverse action to prove Title IX claim):
    a. "[A]ll that matters is that rather than conduct the hearing under the 2020 policy—which defendant has already designed and will implement for new Title IX complaints going forward—defendant insisted that the hearing in plaintiff's case would proceed under the 2018 policy. In other words, whether the Department of Education would have penalized RPI for not complying with the new rules or not, it could easily have implemented the 2020 policy for Doe's hearing because it must implement that policy for all future Title IX complaints. Instead, defendant decided that it would be best to maintain two parallel procedures solely to ensure that at least some respondents would not have access to new rules designed to provide due process protections such as the right to cross-examination that have long been considered essential in other contexts." *Id.* at *6.

    b. "In a vacuum, RPI's inventive use of its policies may not say much about the role Doe's gender played in the process, but Roe's complaint arising out of the same encounter was not subjected to any of these fabricated requirements. The two complaints concerned the same subject matter, of which only the two complainants had first-hand knowledge. From that duality of origin, the female's complaint proceeded without issue, the male's was struck down in part on grounds not contemplated anywhere in the policy's definition of consent. That inequitable treatment provides not inconsiderable evidence that gender was a motivating factor in RPI's treatment of Doe." *Id.* at *6-7

    c. "Of course, the Court does not expect a person to accurately remember or relay every detail of a traumatic narrative like the ones that Roe—and plaintiff—allege. But where the allegations are so inherently intertwined and the female's complaint is accepted, flaws and all, while the male's complaint is rejected for having similar flaws, that discrepancy lends force to the conclusion that the difference is traceable to gender discrimination." *Id*. at *8.

13. *Doe v. Colgate Univ*., 457 F. Supp. 3d 164, 171–72 (N.D.N.Y. Apr. 30, 2020), *reconsideration denied*, No. 517CV1298FJSATB, 2020 WL 3432827 (denying University's motion for summary judgement as to Doe's Title IX claims):

    a. "Plaintiff contends that [Title IX Investigator] was not an impartial factfinder because her investigation was entangled with [NY State Police Officer's] criminal investigation and because she did not thoroughly investigate inconsistencies in Roe's accounts. The evidence supports Plaintiff's contentions." *Id.* at 171-72.

    b. "On March 22, 2017, [NY State Police Officer] and Roe placed a 'controlled' call to Plaintiff. During the call, Roe attempted to get Plaintiff to admit that he had sexually assaulted her; meanwhile Plaintiff was unaware that he was being recorded. In that call, Plaintiff denied that their sexual contact was non-consensual, indicated that he remembered Roe giving 'verbal consent ... like multiple times,' that he recalled Roe initiating the third act of sexual intercourse, and that he did not remember her saying 'no.'" *Id.* at 168.

c. “With respect to the phone call, [Title IX Investigator] testified that [NY State Police Officer’s] told her about his ‘faux pas’ on the call – in which he called Plaintiff an ‘asshole’ while the call was being recorded – and that he wished he hadn't said it. [Title IX Investigator] also attended Plaintiff's criminal arraignment; and, at the hearing, the judge asked her to take a copy of the order of protection and ensure that Roe received it. This, [Title IX Investigator] admitted, was an unusual request; and the judge had only asked her to take an order of protection to a victim one other time. [Title IX Investigator] further admitted that, in cases like this one, there was a ‘crossover’ between her investigation and [NY State Police Officer’s] criminal investigation; and she would request the statements or other documentation from [NY State Police Officer’s] investigation. At a minimum, this conduct creates an appearance of a conflict of interest and raises questions of fact about her bias towards Plaintiff. *Id.* at 172.

14. *Doe v. Syracuse Univ.*, 440 F. Supp. 3d 158 (N.D.N.Y. Feb. 21, 2020) (holding that Defendant failed to provide Plaintiff with adequate notice):

a. “TIVITs [Trauma-informed Victim Interview Techniques] were ‘applied to RP despite the absence of any clinical determination of whether, in fact, RP suffered trauma.’ RP never sought trauma treatment at a hospital. Syracuse applies TIVITs with ‘bias against male students,’, and to 'enhance the credibility and lower the standards of evidence in order to find alleged female victims ‘credible.’” *Id*. at 169.

b. While the Board found RP ‘credible,’ it concluded that Plaintiff was only ‘partially credible,’ citing to his admission that he 1) had sexual desire for RP, and 2) was ‘horny’ after RP withdrew consent for kissing. Plaintiff alleges that applying ‘archaic stereotypes of male sexual desire, the Board took [Plaintiff's] admission of being ‘horny’ as evidence that he could not credibly deny sexually assaulting RP.’ The Board also found that Plaintiff ‘premeditated these actions and had intent to engage in sexual contact and intercourse with [RP] from the moment he saw her at church’ because by Plaintiff's ‘own admission, when he saw [RP] at church, he knew he wanted to have sexual relations with her and knew that such acts would occur.’ Plaintiff alleges that these findings ‘conformed to the stereotype and archaic assumption that Syracuse was beset by a male ‘rape culture’ driven by uncontrollable male sexual desire, while female students are its passive victims and targets.’ Plaintiff alleges that the Board did not question RP about her sexual desire for Plaintiff.” *Id*. at 171.

c. The Board concluded that the incident ‘caused [RP] significant trauma and is affecting her mental well-being.’ By contrast, ‘the Board ignored undisputed evidence of [Plaintiff's] mental anguish and trauma, which had caused him to call a counseling hotline twice.’ Plaintiff alleges that ‘[t]rauma’ averred by the alleged female victim was enough to justify contradictions in [RP's] story. Undisputed trauma of the male student, however, did not make his consistent story credible to the Board.’ The Board did not explain its ‘contradictory findings.’ Plaintiff alleges that Syracuse failed to apply a ‘preponderance standard’ to Plaintiff's case, as required by its policies, and that if it had

applied the correct standard 'a finding of 'not responsible' would have been the only conceivable outcome.'" *Id*.

15. *Averett v. Hardy*, No. 3:19-CV-116-DJH-RSE, 2020 WL 1033543, at *7 (W.D. Ky. Mar. 3, 2020) (denying MTD due process claim against university administrator): According to Averett, [University Student Conduct Officer] Hardy only contacted witnesses who would support [accuser's] version of events. Specifically, Averett alleges that Hardy failed to call [University Police] Detective [who investigated rape allegation] to testify despite [his] knowledge of 'exculpatory evidence'—explicit messages and videos—that Brown recovered from Averett's cellphone … from these allegations the Court may plausibly infer that Hardy's impartiality was 'manifestly compromised' and conclude that Averett has alleged sufficient facts supporting a finding of actual bias."

16. *Doe v. University of Maine System*, no. 1:19-cv-00415-NT (D. Me. Feb. 20, 2020) (denying the university's motion to dismiss because Doe plausibly claim Title IX violations and a procedural due process violation):

    a. "There may be an argument that Doe's report of these details—which occurred after the Settlement Agreement—was a new starting point for assessing how [the University of Maine System (UMS)] responded to his allegations. If so, any failure by UMS to investigate those allegations, while actively investigating the complaints against Doe, could potentially be a new act of selective enforcement or could have contributed to a hostile environment for Doe." *Id.* at *17.

    b. "The Plaintiff alleges that UMS had a 'retaliatory motive' when it took several adverse actions against him. *See Compl*. ¶¶ 137–43. Those adverse actions appear to be complete. *See Compl*. ¶ 140 (actions include barring Doe from his employment, suspending Doe, making public statements about Doe's Title IX case, providing Doe's Title IX case files to the press and others, and failing to disclose that Doe's disciplinary proceedings had been dismissed for exculpatory reasons)." *Id.* at *26.

17. *Doe v. University of South Alabama*, no. 1:17-cv-00394-CG-C, at *14-15 (S.D. Ala. Feb. 14, 2020) (denying in part the university's motion to dismiss because Doe plausibly claimed a violation of his due process rights): "Plaintiff [plausibly claimed] Defendants were actually biased, and Plaintiff should have the opportunity to present evidence that such relationships [which indicate that there may be a personal relationship between individual defendants and accusers or interested parties,] are more than just cordial connections."

18. *Unknown Party v. Arizona Bd. of Regents*, No. CV-18-01623-PHX-DWL, 2019 WL 7282027, at *2 (D. Ariz. Dec. 27, 2019) (holding Doe's hearing contained plausible evidence of sex bias) (EEP): "Paragraph 195 alleges that Rund based his finding that Roe was 'incapacitated' during the sexual encounter in part on the nature of the encounter (a 'threesome'), which Rund characterized as 'outrageous behavior' that could not be the product of a rational, informed decision by an adult. This characterization, according to the FAC, reflects implicit gender bias and antiquated 'sexual mores' because Rund 'did not characterize the men's decision to engage in three-way sex as 'outrageous.'"

19. *Doe v. Haas*, 427 F. Supp. 3d 336 (E.D.N.Y. Dec. 9, 2019) (denying MTD for failure to state a Title IX claim):

    a. "Plaintiff sets forth facts that suggest the evidence of his intoxication was substantial and that BG even admitted he was intoxicated at the time of the encounter at issue, yet the hearing panel found BG not responsible for the charges lodged against her by Plaintiff." *Id.* at 356.

    b. "In this case, both Plaintiff and BG held dual roles of victim and accused and therefore the differing treatment permits an inference on bias based on sex." *Id.* at 357.

20. *Bisimwa v. St. John Fisher College*, et al., E2019005959, at *12, (N.Y. Sup. Ct. Nov. 20, 2019) (denying the school's MTD Bisimwa's breach of contract and defamation claims): "[Bisimwa's] insistence that [Dean of Students and Residential Life and Investigator] Travaglini was biased against him, and therefore acted with malice, is sufficient to call into question the validity of any such potential [qualified immunity] defense."

21. *Doe v. Syracuse University*, No. 5:18-CV-377, 2019 WL 2021026, at *7 (N.D.N.Y. May 8, 2019) (denying defendant's MTD regarding Doe's Title IX and breach of contract claims): "As a result of his bias, Investigator Jacobson assisted Jane in developing her story and accepted, without question, major changes in that story, including the fact that she first said she consented to vaginal sex and then changed her story to say that while she initially consented, she withdrew her consent."

22. *Montague v. Yale University*, no. 3:16-cv-00885 (D. Conn. Mar. 29, 2019) (denying in part the university's motion for summary judgment because there is a genuine issue of fact demonstrating breach of contract, fundamental fairness, and tort violations):

    a. "[Montague] notes that Berkman, the fact-finder in the [University Wide Committee on Sexual Misconduct] UWC II proceedings, wrote in her report that '[deputy Title IX Coordinator] Gleason explained to [Roe] that [Montague] had already been given a recommendation for training after a previous complaint and so that option was no longer open to him.' Montague also cites Berkman's statement that Roe 'was especially motivated to participate in the investigation and hearing process after she heard that [Montague] had already had another complaint against him, as she felt it was important to protect other women.'" *Id.* at *31-32.

    b. "Yale's Title IX leadership violated the duty of impartiality, when they met and decided that they should pursue a formal complaint and by inducing Roe to file a formal complaint against [Montague]." *Id.* at *34.

    c. "Gleason asked Post [who was a UWC member] to be on standby during the meeting between she and Roe so that Post could answer any questions Roe might have about the UWC process." *Id.* at *39.

    d. "[T]here is a genuine issue of material fact as to . . . Post's participation in that meeting motivated Roe to change her informal complaint into a formal complaint. *Id.* at *40

e. "[Yale University] failed to seek exculpatory evidence, cast Roe's inconsistencies as consistencies, placed unfair weight on a supposed inconsistency in Montague's recollections, failed to probe Roe's motive, and transformed and obliterated undisputed evidence to remove facts which raised questions about whether Roe consented." *Id*. at *41.

23. *Norris v. Univ. of Colorado, Boulder*, 362 F. Supp. 3d 1001, 1012 (D. Colo. Feb. 21, 2019) (Denying MTD for failure to state a Title IX claim): Plaintiff points to many aspects of the investigation that infer gender bias. He looks to [Title IX Investigator's] alleged conflicts of interest and her 'background in Women's Studies and extensive career experience as an advocate for female victims of sexual assault and domestic violence.' Then, [Plaintiff] hones [sic] in on specific decisions the Investigators made throughout the process as bolstering the inference of bias. These include: limiting Plaintiff's response time, but allowing Roe unlimited time to participate; limiting Plaintiff's review time of the investigation file and issuing a written evidence summary before his review and without asking follow-up questions; sharing the investigation file with Roe, telling her not to disclose it to anyone other than her advisor, but not punishing her when she did; waiting two months to review Plaintiff's interview with the Boulder Police Department, but observing Roe's interview in person; overlooking numerous inconsistencies in Roe's account when they found her more credible than Plaintiff; and issuing a finding that contradicted Roe's account and misstated facts."

24. *Doe v. University of Mississippi*, 361 F.Supp.3d 597 (S.D. Miss. Jan. 16, 2019) (holding that Doe had raised plausible claims of sex bias and due process violations):

    a. "Doe argues that Defendants violated his rights under the Equal Protection Clause by disciplining him for engaging in sexual intercourse with Roe while she was under the influence of alcohol but failing to discipline Roe for engaging in sexual intercourse with him." *Id.* at 614.

    b. "As it is, Doe has alleged that he and Roe drank together at his fraternity party; that Roe reported to her doctor that she and Doe 'were both drunk and that she felt it was a mutual decision between both of them' to have sex; and that the University pursued disciplinary action against him but not Roe." *Id*. at 615.

25. *Doe v. Rollins College*, 352 F. Supp. 3d 1205 (M.D. Fla. Jan. 16, 2019) (denying the university's motion to dismiss because Doe plausibly alleged college acted out of gender bias, violating Title IX, and college violated various provisions in sexual misconduct policy, warranting breach of contract): "[T]he information Rollins collected during the investigation could have equally supported disciplinary proceedings against Jane Roe for also violating the Sexual Misconduct Policy."

26. *Powell v. Montana State Univ.*, No. CV 17-15-BU-SEH, 2018 WL 6728061 (D. Mont. Dec. 21, 2018) (finding that Doe had raised a valid Title IX claim):

    a. "As stated above, significant unresolved issues of material fact remain that relate to Powell's asserted right of confrontation and cross-examination. At this point, the undisputed record establishes that MSU suspended and removed Powell from MSU, barred him from a public university campus and imposed additional sanctions on the

basis of a single statement claimed to have been made by him to an instructor, in what he believed to be a confidential meeting with her. It was this same single statement attributed to Powell, and which he denies, that MSU determined constituted a violation of its Hostile Environment Policy. The MSU policy statement, taken as a whole, strongly suggests that more than a single statement, made, if at all, under the circumstances and in the setting described by Kujawa, is required to support a finding of a 'hostile environment.' Moreover, the claimed statement was not even made to Perry, the alleged victim, or in her presence. By the record, it was conveyed to her and to others only through a third person when Powell was not present. In addition, the question remains whether the sanctions imposed against Powell beyond suspension from the university, including a ban from campus, ban from contact with Perry, and the requirements for anger management training and civil rights training were constitutionally permissible as prerequisites to readmission to MSU." *Id.* at *8.

b. "Powell asserts that MSU 'treated Perry [and himself] differently under Title IX by ignoring Perry's threatening gesture of showing a pocket knife when asked about her concerns about a potential encounter with Powell,' while finding that Powell violated MSU policy by virtue of a statement allegedly made to Kujawa and directed toward Perry." *Id*.

27. *Doe v. Syracuse University*, 341 F. Supp. 3d 125, 138 (N.D.N.Y. Sep. 16, 2018) (denying the university's motion to dismiss because Doe plausibly stated a Title IX claim under the erroneous outcome theory and a Title IX claim under the selective enforcement theory): "[T]he Investigator, the University Conduct Board, the Appeals Board, and the Syracuse official who ultimately reviewed the appeal chose to believe [the accuser] Roe's description of events in Doe's room even though Roe indicated that she had very little memory of the Incident . . . [these allegations, among others,] meet Plaintiff's minimal burden of casting some articulable doubt on the accuracy of the outcome of the disciplinary proceeding."

28. *Doe v. Brown University*, 327 F. Supp. 3d 397, 413 (D.R.I. Aug. 27, 2018) (denying in part the university's motion to dismiss because Doe plausibly stated a Title IX selective enforcement claim, a Title IX deliberately indifference claim, a Title VI racial discrimination claim, a gender discrimination claim under a Rhode Island state statute, and intentional infliction of emotional distress claim): "It is plausible that the reason behind John [Doe's] differential treatment was that he is black and his accusers white; this is amplified by John's allegations that Brown [University] did not act against Jane [the accuser] when she violated a confidentiality order in referring to John as a "predator," impliedly of white women. And while the use of "boy" in this context may or may not have been imbued with racial hostility, it is plausible that a jury could find it was."

29. *Doe v. University of Mississippi*, No. 3:16-CV-63-DPJ-FKB, 2018 WL 3570229 (S.D. Miss. July 24, 2018) (denying defendant's MTD regarding Doe's Title IX claim and due process claim):

a. "Viewed in the light most favorable to Doe, the Amended Complaint states a plausible claim that [Investigator] Ussery breached her duty to report "all evidence," conducted a biased investigation, and otherwise treated Roe more favorably than Doe." *Id.* at *6.

b. “Here, there is certainly evidence of disparate treatment between Roe and Doe along with statements from Ussery suggesting bias that could have influenced the unfavorable outcome.” *Id.* at *7.

30. *Roe v. Adams-Gaston*, No. 2:17-CV-945, 2018 WL 5306768 (S.D. Ohio Apr. 17, 2018), at *8 (granting Roe’s preliminary injunction on due process grounds since Doe was not able to cross examine her witnesses): “Here, although more than one witness contends that Roe inappropriately touched the complainant, the disciplinary case still boiled down to a choice between believing accusers and believing the accused. As the administrative hearing officer acknowledged in her decision, she chose between competing stories—and ultimately found the story told by the accusers to be more credible. Because the hearing officer chose between believing Roe and believing her accusers without seeing or hearing from the only two witnesses, aside from the complainant, who claimed to have personally observed the inappropriate touching, Defendants likely violated Doe’s procedural due process rights.

31. *Matter of Hall v. Hofstra University*, 101 N.Y.S.3d 699, at *12 (N.Y. Sup. Ct. Apr. 3, 2018) (annulling the sanctions against Hall because the University violated its own policy regarding sexual assault): “The Case File and the hearing transcript are replete with admissions by the Complainant that she acted as the initial aggressor and physically assaulted the Petitioner on multiple occasions. The parties were clearly separated on the boat immediately prior to the incident. The Complainant then went looking for the Petitioner, slapped him, taunted him by throwing pepper on his pants (because she knew the Petitioner did not like getting his clothes dirty), and backhand slapped his groin area. She admittedly was the instigator who initiated contact with the sleeping Petitioner. Other than the parties, not a single eye witness who testified at the hearing stated that the Petitioner struck or threatened to strike the Complainant. Notwithstanding the overwhelming evidence presented to the Board, the Complainant was never disciplined.”

32. *Doe v. University of Oregon*, No. 6:17-CV-01103-AA, 2018 WL 1474531, at *15 (D. Or. Mar. 26, 2018) (denying defendant’s MTD regarding Doe’s due process claim and 14th Amendment equal protection claim): “One plausible inference from plaintiff's allegations is that the University, in an attempt to change historical patterns of giving little credence to sexual assault allegations, has adopted a presumption that purported victims of sexual misconduct are telling the truth.”

33. *Doe v. Marymount Univ.,* 297 F. Supp. 3d 573, 585 (E.D. Va. Mar. 14, 2018) (finding that Doe established a likelihood of sex bias in his hearing and therefore substantiated a Title IX claim): “Doe raises many allegations which he believes demonstrate Marymount's gender bias. But one particular allegation is noteworthy because, if accepted as true, it reveals that Doe's adjudicator, Professor Lavanty, adhered to certain gendered beliefs. Specifically, Doe alleges that in a subsequent sexual assault investigation at Marymount, a male student accused a female student of touching his genitals without his consent and of pushing his hand into her genitals without his consent. Professor Lavanty served as the investigator in that case and allegedly asked the male student ‘were you aroused’ by this unwanted touching? When the student responded, ‘no,’ Lavanty, in apparent disbelief, allegedly asked the male student again, ‘not at all?’ This unpleasant exchange between Lavanty and another male student at Marymount, a fact which must be accepted as true at this stage, reveals that Lavanty's decision-making was infected with impermissible gender bias, namely Lavanty's discriminatory view that males will always enjoy sexual contact even when that contact is not consensual. Because Lavanty served as Doe's

adjudicator and was ultimately responsible for determining Doe's guilt or innocence, any evidence of Lavanty's gender bias is particularly probative. If Lavanty possessed the outdated and discriminatory views of gender and sexuality alleged in Doe's Complaint, these views would have naturally infected the outcome of Doe's Title IX disciplinary proceedings. Therefore, this allegation alone is sufficient to satisfy Doe's burden to plead a fact that creates an inference of gender discrimination in Marymount's disciplinary proceedings."

34. *Rolph v. Hobart & William Smith Colleges,* 271 F. Supp. 3d 386, 401-02 (W.D.N.Y. Sep. 20, 2017) (denying defendant's MTD regarding plaintiff's Title IX erroneous outcome claim): "Here, Plaintiff has adequately alleged facts that plausibly support at least a minimal inference of gender bias on the part of HWS. The allegations which support that inference include the following . . . alleg[ing] that the panel questioned him extensively about whether he was intoxicated and whether he perceived Jane Roe as intoxicated, but failed to question her about whether he appeared intoxicated[.]"

35. *Doe v. University of Chicago*, 1:16-cv-08298, at *27 (N.D. Ill. Sep. 20, 2017) (denying the University's motion to dismiss because Doe plausibly claimed Title IX and intentional infliction of emotional distress violations): "[The University's Dean of Students Inabinet] [d]eliberately encouraging one student to file a Title IX sexual-assault complaint about another student, knowing the complaint is false, is conduct that a factfinder could reasonably find to be extreme and outrageous."

36. *Doe v. Case W. Rsrv. Univ.*, No. 1:17 CV 414, 2017 WL 3840418 (N.D. Ohio Sept. 1, 2017) (holding that Doe had raised a plausible claim of sex bias):

    a. "On November 25, 2014, at the insistence of a friend, Jane Doe agreed to speak to Defendant Milliken, the Title IX director for CWRU, to try to 'sort out her feelings' for Plaintiff about what happened between them. Prior to initiating an investigation, Ms. Milliken asked Jane Doe if she wanted to request academic accommodations. Plaintiff believes that Jane Doe was failing one of her courses (Anatomy) one week prior to the final exam and that she was permitted to withdraw from that class as an academic accommodation provided by the Title IX Office. The Anatomy course was allegedly required for Jane Doe to continue in the nursing program and by allowing her to withdraw, she would be eligible to repeat the course without having had a failing grade from the first attempt and the failed class would not affect her grade point average. In contrast, Plaintiff states that he informed Ms. Milliken (at their first meeting on December 11, 2014) that due to his recent severe depression he had stopped going to classes for two weeks, had dropped one course and was having difficulty in Spanish. Although CWRU policy stated that a student accused of sexual misconduct must also be provided with support resources, Plaintiff was not informed of or offered any academic accommodations." *Id.* at *2.

    b. "Moreover, Plaintiff alleges that both parties to the incident were intoxicated, but that only Plaintiff was punished for the consensual sexual acts initiated by Jane Doe. If only

the male participant is disciplined for participating in the same acts–the implication of gender bias is clear." *Id*. at *7.

37. *Doe v. University of Notre Dame*, No. 3:17CV298-PPS/MGG, 2017 WL 7661416, at *11 (N.D. Ind. May 8, 2017) (granting Doe's motion for TRO and preliminary injunction for violations of breach of contract and Title IX): "These include the unfairness of consideration only of Jane's cherry-picked text messages (and Jane's efforts to avoid production of the entire text history) and the Hearing Panel's refusal of evidence pertinent to Jane's credibility and state of mind (whether she in fact felt threatened by John)."

38. *Doe v. Amherst College*, no. 3:15-cv-30097-MGM, at *37 (D. Mass. Feb. 28, 2017) (denying the university's motion for judgment on the pleadings because Doe plausibly stated breach of contract, national origin discrimination, and Title IX violations): "[W]hile Doe never filed a formal complaint, [Amherst] College certainly learned that [the accuser] Jones may have engaged in sexual activity with Doe while he was "blacked out" and yet, Doe asserts, the College did not take even minimal steps to determine whether Doe should have been viewed as a victim under the terms of the [the sexual misconduct] Policy."

39. *Doe v. Brown University*, 210 F. Supp. 3d 310, 337 (D.R.I. Sep. 28, 2016) (granting a preliminary injunction against defendant for breach of contract): "In testifying that Doe's assertion that he asked for consent and that Ann was a willing participant was belied by the text messages, [Investigator] Perkins was effectively telling the panel that she thought they should find Doe responsible. Even though she qualified her statements with 'that's for the panel to decide,' she was quite clearly still making a recommendation of a finding of responsibility[.]"

40. *Doe v. Washington & Lee Univ.*, W.D. Va. No. 6:14-CV-00052, 2015 WL 4647996, at *10 (W.D. Va. Aug. 5, 2015) (denying MTD for failure to state a Title IX claim): "[G]ender bias could be inferred from [Title IX Officer]'s alleged October 5, 2014 presentation, wherein she introduced and endorsed the article, *Is It Possible That There Is Something In Between Consensual Sex And Rape ... And That It Happens To Almost Every Girl Out There?* That article, written for the female-focused website *Total Sorority Move,* details a consensual sexual encounter between a man and the female author of the article, who comes to regret the incident when she awakens the next morning. As Plaintiff describes it, the article posits that sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations that she did not outwardly express. This presentation is particularly significant because of the parallels of the situation it describes and the circumstances under which Plaintiff was found responsible for sexual misconduct. Bias on the part of [Title IX Officer] is material to the outcome of John Doe's disciplinary hearing due to the considerable influence she appears to have wielded in those proceedings."

41. *Harris v. Saint Joseph Univ.*, No. CIV.A. 13-3937, 2014 WL 1910242, at *8 (E.D. Pa. May 13, 2014) (denying school's motion to dismiss on Title IX grounds): "[P]laintiff's allegation that 'each [defendant] referred to Harris as the perpetrator of a sexual assault on Doe, even though they knew the allegations were false, or with reckless indifference to the truth or falsity of said allegations,' *see* Am. Compl. ¶¶ 113–114, would be considered slander per se."

Summary

Six appellate courts and 41 trial courts have criticized universities that were found to be biased in favor of complainants, which is a violation of Section 160.45(b)(1)(iii). These courts have also found that such conduct can violate respondents constitutional due process rights, statutory Title IX rights, or common law contractual rights. Universities must therefore not be biased in favor of complainants or respondents, but must follow the evidence impartially.

Recommendation

The revised regulation must preserve and affirm Section 160.45(b)(1)(iii). Bias in favor of complainants or respondents can violate the constitution or Title IX rights.

Memorable Quote

Doe v. Arizona Bd. of Regents, Ariz. Ct. App. No. 1 CA-CV 18-0784, 2019 WL 7174525 (Ariz. Ct. App. Dec. 24, 2019) at *4 (holding University's sexual misconduct charge against Doe not supported by substantial evidence): "[I]n finding Complainant must have been incapacitated, [University misconduct 'final decision maker'] Rund relied not on the accounts of other witnesses, but instead accepted at face value Complainant's statements that she did not know what was going on and that 'she was too intoxicated to stop [Respondent and Participant] physically or even tell them to stop.' But Complainant's own accounts of what went on in the bedroom disprove her after-the-fact characterizations of her mental and physical state at the time."

---

11. Standard of Evidence

Introduction

The standard of evidence refers to the level of evidence that adjudicators require to reach a decision of "responsibility."

Regulatory Language

Section 160.45(b)(1)(vii): "State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard; apply the same standard to both faculty and students..."

Trial Court Decisions

1. *Feibleman v. Trustees of Columbia University in City of New York*, No. 19-CV-4327 (VEC), 2020WL 882429, at *15 (S.D.N.Y. Feb. 24, 2020) (denying the university's MTD on Title IX and breach of contract grounds): "Feibleman's allegations present a minimally plausible basis to question whether [the alleged victim] Doe's signs of incapacity were genuine, and the Court must accept those allegations as true for purposes of this motion. That, combined with Doe's capacity when she was on the water tower, calls into question whether Columbia erred in finding by a preponderance of the evidence that Feibleman committed sexual assault in Doe's bedroom."

2. *Doe v. University of Mississippi*, No. 3:16-CV-63-DPJ-FKB, 2018 WL 3570229, at *11 (S.D. Miss. July 24, 2018) (denying defendant's MTD regarding Doe's Title IX claim and due process claim): "The only circuit that appears to have addressed the issue did so in an unpublished opinion that found no due-process violation when the university used the preponderance standard in a school disciplinary proceeding. *See Cummins*, 662 Fed.Appx. at 449. But Judge Edith Jones made a forceful argument in her *Plummer* dissent that hearings on alleged sexual misconduct are quasi criminal and have long-lasting impacts on the accused. She therefore advocated for a more burdensome standard of review . . . [g]iven the developing nature of the law, and the fact that other portions of this claim survive Defendants' Rule 12(b)(6) attack, the Court elects to carry this issue beyond the pleading stage."

3. *Doe v. Regents of the University of California*, et al., Case No. 17CV03053, at *12 (Cal. Sup. Ct. Dec. 22, 2017) (granting Doe's writ of mandamus for due process violations when considering Doe's sanction appeal): "[The Interpersonal Violence Appeal Review Committee (IVARC)] must reach a decision based on a preponderance of the evidence standard; shall take into account the record developed by the investigator and the evidence presented at the hearing; and may make its own findings and credibility determinations based on all the evidence before it. But, in determining whether the decision was unreasonable based on the evidence, IVARC expressly stated that it "evaluated whether the decision was unreasonable based on the evidence, using only the evidence in the Title IX investigative report." In essence, IVARC reviewed the [Title IX and Sexual Harassment Policy Complaince Office and the Office of Judicial Affairs] decision for substantial evidence. That is inconsistent with the independent de novo review of all the evidence, including the testimony at the hearing that [the Sexual Violence and Sexual Harrasment Policy] demands."

Summary

Three trial courts have discussed the standard of evidence in student conduct proceedings. Section 160.45(b)(1)(vii) allows for either the preponderance of the evidence standard or the clear and convincing standard. One court, *Doe v. University of Mississippi*, discussed the quasi-criminal penalties a disciplined student can suffer, including career destruction.

Recommendation

Based on *Doe v. University of Mississippi*, the revised Title IX regulation should consider amending Section 160.45(b)(1)(vii) to require the clear and convincing evidentiary standard.

Memorable Quote

Doe v. University of Mississippi, No. 3:16-CV-63-DPJ-FKB, 2018 WL 3570229, at *11 (S.D. Miss. July 24, 2018) (denying defendant's MTD regarding Doe's Title IX claim and due process claim): "Judge Edith Jones made a forceful argument in her *Plummer* dissent that hearings on alleged sexual misconduct are quasi criminal and have long-lasting impacts on the accused. She therefore advocated for a more burdensome standard of review . . . [g]iven the developing nature of the law, and the fact that other portions of this claim survive Defendants' Rule 12(b)(6) attack, the Court elects to carry this issue beyond the pleading stage."

---

12. Appeals

Introduction

A fundamental element of due process is the availability of an appeal mechanism.

Regulatory Language

Section 160.45(b)(1)(viii): "Include the procedures and permissible bases for the complainant and respondent to appeal."

Appellate Court Decisions

1. *Schwake v. Arizona Bd. of Regents*, 967 F.3d 940 (9th Cir. July 29, 2020) (reversing the district court's dismissal for failure to state a Title IX claim because the plaintiff plausibly stated a Title IX claim):

    a. "Despite Schwake's repeated protests, [Associate Dean] refused to permit Schwake to appeal the punishment and the University's underlying finding of responsibility on the sexual misconduct Student Code violations. Contrary to the University's suggestion that there can be no showing of gender bias because University policy foreclosed an appeal, gender bias is a plausible explanation in light of the background indicia of sex discrimination. In modifying the punishment, the inference may be drawn that the University sought to show that it took sexual misconduct complaints seriously by punishing Schwake while simultaneously insulating the finding of responsibility from scrutiny in light of the University's policy limiting the availability of an appeal hearing." *Id.* at 950.

    b. "[Professor's] comments that the University had 'convicted [Schwake] of sexual assault' and that individuals 'should immediately call the police' if they saw Schwake in the building layered criminal overtones onto what was essentially a preliminary finding made by University officials in a school disciplinary case. [Professor] also divulged confidential and privileged information about Schwake's disciplinary case, shared 'graphic' details about the alleged assault with other students, and used the case as a classroom prompt about how to handle sexual misconduct complaints. [Professor] made these comments despite the fact that Schwake had the right to appeal the University's decision, thereby ensuring that one version of the sexual misconduct disciplinary case would be the publicly known version. This alleged conduct reflects an atmosphere of bias against Schwake during the course of the University's disciplinary case … [Professor's] statements are relevant here precisely because he knew privileged and confidential information about the case shortly after the University made a preliminary decision, despite not being a decisionmaker." *Id.*

2. *Doe v. Carry*, Cal. Ct. App. No. B282164, 2019 WL 155998, at *9 (Cal. App. Jan. 8, 2019) (reversing trial court denial of administrative mandate challenging expulsion because USC's investigation procedure was unfair): "Moreover, the harm to fundamental fairness created by USC's system is amplified by the limited review of the investigator's factual findings available in the university's

appellate process. As we have explained, the [Board of Appeals] review relies wholly on the [Single Investigator Report], plus any additional written materials accepted on appeal, and is limited to review for substantial evidence. The [Board of Appeals] may not substitute its credibility findings for those made by the investigator, and may not make new factual findings. Because a version of events provided by a single witness (assuming it is not implausible on its face) constitutes substantial evidence, the mere fact that the complainant's allegations of misconduct are deemed credible by the investigator constitutes substantial evidence. Thus, the [Board of Appeals] will virtually never be in a position to set aside an investigator's factual findings. Moreover, because the [Board of Appeals] cannot modify a sanction imposed by the investigator unless it is unsupported by the investigator's factual findings or is grossly disproportionate to the violation shown by those findings, the sanction imposed by the investigator will rarely, if ever, be modified."

3. *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 136 (Cal. App. 5th Jan. 4, 2019) (reversing the trial court's judgment against Doe with directions to grant Doe' petition for writ of administrative mandate and set aside the findings that Doe violated the University's sexual assault policy because Doe was denied fundamental fairness throughout his sexual assault allegation): "[T]he harm to fundamental fairness created by [the University of Southern California's] system is amplified by the limited review of the investigator's [, Dr. Allee,] factual findings available in the university's appellate process. As we have explained, the [Student Behavior Appeals Panel's] review relies wholly on the [Summary Administrative Report], plus any additional written materials accepted on appeal, and is limited to review for substantial evidence."

4. *Doe v. Regents of the University of California*, 2d Civ. No. B283229, at *19 (Cal. App. Oct. 9, 2018) (reversing the trial court's judgment denying Doe a writ of administrative mandate for fairness and procedural due process violations and remanding the case to the superior court with the direction to grant Doe's writ of administrative mandate): "'The accused has the right to due process as outlined in the Campus Regulations. Among these rights are . . . (vi) [t]o simultaneously with the accuser, be informed in writing of . . . the institution's procedures for appealing the results of the proceeding[.]'"

5. *Boyd v. State Univ. of New York at Cortland*, 973 N.Y.S.2d 413, 415-6 (N.Y. App. Div. Oct. 17, 2013) (annulling university disciplinary determination for violating Boyd's due process rights): "Here, petitioner was charged with both harassment as defined under the Code as well as violating Delaware law by committing the crimes of harassment and terroristic threatening. The charges were based upon his alleged dissemination of various communications to the victim on four separates dates between October 8, 2010 and November 1, 2010. Notably, Delaware law sets forth a number of different courses of conduct that may constitute the crime of harassment. Yet, the Hearing Panel's determination contains only a conclusory statement that petitioner 'harassed and threatened [the victim].' Although such determination states that it was 'based upon the testimony of the University of Delaware police officer and the incident report provided by the University of Delaware,' it fails to set forth the specific conduct that constituted the basis for the finding of guilt on the charges of harassment and violating Delaware law, and wholly lacks any factual findings concerning the elements of the Delaware crimes. Shockingly, it even fails to indicate which Delaware crime(s) petitioner was found to have committed. The determinations of the Suspension Review Panel and [University VP for Student Affairs] suffer from the same deficiencies, as they simply uphold the 'findings' of the Hearing Panel."

Trial Court Decisions

1. *Doe v. Columbia University*, Case 1:20-cv-06770-GHW, at *44 (S.D.N.Y. Aug 1, 2021) (granting Doe's Title IX erroneous outcome claim in imposing interim suspension, Title IX selective enforcement claim in the Jane Doe 1 proceeding, Title IX erroneous outcome claim in the Jane Doe 4 proceeding, and Title IX erroneous outcome claim in the Jane Doe 3 proceeding because Doe plausibly stated all claims listed above): "But [John Doe] was never given a hearing of any sort, and has pleaded that the opportunity Columbia offered him to appeal the decision in writing did not constitute a meaningful opportunity to be heard."

2. *Doe v. Coastal Carolina Univ.*, No. 4:18-CV-00268-SAL, 2021 WL 779144, at *9 (D.S.C. Mar. 1, 2021) (defendant's MSJ denied; genuine issue as to sex bias warranting a Title IX claim): "Plaintiff was found not guilty at his first hearing. [University 'appellate authority'] Dr. Byington decided to grant Jane Doe's appeal to have the case heard again. His deposition testimony does not reveal why he decided to do so. The policy generally limits grounds for appeal to new evidence or procedural flaws. However, Dr. Byington does not say that he granted the appeal on either of these bases. As Defendant argues, the policy technically gave Dr. Byington the discretion to grant appeals on other bases. However, the justification for exercising this discretion is unclear based on the record before the court … Dr. Byington decided to have an independent Title IX report prepared, which he reviewed in deciding to grant Jane Doe's appeal. This outside independent review of the first panel's decision is not contemplated in the school's appeal policy. This evidence may reflect an appeal process that was unusually generous towards the female appellant. Therefore, the review process on appeal creates a genuine dispute of material fact as to gender bias."

3. *Doe v. Grinnell College*, 473 F. Supp. 3d 909, 924 (S.D. Iowa July 9, 2019) (denying defendant's MSJ because Doe plausibly stated Title IX and breach of contract claims): "Evidence regarding [the appeals officer's] consultation with the Adjudicator is sufficient to generate a dispute of material fact regarding the accuracy of the outcome of Doe's disciplinary proceeding. A reasonable jury could conclude that, even though the Policy does not explicitly prohibit consultation between the appeals officer and an adjudicator, such consultation detracts from the appeals officer's independence. A reasonable jury could further conclude that Doe did not receive a fair and impartial review of his appeal and this lack of an impartial review casts doubt on the accuracy of the outcome of the disciplinary proceeding."

4. *Doe v. Coastal Carolina University*, 359 F. Supp. 3d 367, 376 (D.S.C. Jan. 9, 2019) (denying in part the university's motion to dismiss because Doe sufficiently alleged circumstances suggesting that gender bias, a violation of Title IX, was a motivating factor behind the university's allegedly erroneous findings): "[T]he appeal panel was not duly constituted because there were no students in the panel as required by Defendant's Student Code[.]"

5. *Doe v. George Washington University*, no. 1:18-cv-00533-RMC, at *15 (D.D.C. Aug. 14, 2018) (granting Doe's motion for summary judgment because the university breached its contract with Doe): "Ignoring [review and appeal procedures] . . . would also deprive students of a promised level of intermediate review, legitimately designed to weed out those appeals with no new evidence and no reasonable chance of changing the result, but allowing others to proceed to a second panel of review."

6. *Gulyas v. Appalachian State Univ.*, W.D.N.C. No. 516CV00225RLVDCK, 2017 WL 3710083, at *2 (W.D.N.C. Aug. 28, 2017) (denying the university's MTD because plaintiff plausibly stated a due process claim): "Plaintiff appealed the University Conduct Board's decision, raising several procedural and evidentiary challenges and noting that he was not provided a copy of his hearing transcript for purposes of appeal. On November 10, 2015, Plaintiff received a letter from Defendant [University Official] that indicated that his appeal had been denied. On November 17, 2015, the district attorney dismissed the criminal charges filed by Costa."

7. *Doe v. Alger*, 228 F. Supp. 3d 713, 730 (W.D. Va. Dec. 23, 2016) (granting Doe summary judgment on his procedural due process claim for plausibly stating a due process violation): "[T]he appeal board effectively reversed the decision of the hearing board without any explanation whatsoever and without ever expressing a finding that Doe was responsible for sexual misconduct."

8. *Tanyi v. Appalachian State Univ.*, No. 5:14-CV-170RLV, 2015 WL 4478853, at *6 (W.D.N.C. July 22, 2015) (finding that Plaintiff has stated plausible procedural and substantive due process claims): "Defendant Gonzalez failed to articulate a legitimate reason for re-hearing Student B's rape allegations. In her letter to Tanyi, Gonzalez essentially wrote that a second hearing was necessary because ASU did not adequately prove its case against him at the first hearing. Such reasoning is a plainly inadequate basis for granting a new hearing, and fundamentally unfair to Tanyi."

Summary

Five appellate courts and eight trial courts have found that when a university employs a "rubber stamp" appeals process or one that makes inexplicable decisions, such a process can violate constitutional and statutory rights of the student.

Recommendation

Section 160.45(b)(1)(viii) provides that a university must simply state the bases and procedures for appeal. This is insufficient. This section should be amended to include a provision that requires the appeal process to be "substantive and meaningful."

Memorable Quote

Doe v. Regents of the University of California, 2d Civ. No. B283229, at *19 (Cal. Ct. App. 2d 2018) (reversing the trial court's judgment denying Doe a writ of administrative mandate for fairness and procedural due process violations and remanding the case to the superior court with the direction to grant Doe's writ of administrative mandate): "'The accused has the right to due process as outlined in the Campus Regulations. Among these rights are . . . (vi) [t]o simultaneously with the accuser, be informed in writing of . . . the institution's procedures for appealing the results of the proceeding[.]'"

---

13. Notice

Introduction

In *Goss v. Lopez*[8], 419 U.S. 565 (1975), the U.S. Supreme Court held that public school students facing even a short suspension are entitled to notice of the charges against them.

Regulatory Language

Section 106.45(b)(2)(i)(A): "Notice of the recipient's grievance process."

Section 106.45(b)(2)(i)(B): "Notice of the allegations of sexual harassment potentially constituting sexual harassment…" [including the parties and the conduct]

Section 106.45(b)(5)(v): "...to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate."

Appellate Court Decisions

1. *Schwake v. Arizona Bd. of Regents*, 967 F.3d 940, 951 (9th Cir. July 29, 2020) (reversing district court's dismissal of Title IX action for failure to state a claim because plaintiff plausibly stated a Title IX claim): "Schwake's allegations of the University's one-sided investigation support an inference of gender bias. According to Schwake, the University [among other things]... refused to provide him with any written information about the complainant's allegations against him and only orally summarized them."

2. *Doe v. Oberlin Coll.*, 963 F.3d 580, 586–87 (6th Cir. June 29, 2020) (reversing district court's motion to dismiss for failure to state a Title IX erroneous outcome claim because Doe plausibly stated a Title IX claim): "The College's own Policy states that usually its investigation will be completed in 20 days, and the matter as a whole will be resolved in 60. But here the investigation alone took 120 days; Doe was not even informed of the specific allegations against him for that same period; and the hearing panel did not reach a decision until about 240 days after the complaint, which was 180 days later than contemplated by the Policy. That delay was compounded by the College's failure to do what the Policy twice promised it would do, namely to notify the parties 'of the reason(s) for the delay and the expected time frames.' Those omissions were especially strange given that those promises were included in the Policy precisely because, in 2012, a female student had understandably complained about the emotional harm caused by the College's delay in resolving the proceeding in which she was involved."

3. *Doe v. Regents of the University of California*, 2d Civ. No. B283229, at *18 (Cal. Ct. App. Oct. 9, 2018) (reversing the trial court's judgment denying Doe a writ of administrative mandate for fairness and procedural due process violations and remanding the case to the superior court with the direction to grant Doe's writ of administrative mandate): "'The accused has the right to

[8] https://www.law.cornell.edu/supremecourt/text/419/565

due process as outlined in the Campus Regulations. Among these rights are: [¶] (i) The right to written notice of the charges[.]'"

4. *Doe v. Skidmore College*, 59 N.Y.S.3d 509 (N.Y. App. Div. July 13, 2017) (reversing University "guilty" decision and vacating expulsion because plaintiff had lack of notice of the allegations against him): "[P]etitioner did not learn the specific nature of the complainant's allegations against him until he received the initial draft of the investigation report, which took place *after* he had been interviewed by investigators and after the complainant and nine of the witnesses had also been interviewed regarding the allegations. The interview is a significant stage of the investigatory procedure, as it provides the sole opportunity during the process for an accused student to speak directly with investigators. The investigators take notes describing this interview which are incorporated into the investigative report that will ultimately be submitted to the panel. Due to the absence of factual allegations within the complaint, petitioner was required to participate in the interview and respond to the investigators' questions based solely upon his memory of an event that had taken place more than a year and a half earlier, with no knowledge of the specific allegations against him."

5. *Doe v. Univ. of S. California*, 200 Cal. Rptr. 3d 851 (Cal. Ct. App. Apr. 5, 2016) (reversing trial court's affirmation of University's decision that Doe violated USC sexual misconduct policy because Doe was not given sufficient notice of the allegations against him):

    a. "In the initial letter from [University Student Conduct Office], John was not apprised of the factual basis of the accusations against him; he was given only a list of code sections, a date, and Jane's name. After its investigation, [University Student Conduct Office] found that sanctions were warranted because John participated in a group sexual assault. The Appeals Panel, on the other hand, found that sanctions for sexual assault could not be supported on the record. Instead, the Appeals Panel found that John violated section 11.44C because John encouraged or permitted the other students to slap Jane. John was never provided notice or an opportunity to respond to the theory that his actions in relationship to the other students' slaps, separated from the remaining activity, could result in his suspension. The Appeals Panel also found that John violated section 11.32 because he endangered Jane when he left the bedroom. The factual basis for this finding is troubling, because the [University Student Conduct Office] report does not even suggest that Jane was in danger when John left the room, or that John endangered Jane by his actions after the group activity ceased. Because John had no notice that such allegations were at issue, he had no opportunity to defend himself." *Id.* at 867.

    b. "Because John was not informed of the factual basis of the allegations at the outset, [University Student Conduct Office] told John that they were investigating his involvement in a sexual assault, and the sanction John appealed was based primarily on a finding of sexual assault, John was never afforded notice or a meaningful opportunity to address whether he 'encouraged or permitted' the slaps, or whether his departure from the bedroom endangered Jane. If notice is to be meaningful, it must include information about the basis of the accusation--not just a list of Student Conduct Code sections that can be interpreted to encompass any activity [University Student Conduct Office] or the Appeals Panel finds to be inappropriate." *Id.* at 870.

6. *Boyd v. State Univ. of New York at Cortland*, 973 N.Y.S.2d 413, 415 (N.Y. App. Div. Oct. 17, 2013) (annulling university disciplinary determination Boyd's due process rights): "Here, petitioner was charged with both harassment as defined under the Code as well as violating Delaware law by committing the crimes of harassment and terroristic threatening. The charges were based upon his alleged dissemination of various communications to the victim on four separates dates between October 8, 2010 and November 1, 2010. Notably, Delaware law sets forth a number of different courses of conduct that may constitute the crime of harassment. Yet, the Hearing Panel's determination contains only a conclusory statement that petitioner 'harassed and threatened [the victim].' Although such determination states that it was 'based upon the testimony of the University of Delaware police officer and the incident report provided by the University of Delaware,' it fails to set forth the specific conduct that constituted the basis for the finding of guilt on the charges of harassment and violating Delaware law, and wholly lacks any factual findings concerning the elements of the Delaware crimes. Shockingly, it even fails to indicate which Delaware crime(s) petitioner was found to have committed."

Trial Court Decisions

1. *Doe v. Purdue University*, No. 4:18-cv-00089 (N.D. Ind. Jan. 13, 2022), ECF No. 73 at *12 (denying the university's motion for summary judgment because a reasonable jury could find the university violated Mary Doe's rights protected under Title IX and the 14th Amendment's equal protection clause and due process clause): "Doe was advised that the [investigative] panel was investigating 'possible violation(s) of the University's Anti-Harassment Policy by [Male Student A],' but Defendants have not provided any evidence or argument that Doe was advised the panel was investigating Doe's conduct. A jury could find that not telling a student her conduct was also being investigated as part of the panel hearing was unreasonable."

2. *Doe v. Southern Indiana University,* no. 82C01-2109-PL-004615, at *1 (Ind. Cir. Ct. Sept. 24, 2021) (granting a temporary restraining order against the university for not providing adequate notice): "Plaintiff received notice of suspension . . . less than seventy-two (72) hours before [the university] intended to impose the suspension[.]"

3. *Doe v. Lincoln-Sudbury Regional School Committee*, No. 1:20-cv-11564-FDS, at *16 (D. Mass. Aug. 27, 2021) (denying the school's motion to dismiss because Doe plausibly stated due process claim): "The complaint alleges that the retraction letter violated plaintiff's right to due process because, among other reasons, defendants failed to notify him of their intent to retract the letter stating that their Title IX investigation was inconclusive . . . [t]he complaint therefore plausibly alleges a claim for a violation of plaintiff's due-process rights as to the 2017 retraction letter."

4. *Moe v. Grinnell College*, No. 4:20-cv-00058-RGE-SBJ, at *27 (S.D. Iowa Aug. 23, 2021) (denying the college's motion for summary judgment because Moe plausibly stated a Title IX claim and a breach of contract claim): "Moe provides evidence that the following deviations occurred during the Title IX process: Grinnell College did not provide him with the requisite written explanation of the over sixty-day delay in resolving the Title IX Complaints, and the Title IX response team did not request an expedited investigation[.]"

5. *Doe v. Columbia University*, Case 1:20-cv-06770-GHW, at *46 (S.D.N.Y. Aug 1, 2021) (denying the University's MTD Doe's Title IX erroneous outcome claim in imposing interim suspension, Title IX selective enforcement claim in the Jane Doe 1 proceeding, Title IX erroneous outcome claim in the Jane Doe 4 proceeding, and Title IX erroneous outcome claim in the Jane Doe 3 proceeding because Doe plausibly stated all claims listed above): "Plaintiff has alleged procedural irregularities: namely, that Columbia imposed the suspension with no prior notice[.]"

6. *Victim Rights Law Center v. Cardona*, no. 1:20-cv-11104-WGY, at *54 (D. Mass. July 28, 2021) (affirming 12 of 13 challenged Department of Education's 2020 Title IX Regulations based on Title IX statutory law): "[T]he Advocates had notice that section 106.45(b)(6)(i)'s hearing procedures were being considered, including the bar on statements not subject to cross-examination."

7. *John Doe v. University of Massachusetts*, No. 1:20-cv-11571 (D. Mass. April 28, 2021) (denying MTD on due process and Title IX grounds):

    a. "One day before the hearing, plaintiff was allowed one hour to review the University's investigatory file, but he was not allowed to make copies of any of these material." *Id.* at *2.

    b. "Plaintiff has plausibly alleged that he did not have adequate notice of the allegations against him due, in part, to his lack of access to the University's investigatory file." *Id.* at *3.

8. *Doe v. Princeton Univ.,* D.N.J. No. 319CV07853BRMTJB, 2020 WL 7383192, at *3 (D.N.J. Dec. 16, 2020) (denying University's motion to dismiss for failure to state a claim for deprivation of fairness): "Doe further contends he was not given proper notice ... [W]ith respect to notice, Doe alleges he never received a copy of Roe's initial statement or the identities of the witnesses against him."

9. *Doe v. University of Delaware*, No. CV 19-1963-MN, 2020 WL 6060476, at *7 (D. Del. Oct. 14, 2020), *report and recommendation adopted*, No. 19-1963 (MN), 2020 WL 6343290 (D. Del. Oct. 29, 2020) (denying Delaware's MTD because plaintiff plausibly stated a breach of contract claim): "Plaintiff alleges that UD failed to provide him with a copy of Roe's complaint at the initial meeting as required by the policy, and that he was interviewed without having that information."

10. *New York v. U.S. Department of Education*, no. 20-cv-4260-JGK, at *26-27 (S.D.N.Y. Aug. 9, 2020) (denying the state's motion for preliminary injunction, or in the alternative, stay the 2020 Title IX Regulations because state failed to establish a likelihood of success on the merits and that they were likely to suffer substantial irreparable harm): "The [2020] Rule provides postsecondary institutions with wide discretion to craft and implement the recipient's own employee reporting policy to decide which employees may be mandatory reporters, but requires that all students and employees receive notice of the Title IX Coordinator's contact information and have clear reporting channels for reporting harassment."

11. *Doe v. University of Michigan*, 448 F. Supp. 3d 715, 732 (E.D. Mich. Mar. 23, 2020) (granting Doe's motion for partial summary judgment and denying the university's MTD on due process

grounds): “Due process safeguards apply to disciplinary proceedings in higher education. Flaim, 418 F.3d at 633; Miami Univ., 882 F.3d at 599; Cincinnati, 872 F.3d at 399. Those safeguards must comply with two fundamental parameters: notice and an opportunity to be heard. Flaim, 418 F.3d at 634; Cincinnati, 872 F.3d at 399.”

12. *Averett v. Hardy*, No. 3:19-CV-116-DJH-RSE, 2020 WL 1033543, at *6 (W.D. Ky. Mar. 3, 2020) (denying MTD due process claim against university administrator because of due process violations): “Averett alleges that Hardy did not provide him with the materials compiled against him until the day of his hearing, in violation of the [University] Code of Student Conduct. The Code states that ‘all available information’ will be reviewed with the accused student prior to the hearing. Averett denies that such a meeting ever occurred … Averett alleges that Hardy—an agent of the university—intentionally failed to provide him with accessible critical evidence in violation of its own policies.”

13. *Doe v. Syracuse Univ.*, 440 F. Supp. 3d 158, 177 (N.D.N.Y. Feb. 21, 2020) (holding that Defendant failed to provide Plaintiff with adequate notice warranting a due process violation): “However, to the extent Plaintiff is relying on the provision stating that a student will be notified ‘in writing of the charges *filed* against the respondent,’ that provision is specific and concrete, and Plaintiff has plausibly alleged that it was breached (emphasis added). Plaintiff asserts that Syracuse violated this provision because he ‘was never notified, and still to this day has not received the complaint against him.’”

14. *T.S.H. v. Northwest Missouri State University*, No. 19-06059-CV-SJ-ODS, 2019 WL 4647263, at *4 (W.D. Mo. Sep. 23, 2019) (denying defendant’s MTD on due process and breach of contract grounds): “Plaintiffs were denied due process, as guaranteed by the Fourteenth Amendment, 18 U.S.C. § 5033,3 and other applicable provisions of the U.S. Constitution and federal law, in that (a) they were effectively arrested and questioned without the benefit of notification to their parents and proper legal authorities . . . their parents were not notified of their confinement or their rights during that confinement[.]”

15. *Doe v. Grinnell College*, 473 F. Supp. 3d 909, 934 (S.D. Iowa July 9, 2019) (denying defendant’s MSJ on Title IX and breach of contract grounds): “[T]he Notice of Investigation Doe received did not accurately indicate the conduct for which he was being investigated[.]”

16. *Montague v. Yale University*, no. 3:16-cv-00885, *49 (D. Conn. Mar. 29, 2019) (denying in part the university’s motion for summary judgment because there is a genuine issue of fact demonstrating breach of contract, fundamental fairness, and tort violations): “Yale failed to provide [Montague] with adequate notice of the complaint.”

17. *Norris v. Univ. of Colorado, Boulder*, 362 F. Supp. 3d 1001, 1011 (D. Colo. Feb. 21, 2019) (Denying MTD for failure to state a Title IX claim because plaintiff plausibly stated a Title IX violation): “Plaintiff notes he does not simply disagree with the Investigators' findings, but instead his Complaint sets forth a litany of grievances which he argues denied him of a fair and impartial process. In part, Plaintiff disputes the University's actions of: [] withholding service of the notice of investigation until after Plaintiff was interviewed by police…”

18. *Jia v. University of Miami et al*, no. 1:17-cv-20018-DPG, at *9-10 (S.D. Fla. Feb. 12, 2019) (denying the university's motion to dismiss because plaintiff sufficiently established a plausible Title IX claim and a defamation claim): "[Irregularities in the investigation process] include . . . (4) failing to give Plaintiff notice of his rights or permit him to have legal counsel present . . . [which] could plausibly affect its disciplinary proceedings against Plaintiff."

19. *Doe v. The Trustees of the State of California*, No. BS167329 (Cal. Sup. Ct. Feb. 5, 2019) (granting Doe's writ of mandate for lack of fairness during the adjudicative process):

    a. "[T]he accused student shall be given notice of the charges and a description of the allegations prior to or during his initial interview. (AR 15.) There is no evidence [Title IX Investigator] Boele informed Petitioner of the charges regarding Roe 1 prior to or during his interview." *Id.* at *7.

    b. "Petitioner did not have notice of the allegation about Roe 1's age during a procedure in which he could pose questions to Roe 1, including about her age, or challenge Boele's investigative findings, including her basis for concluding that Roe 1 was under the age of 18." *Id.* at *8.

20. *Doe v. Johnson & Wales University*, no. 1:18-cv-00106-MSM-LDA, *5-6 (D.R.I. Apr. 16, 2018) (holding Doe plausibly stated a Title IX violation): "[The University], among other things stated in Doe's lawsuit, failed to provide Doe with a copy of the 18+ page incident/complaint filed against him, never provided oral or written guidance as to how the Hearing would proceed, never informed him whether he could bring any evidence or witness, never informed him whether he could question any witnesses, whether he was allowed an opening or closing statement."

21. *Elmore v. Bellarmine University*, no. 3:18-cv-00053-RGJ-RSE, at *9 (W.D. Ky. Mar. 29, 2018) (issuing a preliminary injunction against the university because Elmore illustrated a strong likelihood of success on the merits regarding his Title IX claim): "Bellarmine notified Elmore . . . three months after his filing of the Title IX complaint against Dr. Barrios that Bellarmine intended to proceed on the September 2017 Student Code of Conduct violation and on two new code violations derived from Elmore's Title IX complaint."

22. *Schaumleffel v. Muskingum University*, no. 2:17-cv-000463-SDM-KAJ, at *38 (S.D. Ohio Mar. 6, 2018) (denying the University's motion to dismiss because plaintiff plausibly stated a Title IX erroneous outcome claim, promissory estoppel claim, negligence claim, and breach of contract): "[There is a] duty allegedly owed by Muskingum [University] arising under [Family Educational Rights and Privacy Act, or] FERPA[,] for disclosing information about the charges against Plaintiff and his expulsion[.]"

23. *Powell v. St. Joseph's University, et al.*, Civil Action No. 17-4438 (E.D. Pa. Feb. 16, 2018) (denying defendant's MTD on breach of contract grounds):

    a. "In this case, the Amended Complaint sufficiently alleges that the University failed to provide plaintiff notice of and an opportunity to respond to the charges against him under the [Policy Prohibiting Discrimination, Harrasment, and Retaliation (PPDHR)], as required by that policy." *Id.* at *8.

b. "The PPDHR requires the delivery of the complaint to the accused student and an opportunity to respond in writing." *Id.* at *9.

c. "[T]hese allegations are sufficient to state a claim that the University violated the PPDHR's requirement that a student under investigation be given notice and an opportunity to respond." *Id.*

24. *Doe v. Pennsylvania State Univ.*, M.D. Pa. No. 4:17-CV-01315, 2018 WL 317934, at *4 (M.D. Pa. Jan. 8, 2018) (denying MTD on due process grounds): "[Doe's] complaint alleges numerous constitutional violations '[i]n the course of [the] investigation and adjudication.' It alleges, for example, that he was not provided 'proper notice of the charges against him,' since it was not until October 5, 2016—after meeting with … [Title IX Investigator] several times—that he learned of the allegation of 'nonconsensual digital penetration.'"

25. *In the Matter of John Doe v. Rensselaer Polytechnic Institute*, No. 254952, at *12 (N.Y. Sup. Ct. Nov. 6, 2017) (granting New York state law Article 78 order annulling Respondent's initial determination that Petitioner violated RPI's Student Sexual Misconduct Policy): "Respondents contacted Petitioner and requested a meeting and never notified him of the reasons for the meeting."

26. *Richmond v. Youngstown State University*, No. 4:17CV1927, 2017 WL 6502833, at *1 (N.D. Ohio Sep. 14, 2017) (granting plaintiff's TRO because plaintiff plausibly stated a Title IX claim and a breach of contract claim): "For the reasons stated on the record, that Plaintiff will suffer irreparable harm is patent. This is due, in part, to the public nature of being banned from playing football due to past behavior—non-YSU student related behavior—without notice, or process."

27. *Gulyas v. Appalachian State Univ.*, W.D.N.C. No. 516CV00225RLVDCK, 2017 WL 3710083, at *2 (W.D.N.C. Aug. 28, 2017) (denying MTD on due process grounds): "The University [Sexual] Conduct Board hearing occurred on Friday, October 2, 2015, with several students testifying but [University] Investigator [] not appearing. On October 5, 2015, the [Domestic Violence Protective Order] Court held its final hearing on [Accuser]'s [Domestic Violence Protective Order] Complaint, during which [University] Investigator [] testified about the events of February 21, 2015 and [University Officials'] directive to [University Investigator] about not including the [potentially exculpatory] events of February 21 in her investigation report. Prior to [University Investigator]'s testimony at the [Domestic Violence Protective Order] Complaint hearing on October 5, 2015, Plaintiff was unaware that Defendant [University Officials] had directed [University Investigator] not to investigate the [potentially exculpatory] February 21 incident and to omit details of the incident from the investigation report provided to the University Conduct Board."

28. *Nokes v. Miami University*, No. 1:17-CV-482, 2017 WL 3674910, at *12 (S.D. Ohio Aug. 25, 2017) (granting Nokes' motion for a preliminary injunction against defendants on procedural due process grounds): "Finally, even if the Court accepts Defendants' argument that notice is irrelevant unless Plaintiff can show he was prejudiced by the lack of notice, Plaintiff has pointed to additional evidence he would have used at the hearing had he been given adequate notice."

29. *Culiver v. U.S.*, No. 2:17-cv-03514-JS-SIL, Document 48 (E.D.N.Y. July 6, 2017) (requiring the Government to submit charges against plaintiffs within ten days because they have not been awarded due process):

    a. "[The Marine Academy] admit[s] that they withheld notice from [the plaintiffs] from the September [graduation] event until June." *Id*. at 8.

    b. "You don't think [the plaintiffs are] entitled to know what the charges are, how long it's going to be? Does this go on forever? Did you ever hear of the United States Constitution of due process?" *Id*. at 12.

    c. "[The Marine Academy] refused to graduate them and it's going on for five months and still nobody knows what the charges are in the bus." *Id*. at 14.

30. *Doe v. University of Notre Dame*, No. 3:17CV298-PPS/MGG, 2017 WL 7661416 (N.D. Ind. May 8, 2017) (granting Doe's motion for TRO and preliminary injunction for violations of breach of contract and Title IX):

    a. "[T]he lack of meaningful notice to John of the allegations against him, so as to be able to adequately prepare his defense, has a more than negligible chance of being found to render the disciplinary process capricious." *Id.* at *9.

    b. "At the beginning of Jane's formal complaint process, the University's November 29 letter merely advised John that "the incident alleged may be a violation of the University's policies related to sexual assault, sexual misconduct, dating and domestic violence, stalking, and/or conduct that creates a hostile environment." [Def. Exh. 118 at 1.] This amounts to no notice at all. It doesn't tell him what he is alleged to have done wrong nor when the wrongdoing was alleged to have taken place." *Id.*

31. *Doe v. W. New England Univ.*, 228 F.Supp.3d 154, 175 (D. Mass. Jan. 11, 2017) (denying MTD on breach of contract grounds): "The [Title IX Board] found that 'it was more likely than not' that Plaintiff violated 'both of the standards of the Student Code of Conduct under which [he was] charged'. The [Title IX Board]'s decision, however, was based on its findings that Plaintiff violated two sections of the Title IX Policy on Sexual Misconduct, which were not included in either the 2014–2015 Handbook or the notices provided to Plaintiff. The University could not reasonably expect Plaintiff to understand that the descriptions of his alleged misconduct, which it provided to him prior to the hearing, included the Title IX Policy on sexual misconduct."

32. *Collick v. William Paterson Univ.*, D.N.J. No. 16-471 (KM) (JBC), 2016 WL 6824374, at *11 (D.N.J. Nov. 17, 2016), *adhered to on denial of reconsideration*, D.N.J. No. CV 16-471 (KM) (JBC), 2017 WL 1508177 (D.N.J. Apr. 25, 2017), and *aff'd in part, remanded in part*, 699 Fed. Appx. 129 (3d Cir. 2017) (denying MTD on Title IX grounds): "The Complaint [alleges] that '[a]s a purported female victim, the Accuser's allegations against the male plaintiffs were accepted as true without any investigation being performed and without the development of any facts or exculpatory evidence.' And the Complaint does allege that Collick and Williams were not given the opportunity to respond or explain themselves, did not receive proper notice of the specific charges, were not permitted to confront or cross-examine their accuser, were not given a list of

witnesses against them, and more generally were not afforded a thorough and impartial investigation."

33. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 603 (D. Mass. Mar. 31, 2016) (Denying MTD on breach of contract grounds): "Brandeis did not require J.C. to provide a 'full account' or 'thorough statement' of the charges, and never provided such a statement to John. Instead, John was expected to defend himself against the vague and open-ended charge that he had 'numerous inappropriate, nonconsensual sexual interactions' with J.C. from September 2011 to May 2013 … [T]he lack of specific notice of the charges may have been particularly prejudicial. This was not a dispute about a single isolated event; it involved a lengthy and apparently tangled relationship that went on for nearly two years. Brandeis's failure to inform John of the details of the charges appears to have had a significant adverse effect on his ability to prepare a defense."

34. *Tanyi v. Appalachian State Univ.*, No. 5:14-CV-170RLV, 2015 WL 4478853 (W.D.N.C. July 22, 2015) (finding that Plaintiff has stated plausible procedural and substantive due process claims):

    a. "For all intents and purposes, Tanyi received notice of the new harassment charge at the eleventh hour, when it was too late to mount an effective defense. Educational institutions are largely left to their own devices regarding student disciplinary proceedings. However, at a minimum due process requires adequate notice. *See Goss,* 419 U.S. at 579 (1975)." *Id.* at *6.

    b. "Regarding the short notice Tanyi received of Student B's harassment allegations, 'the essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.' Providing Tanyi with less than 24 hours' notice of an entirely new charge, after he had submitted his list of proposed witnesses, did not provide Tanyi with adequate notice, and violated a clearly established right that Defendants should have been aware of." *Id*. at *9.

Summary

Six appellate courts and 34 trial courts have criticized universities that fail to meet this basic requirement. This failure can violate the constitutional due process rights and statutory Title IX rights of the student.

Recommendation

The revised regulation should affirm and preserve the requirements specified in Sections 106.45(b)(2)(i)(A), 106.45(b)(2)(i)(B), and 106.45(b)(5)(v).

Memorable Quote

Schwake v. Arizona Bd. of Regents, 967 F.3d 940, 951 (9th Cir. July 29, 2020) (reversing district court's dismissal of Title IX action for failure to state a claim): "Schwake's allegations of the University's one-sided investigation support an inference of gender bias. According to Schwake, the University

[among other things]... refused to provide him with any written information about the complainant's allegations against him and only orally summarized them."

---

14. Burden of Proof and Evidence Collection

Introduction

Placing the burden of proof on the school, not on the respondent (or complainant), is an essential component of the presumption of innocence.

Regulatory Language

Section 160.45(b)(5)(i): "Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties."

Appellate Court Decision

1. *Doe v. Regents of the University of California* (UCLA), No. 20-55831, at *21 (9th Cir. Jan. 11, 2022) (reversing and vacating the order and judgment of the District Court of the Central District of California dismissing a Title IX action brought by Doe because Doe plausibly stated a Title IX claim against the Regents): "[I]rregular proceedings during the appeal hearing itself, [included] . . . (1) the burden was placed on Doe, not the University; (2) Doe was not permitted to speak at the appeal hearing; (3) fact witness testimony supporting Doe's account of the events was discounted, while witness testimony supporting Roe's account was accepted without the need for an independent interview by the appeal panel[.]"

2. *Yeasin v. University of Kansas*, No. 113,098, at *5 (Kan. Ct. App. Sep. 25, 2015) (affirming the district court's holding that the University violated its own Student Code and rules because the alleged violations occurred off-campus and must occur on-campus or at campus sponsored activities): "[T]he University presented no evidence that the conduct set forth as the basis for the alleged Article 22 Student Code violation occurred on campus or at a University sponsored event, the district court found that the Student Code, as written, did not apply to off-campus conduct."

Trial Court Decision

1. *Doe v. Texas A&M University – Kingsville, et al.*, no. 2:21-cv-00257, at *3 (S.D. Tex. Nov. 5, 2021) (granting Doe's motion for a temporary restraining order and preliminary injunction to preserve the status quo because Doe was denied due process): "As a result [of the lack of due process], the burden of proof was effectively shifted to [Doe] to disprove the allegations against him and he was denied the tools for meeting that burden."

2. *Mock v. University of Tennessee at Chattanooga*, No. 14-1687-II (Tenn. Ch. Ct. Aug. 4, 2015) (granting Mock injunctive relief reinstating UTC's initial finding of Mock being not guilty on procedural due process grounds):

a. "The [University of Tennessee at Chattanooga] UTC Chancellor's . . . implementation of [a] rule erroneously shifted the burden of proof onto Mr. Mock [by operation of the university's affirmative consent policy], when the ultimate burden of proving a sexual assault remained on the charging party, UTC." *Id.* at *11.

b. "The position of UTC is that it satisfies its burden of proof by requiring the accused to affirmatively prove consent[.] This procedure is flawed and untenable if due process is to be afforded [tp] the accused." *Id.*

Summary

Two appellate court and two trial courts have recognized the importance of the burden of proof being placed on the school. Section 160.45(b)(5)(i) is essential because experience reveals some universities improperly shift the burden onto the students. In some cases, this burden shifting occurs by virtue of an affirmative consent policy, which makes the default sexual interaction a sexual assault and requires a student to prove that the encounter was not, in fact, sexual assault. *See Mock v. Univ. of Tennessee.*

Recommendation

The revised regulation should preserve this Section, preventing universities from inappropriately placing the burden of proof on the accused. This section should be clarified to prohibit substantive policies that would have the *de facto* effect of shifting the burden of proof onto the student, such as affirmative consent policies.

Memorable Quote

Mock v. University of Tennessee at Chattanooga, No. 14-1687-II, at *11 (Tenn. Ch. Ct. Aug. 4, 2015) (granting Mock injunctive relief reinstating UTC's initial finding of Mock being not guilty on procedural due process grounds): "The [University of Tennessee at Chattanooga (UTC)] Chancellor's . . . implementation of [a] rule erroneously shifted the burden of proof onto Mr. Mock [by operation of the university's affirmative consent policy], when the ultimate burden of proving a sexual assault remained on the charging party, UTC . . . [t]his procedure is flawed and untenable if due process is to be afforded [to] the accused."

---

15. Access to Evidence

Introduction

Timely and unfettered access to evidence is an essential component of due process. The parties should not be "ambushed" by evidence that is disclosed at the last minute.

Regulatory Language

Section 160.45(b)(5)(iii): "Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence."

Section 160.45(b)(5)(vi): “Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.”

Section 160.45(b)(5)(vii): “Create an investigative report that fairly summarizes relevant evidence and... 10 days prior to a hearing sent to each party... the investigative report in an electronic format or a hard copy, for their review and written response.”

Appellate Court Decisions

1. *Doe v. Regents of the University of California* (UCLA), No. 20-55831 at *7 (9th Cir. Jan. 11, 2022) (reversing and vacating the order and judgment of the District Court of the Central District of California dismissing a Title IX action brought by Doe because Doe plausibly stated a Title IX claim against the Regents): “Doe was provided with limited, online access to a summary of information collected during [Title IX Investigator] Ms. Shakoori’s investigation and a brief opportunity to comment or provide new information.”

2. *Doe v. University of Denver,* No. 19-1359, at *23 (10th Cir. June 15, 2021) (reversing the district court’s order granting the University summary judgment because Doe satisfies the requirements of the *McDonnell Douglas* test through a Title IX claim to overcome summary judgment): “The Final Report acknowledges Jane had chosen what pages of the [Sexual Assault Nurse Examiner] report to provide and had omitted potentially important exculpatory information[.]”

3. *Doe v. Purdue University*, 928 F.3d 652, 663 (7th Cir. June 28, 2019) (holding that Doe had a constitutionally protected liberty interest in his pursuit of a Navy career): “But Purdue did not disclose its evidence to John. And withholding the evidence on which it relied in adjudicating his guilt was itself sufficient to render the process fundamentally unfair.”

4. *Doe v. Westmont College*, 2d Civil No. B287799 (Cal. Ct. App. Apr. 23, 2019) (affirming the trial court’s writ of mandate setting aside Westmont’s determination and sanctions against Doe because of fairness issues):

    a. “The policies permitted John [Doe] to access all evidence [investigator and adjudicator] Cleek discovered or developed during his investigation, yet Cleek omitted some of his questions and the witnesses' answers from his reports. This limited the scope of questions John could pose for the witnesses.” *Id.* at *20.

    b. “[The Panel] had access to Cleek’s interviews and the more detailed notes of witnesses’ testimony, neither of which was made available to John. That information imbalance hindered John’s ability to respond to the evidence against him.” *Id.*

    c. “We [the Court] simply hold that where the outcome of a sexual misconduct disciplinary proceeding turns on witness credibility, an adjudicatory body cannot base its credibility determinations on information in its possession that is not made available to the accused.” *Id.* at *21.

5. *John Doe v. University of South Florida, St. Petersburg*, No. 17-000028AP-88B, at *4 (Fla. 6th Cir. App. Ct. Dec. 21, 2018) (granting Doe's writ of certiorari for possible procedural due process violations): "Petitioner's due process rights were violated by the nondisclosure of information that either directly or materially affected what was actually presented at the hearing."

6. *Doe v. Univ. of S. California*, 241 Cal. Rptr. 3d 146, 168 (Cal. Ct. App. Dec. 11, 2018) (finding that Doe was denied a fair hearing violating procedural due process): "Jane told Dr. Allee that Andrew threw away the sheets at her request, but Jane had collected the clothes she wore the night of the party as evidence. Yet Dr. Allee did not request Jane provide her clothes as part of the investigation. Rather, she only informed Jane that John had requested Jane's clothes (and the condom Jane found in the apartment) because John wanted 'to do [independent] testing on his own in order to better respond to the allegations.' Further, by emphasizing 'the request [was] coming from John Doe rather than from [Dr. Allee] or USC,' this made it easier for Jane to ignore the request, hampering John's ability to defend himself… In addition, John requested the medical report and other evidence from the rape treatment center, but Dr. Allee never asked Jane if she would consent to release of this information."

7. *Doe v. Regents of the University of California*, 2d Civ. No. B283229 (Cal. Ct. App. 2d Oct. 9, 2018) (reversing the trial court's judgment denying Doe a writ of administrative mandate for fairness and procedural due process violations and remanding the case to the superior court with the direction to grant Doe's writ of administrative mandate):

    a. "Without access to the complete [Sexual Assault Response Team's (SART)] report [on the complaintant], John did not have a fair opportunity to cross-examine the detective and challenge the medical finding in the report. The accused must be permitted to see the evidence against him." *Id.* at *19.

    b. "Without the complete SART report, the trier of fact was left to rely on the detective's recollection and veracity. To argue that it is fair to allow the detective to testify about the contents of the SART report, but preclude the accused and the trier of fact from seeing the report, strains credulity." *Id.* at *20.

    c. "The SART report was critical evidence, but the [Sexual/Interpersonal Violence Conduct] Committee did not have the report. At a minimum, [the University of California at Santa Barbara] should have required the detective to provide a complete copy of the SART report. The Committee should not have considered the SART evidence without giving John timely and complete access to the report." *Id.* at *21-22.

8. *John Doe v. Trustees of Boston College* 892 F.3d 67 (1st Cir. June 8, 2018) (reversing the district court's order granting the college summary judgment because of procedural due process/fairness issues and breach of contract regarding the disciplinary proceedings):

    a. "Doe was provided with the notice of the sexual assault charge and given the procedures for the investigation and hearing, but could only review—though not have a copy of—A.B.'s statement during these meetings." *Id.* at 77

b. "[T]he Board also rejected Doe's request to stay proceedings in anticipation of the results of the forensic tests, which had not yet been completed by the State Police." *Id.* at 78

9. *Doe v. Miami University*, 883 F.3d 579, 603 (6th Cir. Feb. 9, 2018) (holding that Doe plead a plausible erroneous outcome claim under Title IX): "John alleges that Miami University refused to provide this report, or the evidence against him contained within the report, even though the University's policies state that he was allowed access to this evidence… Thus, to the extent any of the evidence contained within this report was used by the Administrative Hearing Panel to adjudicate John's claim, and John was not provided this evidence, he has alleged a cognizable due process violation."

Trial Court Decisions

1. *Doe v. Texas A&M University – Kingsville, et al.*, no. 2:21-cv-00257, at *2 (S.D. Tex. Nov. 5, 2021) (granting Doe's motion for a temporary restraining order and preliminary injunction to preserve the status quo because Doe was denied due process): "[Doe] states that he was denied access to original interview materials."

2. *Moe v. Grinnell College*, No. 4:20-cv-00058-RGE-SBJ, at *24 (S.D. Iowa Aug. 23, 2021) (denying the college's motion for summary judgment because Moe plausibly stated a Title IX claim and breach of contract claim): "[A] part of the transcript of Moe's interview with the investigator was not provided in time for [adjudicator] Ternus to review prior to the adjudication meetings[.]"

3. *Doe v. Hobart and William Smith Colleges,* 6:20-cv-06338 EAW. at *33 (W.D.N.Y. June 23, 2021) (denying Defendant's motion to dismiss because Doe plausibly stated a Title IX erroneous outcome claim): "[Hobart and William Smith Colleges]'s contention that Plaintiff 'does not claim that he ever brought the text messages to the Investigator's attention, or to the attention of the Adjudicator or Appeal Panel, for that matter' (Dkt. 29 at 6) is a red herring; Plaintiff was not required to set forth in his pleadings his own actions with respect to the text messages at issue and, at this stage of the proceedings, the Court must draw all inferences in his favor."

4. *John Doe v. University of Massachusetts*, 1:20-cv-11571 (D. Mass. April 28, 2021), at *3 (denying MTD because Doe plausibly stated a due process claim): "One day before the hearing, plaintiff was allowed one hour to review the University's investigatory file, but he was not allowed to make copies of any of these materials."

5. *Doe v. Princeton Univ.*, D.N.J. No. 319CV07853BRMTJB, 2020 WL 7383192, at *7 (D.N.J. Dec. 16, 2020) (denying University's motion to dismiss for failure to state a claim for deprivation of fairness): "Doe alleges the disciplinary process failed to comply with the University's established policies, and was one-sided and biased. (*Id.* at 20.) Doe alleges certain evidence was withheld from him including 'all of the witness identities and, on information and belief, some of the witness statements and Alex Roe's own initial statement, and that no real effort was undertaken to assess Roe's credibility.'"

6. *Doe v. N.Y. Univ.*, No. 1:20-cv-01343-GHW, 2021 U.S. Dist. LEXIS 62985, at *10 (S.D.N.Y. Mar. 31, 2021) (denying University's motion to dismiss for failure to state a Title IX claim because Doe plausibly stated a Title IX claim): "NYU's investigator, Hodge, met with Plaintiff to discuss Jane's

allegations. Hodge 'relayed Jane's allegations in a very simplistic manner' and 'focused on two pieces of evidence Jane submitted to the Title IX office.' Hodge did not advise Plaintiff that Jane had submitted over 100 pages of evidence against him and did not show him the evidence."

7. *Doe v. Harvard Univ*., 462 F. Supp. 3d 51, 65–66 (D. Mass. May 28, 2020) (denying university's motion to dismiss breach of contract claim because Doe plausibly stated a breach of contract claim): "The [University Title IX] Policy states that, '[a]fter the collection of additional information is complete but prior to the conclusion of the investigation, the Investigator will request individual follow-up interviews with the Complainant and the Respondent to give each the opportunity to respond to the additional information.' Plaintiff alleges that he was not asked for a follow-up interview prior to the conclusion of the investigation and was not given an opportunity to meaningfully respond to information obtained during the investigation … He was interviewed telephonically on August 16, 2017. Plaintiff received a copy of a draft of [Title IX Office's] investigatory report on September 25, 2017. In between the first interview and the issuance of the draft [Title IX Office] report over a month later, Plaintiff was not contacted for a second interview. Plaintiff contends further that he was not provided an opportunity to respond to a statement made by Jane Roe on October 17, 2017, before the Final Report was issued."

8. *Doe v. University of Connecticut*, No. 3:20CV92 (MPS), 2020 WL 406356, at *4 (D. Conn. Jan. 23, 2020) (granting Doe's TRO against the university on due process grounds): "Under UCONN's policy, the Plaintiff was provided with a copy of Jane Roe's statement and notes from interviews with Roe and two other female witnesses only after the investigation was complete and the investigator had prepared recommended findings."

9. *Doe v. Quinnipiac Univ.*, 404 F. Supp. 3d 643 (D. Conn. July 10, 2019) (denying MSJ on Title IX grounds):

    a. "[Deputy Title IX Coordinator's] deposition testimony states that as a matter of general practice, '[a]t the conclusion of the hearing, once the chairperson completes the letter, all of their materials, if they had them, paper materials would be given to me and we would -- I would shred them.' [Deputy Title IX Coordinator] also testified that he did this because he 'didn't want extra copies of the case materials hanging around.'" *Id.* at 656-57.

    b. "The destroyed evidence relates directly to Plaintiff's claims that he was subjected to an unfair investigatory process in both his capacities as a respondent and complainant. With respect to the hearing notes shredded by [Deputy Title IX Coordinator], there is no evidence in the record or argument by Defendants that the substance of those notes was preserved through incorporation into any other document or record. When the hearing took place, Plaintiff had already filed this action, and Plaintiff and QU had already litigated Plaintiff's motion to preliminarily enjoin QU from proceeding with the hearing. Defendants simply offer no justification for the destruction of evidence." *Id.*

10. *Norris v. Univ. of Colorado, Boulder*, 362 F. Supp. 3d 1001, 1011 (D. Colo. Feb. 21, 2019) (Denying MTD on Title IX grounds): "Plaintiff notes he does not simply disagree with the Investigators' findings, but instead his Complaint sets forth a litany of grievances which he argues denied him of a fair and impartial process. In part, Plaintiff disputes the University's actions of: 'unreasonably denying Plaintiff access to the investigation file … [] failing to provide Plaintiff

with any information about the Standing Review Committee, which reviewed the Investigators' finding.'"

11. *Doe v. The Trustees of the State of California*, No. BS167329, at *7 (Cal. Sup. Ct. Feb. 5, 2019) (granting Doe's writ of mandate for lack of fairness during the adjudicative process): "In her June 2016 report, [Title IX Investigator] Boele found Petitioner guilty of misconduct with regard to Roe 1 based on a different allegation, i.e. that Roe 1 was under the age of 17. (AR 41.) Petitioner was not given a copy of [the June 2016] report before findings [of the current proceedings] were made [finding Doe responsible under alternative reasoning]."

12. *Matter of Hall v. Hofstra University*, 101 N.Y.S.3d 699, at *12 (N.Y. Sup. Ct. Apr. 3, 2018) (annulling the sanctions against Hall because the University violated its own policy regarding sexual assault): "The University's unreasonable delay in affording the Petitioner a prompt review of the charges effectively fixed a significant punishment indefinite in its duration. When the Petitioner attempted to utilize the review process afforded to him pursuant to the Policy as a student affected by a term in the no-contact order, he was met with having to defend himself against a stale charge. Indeed, no new incidents occurred and the Petitioner in no way violated the no-contact order that was in place."

13. *Doe v. University of Oregon*, No. 6:17-CV-01103-AA, 2018 WL 1474531, at *15 (D. Or. Mar. 26, 2018) (denying defendant's MTD because Doe plausibly stated a due process claim and a 14th Amendment equal protection claim): "Plaintiff alleges significant and pervasive flaws in the procedures used to investigate and adjudicate Roe's allegations, including that the University . . . declined to give him full access to the record before and during the hearing[.]

14. *Schaumleffel v. Muskingum University*, no. 2:17-cv-000463-SDM-KAJ, at *38 (S.D. Ohio Mar. 6, 2018) (denying the University's motion to dismiss because plaintiff plausibly stated a Title IX erroneous outcome claim, promissory estoppel claim, negligence claim, and breach of contract): "[There is a] duty allegedly owed by Muskingum [University] arising under [Family Educational Rights and Privacy Act, or] FERPA[,] for disclosing information about the charges against Plaintiff and his expulsion[.]"

15. *Doe v. Alger*, 228 F. Supp. 3d 713, 732 (W.D. Va. Dec. 23, 2016) (granting Doe summary judgment because the university violated his procedural due process rights): "Although [Doe] had knowledge of the voicemail and statement from the friend prior to filing his response, he did not have timely access to Roe's new appeal statement about its significance."

16. *Nokes v. Miami University*, No. 1:17-CV-482, 2017 WL 3674910, at *11 (S.D. Ohio Aug. 25, 2017) (granting Nokes' motion for a preliminary injunction against defendants on procedural due process grounds): "The Court is not holding as a matter of law that seven days constitutes inadequate time to prepare; rather, the Court is expressing that it not sufficiently satisfied—based on the current record—that Plaintiff had a meaningful opportunity to prepare; thus, a finding that he is unlikely to succeed would be inappropriate at this juncture."

17. *Doe v. University of Notre Dame*, No. 3:17CV298-PPS/MGG, 2017 WL 7661416, at *10 (N.D. Ind. May 8, 2017) (granting Doe's motion for TRO and preliminary injunction for violations of breach of contract and Title IX): "John had two-and-a-half days to review the materials, and could only

do so in the OCS office, without making copies. Such a process is not designed to facilitate a fair hearing for which John is fully prepared to respond against Jane's allegations and evidence."

18. *Marshall v. Indiana University*, 170 F. Supp. 3d 1201 (S.D. Ind. Mar. 15, 2016) (denying MTD under Title IX grounds):

    a. "On October 13, 2014, Dean Tomlinson provided Marshall with a witness list but prohibited Marshall from contacting any of the witnesses and instructed him that he should not contact other IUPUI students to testify on his behalf." *Id.* at 1204.

    b. "[A]lthough Marshall's pleading may lack the contours of more particularized facts, the Defendants do not deny that they are in sole possession of all information relating to the allegations made by and against Marshall, notably refusing, at all times, to share such information with Marshall or his attorneys." *Id.* at 1210.

19. *Doe v. Salisbury University*, no. 1:15-cv-00517-JKB, at *20 (D. Md. Aug. 21, 2015) (denying the university's motion to dismiss because Doe plausibly claimed an erroneous outcome Title IX violation and a negligence violation): "[Salisbury University or] SU barred Plaintiffs from reviewing witness statements and the list of witnesses prior to the hearing, and failed to provide Plaintiffs with all evidence that was to be presented to the [Community] Board[.]"

Summary

Nine appellate courts and 19 trial courts have found that when a university refuses to provide evidence to either party in the campus disciplinary setting, or fails to provide the parties with a fairly drafted investigative report, this violates the constitutional or Title IX statutory rights of the parties.

Recommendation

The revised regulation should affirm and preserve Sections 160.45(b)(5)(iii) and (vi)-(vii).

Memorable Quote

Doe v. Purdue University, 928 F.3d 652, 663 (7th Cir. 2019) (EEP) (holding that Doe had a constitutionally protected liberty interest in his pursuit of a Navy career): "But Purdue did not disclose its evidence to John. And withholding the evidence on which it relied in adjudicating his guilt was itself sufficient to render the process fundamentally unfair."

---

16. Participation of Advisors

Introduction

Given parties' lack of familiarity with campus proceedings, both parties need to have an advisor.

Regulatory Language

Section 106.45(b)(5)(iv): “Provide the parties with the same opportunities to have… the advisor of their choice [be present during the proceedings]... however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.”

State Supreme Court Decisions

1. *Bursch v. Purchase Coll. of State Univ. of New York*, 125 N.E.3d 830 (N.Y. June 6, 2019) (vacating Title IX disciplinary finding of responsibility and ordering a new Title IX proceeding because the college failed to allow Doe be represented by his attorney): “Petitioner, a student enrolled at respondent Purchase College of the State University of New York, was accused of multiple disciplinary violations including sexual assault of another student. Petitioner requested a three-hour adjournment of his scheduled administrative hearing so that his attorney could attend the proceeding. Respondents denied this request. Under the particular circumstances of this case, we find respondents abused their discretion as a matter of law by failing to grant the requested adjournment.”

Appellate Court Decisions

1. *Doe v. Regents of the University of California*, 2d Civ. No. B283229 (Cal. Ct. App. Oct. 9, 2018) (reversing the trial court’s judgment denying Doe a writ of administrative mandate for fairness and procedural due process violations and remanding the case to the superior court with the direction to grant Doe’s writ of administrative mandate):

    a. “‘The accused has the right to due process as outlined in the Campus Regulations. Among these rights are . . . (ii) [t]o be accompanied at the hearing by an advisor of his/her choice[.]’” *Id*. at *18.

    b. “The [Sexual/Interpersonal Violence Conduct] Committee, however, permitted [the University of California at Santa Barbara (UCSB)’s] general counsel to actively participate and to make formal evidentiary objections. This unfairness is magnified when UCSB’s general counsel is allowed to make formal evidentiary objections, which UCSB’s policies and procedures do not permit. A student, whose counsel cannot actively participate, is set up for failure because he or she lacks the legal training and experience to respond effectively to formal evidentiary objections.” *Id.* at *23.

2. *Arishi v. Washington State Univ.*, 196 Wash. App. 878, 908–09, 385 P.3d 251, 265 (Wash. Ct. App. Dec. 1, 2016) (finding that Washington State’s adjudicative hearing was prejudiced against Doe, violating TItle IX): “The denial of representation by counsel also undermines confidence in the result. Had Mr. Arishi been represented, his lawyer could have alerted the conduct board to the problem with relying on testimony about Sergeant Chapman's and Detective Dow's opinions. Entirely apart from the fact that the opinions were presented through hearsay (hearsay can be admitted in full adjudications), ‘Obvious opinions on credibility ... are barred by Rule 608, and the point is beyond debate. Obvious opinions on credibility have seldom been considered by Washington's appellate courts because there is nothing that can be argued on appeal to make them admissible.’ 5A KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE

§ 608.16, at 458 (6th ed. 2016). A police officer's "purported 'expert' opinion[ ] that a witness is truthful is no exception."

Trial Court Decisions

1. *Fraternity of Alpha Chi Rho, Inc. v. Syracuse University*, 141 N.Y.S.3d 296 (N.Y. Sup. Ct. Mar. 10, 2021) (denying a private university's motion to dismiss in an state civil rights Article 78 proceeding because the university's appeal board's decision lacked any rational basis): "[T]he University's refusal to allow an attorney to represent the fraternity at the hearing when it knew that allegations of sexual harassment had been made (NYSCEF Doc. 15), violated Section 6.3 of the Code of Student Conduct, which permits attorney advisors in any case that 'involves allegations of sex-based discrimination or harassment' (NYSCEF Doc. 9)."

2. *Doe v. American Univ.*, No. 19-CV-03097 (APM), 2020 WL 5593909, at *4 (D.D.C. Sep. 18, 2020) (denying MTD on Title IX grounds): "Doe was in Kuwait at the time, so he chose to submit a written statement. He also intended to have his advisor attend the panel. But on the day the sanctioning panel convened, Doe received an email stating: 'Since you are not attending, this unfortunately also means your advisor cannot attend,' and Doe's advisor was later barred from entering the panel meeting."

3. *Doe v. Oberlin Coll.*, 963 F.3d 580, 584, 585, 587 (6th Cir. June 29, 2020) (reversing district court's motion to dismiss for failure to state a claim, here discussing procedural irregularities that support inference of sex bias): "A few days [before Doe's Title IX hearing], Doe asked the Title IX Team to assign him an 'advisor' for the hearing. Such an advisor, the College conceded at oral argument, is supposed to serve the best interests of the accused at the hearing. The Title IX Team appointed Assistant Dean Adrian Bautista as Doe's advisor … [A]dvisor Bautista [ ] 'left the hearing early.' Two weeks later, he retweeted: 'To survivors everywhere, we believe you' … Remarkable as well was advisor Bautista's performance, given that he did not even attend the entire hearing, even though his role was to assist Doe there."

4. *Harnois v. Univ. of Massachusetts at Dartmouth*, No. CV 19-10705-RGS, 2019 WL 5551743 at *3 (D. Mass. Oct. 28, 2019) (denying UMass' 12(b)(6) motion on nine counts, including Title IX, due process and fairness): "Harnois sought to have Professor Buck serve as his advisor during the Title IX investigation; Majewski [investigator] rejected Harnois's request and suggested he retain outside counsel."

5. *Jia v. University of Miami et al*, no. 1:17-cv-20018-DPG, at *9-10 (S.D. Fla. Feb. 12, 2019) (denying the university's motion to dismiss because plaintiff sufficiently established a plausible Title IX claim and a defamation claim): "[Irregularities in the investigation process] include . . . (4) failing to give Plaintiff notice of his rights or permit him to have legal counsel present . . . [which] could plausibly affect its disciplinary proceedings against Plaintiff."

6. *Matter of Hall v. Hofstra University*, 101 N.Y.S.3d 699, at *13 (N.Y. Sup. Ct. Apr. 3, 2018) (annulling the sanctions against Hall because the University violated its own policy regarding sexual assault): "While the University contends that only the Petitioner was permitted to take notes, the purported rule [of forbiding Petitioner's counsel of taking notes] is not reflected anywhere in the Policy or the Advisor Form. The University's conduct in this regard further thwarted the Petitioner's ability to adequately prepare a defense."

7. *Rolph v. Hobart & William Smith Colleges,* 271 F. Supp. 3d 386, 401 (W.D.N.Y. Sep. 20, 2017) (denying defendant's MTD because plaintiff plausibly stated a Title IX erroneous outcome claim): "Here, Plaintiff has adequately alleged facts that plausibly support at least a minimal inference of gender bias on the part of HWS. The allegations which support that inference include the following . . . alleg[ing] that his disciplinary proceedings put him at a disadvantage as compared to Jane Roe. For example, Plaintiff points to the fact that, during the proceeding, he was not allowed to be represented by counsel and to cross-examine Jane Roe[.]"

8. *Tsuruta v. Augustana University*, No. CIV. 4:16-4107-KES, 2017 WL 11318533, at *2 (D.S.D. June 16, 2017) (denying defendant's MTD because plaintiff plausibly stated a breach of contract claim and negligence claim): "The Handbook also gives students six rights . . . (3) to have an advocate during this process[.]"

9. *Doe v. University of Notre Dame*, No. 3:17CV298-PPS/MGG, 2017 WL 7661416, at *11 (N.D. Ind. May 8, 2017) (granting Doe's motion for TRO and preliminary injunction for violations of breach of contract and Title IX): "[T]he accused student is essentially on his own. The actual presentation of the student's side of the case is left to the student himself, but with severe limitations. [The student can have an attorney present, but cannot speak on his behalf.]"

10. *Doe v. Rivera*, No. 37-2015-00029558-CU-WM-CTL (Cal. Sup. Ct. Feb. 1, 2017) (granting petitioner's writ of mandate order to continue the case on procedural fairness issues):

    a. "Petitioner was required to speak on his own behalf and did so, with one exception, throughout the hearing." *Id.* at *4.

    b. "Respondents' failure to provide Petitioner with an 'adult advisor,' with the same or substantially similar skills, training and experience as [investigator and counsel] Dr. Mintz, who was entitled to speak on Petitioner's behalf, fundamentally deprived Petitioner of a fair hearing." *Id.* at *5.

11. *Doe v. Salisbury University*, no. 1:15-cv-00517-JKB, at *20-21 (D. Md. Aug. 21, 2015) (denying the university's motion to dismiss because Doe plausibly claimed an erroneous outcome Title IX violation and a negligence violation): "[Salisbury University or] SU told Plaintiffs that they were not entitled to have an attorney present at the [adjudicative body or Community Board] hearing, even though the SU Code of Conduct states that students who are likely to face federal criminal charges may request that their attorney be present[.]"

12. *King v. DePauw Univ.*, S.D. Ind. No. 2:14-CV-70-WTL-DKL, 2014 WL 4197507, at *13 (S.D. Ind. Aug. 22, 2014) (granting PI enjoining enforcement of King's suspension from university because of the impartiality of the investigation): "Finally, the fact that J.B.'s advisor is married to the Title IX coordinator, who obtained and summarized a statement from King that was a prime reason for the Board's discrediting of his testimony, is troublesome, as is the fact that King's own advisor was ill-equipped to be of any real assistance to him."

Summary

As these two appellate cases, 12 trial cases, and one state's highest court make clear, schools frequently fail to allow an advisor to play a meaningful role in the proceedings. Advisors are essential because students are almost always unequipped to effectively advocate for themselves in an adversarial setting.

Recommendation

The revised regulation should preserve Section 106.45(b)(5)(iv)'s requirement for an advisor of the student's choice. The revised regulation should remove the clause, "the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings." Consistent with the judicial decisions cited above, the forthcoming regulation should state that such an advisor can actively participate in the proceedings as much as reasonably practicable. *See Doe v. Regents of the Univ. of California* ("A student, whose counsel cannot actively participate, is set up for failure").

Memorable Quote

Doe v. Regents of the University of California, 2d Civ. No. B283229, at *23 (Cal. Ct. App. 2d 2018) (reversing the trial court's judgment denying Doe a writ of administrative mandate for fairness and procedural due process violations and remanding the case to the superior court with the direction to grant Doe's writ of administrative mandate): "The [Sexual/Interpersonal Violence Conduct] Committee, however, permitted [the University of California at Santa Barbara (UCSB)'s] general counsel to actively participate and to make formal evidentiary objections. This unfairness is magnified when UCSB's general counsel is allowed to make formal evidentiary objections, which UCSB's policies and procedures do not permit. A student, whose counsel cannot actively participate, is set up for failure because he or she lacks the legal training and experience to respond effectively to formal evidentiary objections."

---

17. Live Hearings

Introduction

In *Goss v. Lopez,*[9] the U.S. Supreme Court ruled that public school students are entitled to an opportunity to present their side of the story. Given the complexities of fairly adjudicating a sexual misconduct grievance, a "live" hearing is a necessary element of equitable procedures.

Regulatory Language

Section 106.45(b)(6)(i): "For postsecondary institutions, the recipient's grievance process must provide for a live hearing."

Appellate Court Decisions

1. *Doe v. University of Sciences*, 961 F.3d 203, 214 (3d Cir. May 29, 2020) (reversing the district court's order dismissing Doe's complaint because of fairness issues and Doe plausibly stating a Title IX violation and breach of contract): "In other private-university cases, Pennsylvania courts

[9] Norval Goss et al., Appellants, v. Eileen LOPEZ et al.| Supreme Court | US Law | LII / Legal Information Institute (cornell.edu).

have similarly determined that fairness includes . . . the ability to participate in a live, adversarial hearing during which the accused may present evidence and a defense."

2. *Doe v. Allee*, 242 Cal. Rptr. 3d 109 (Cal. App. 5th Jan. 4, 2019) (reversing the trial court's judgment against Doe with directions to grant Doe' petition for writ of administrative mandate and set aside the findings that Doe violated the University's sexual assault policy because Doe was denied fundamental fairness throughout his sexual assault allegation):

    a. "[I]n [the University of Southern California (USC)] system, no in–person hearing is ever held, nor is one required . . . fundamental fairness requires, at a minimum, that the university provide . . . a hearing in which the witnesses appear in person or by other means[.]" *Id.* at 135, 137.

    b. "[Doe] was entitled to . . . a hearing at which the witnesses appeared in person or by other means[.]" *Id.* at 138.

3. *Doe v. Univ. of S. California*, 200 Cal. Rptr. 3d 851, 873 (Cal. Ct. App. Apr. 5, 2016) (reversing trial court's affirmation of University's decision that Doe violated USC sexual misconduct policy for lack of a fair hearing which violates Doe's procedural due process rights): "Here, [University Student Conduct Office] relied on information never revealed to John, and the Appeals Panel suspended John on a different theory than [University Student Conduct Office]. John was not provided any information about the factual basis of the charges against him, he was not allowed to access any evidence used to support those accusations unless he actively sought it through a written request, and he was not provided with any opportunity to appear directly before the decisionmaking panel to rebut the evidence presented against him. While a full trial-like proceeding with the right of cross-examination is not necessary for administrative proceedings, we cannot agree with USC that the process afforded to John met the standards of a fair hearing…"

Trial Court Decisions

1. *Doe v. Columbia University*, Case 1:20-cv-06770-GHW, at *44 (S.D.N.Y. Aug 1, 2021) (denying the University's MTD Doe's Title IX erroneous outcome claim in imposing interim suspension, Title IX selective enforcement claim in the Jane Doe 1 proceeding, Title IX erroneous outcome claim in the Jane Doe 4 proceeding, and Title IX erroneous outcome claim in the Jane Doe 3 proceeding because Doe plausibly stated all claims listed above): "But [John Doe] was never given a hearing of any sort, and has pleaded that the opportunity Columbia offered him to appeal the decision in writing did not constitute a meaningful opportunity to be heard."

2. *Doe v. New York University*, 1:20-CV-01343-GHW, 2021 WL 1226384 (S.D.N.Y. Mar. 31, 2021) (denying MTD on Title IX grounds):

    a. Accused student's technical difficulties while participating in hearing over Zoom (while all other participants met in-person), which student claims affected his ability to understand and answer accurately the questions posed to him, "adequately pleads a procedural flaw." *Id.* at *18.

b. “First, Plaintiff alleges fundamental procedural flaws with the hearing itself. Here, the procedural flaws flow from that fact that Plaintiff was studying abroad in Australia at the time of his disciplinary hearing and thus attended remotely, while everyone else participating in the hearing attended in-person. Plaintiff requested that NYU wait to hold the hearing until he came back to New York and could participate in-person. That NYU decided to conduct the hearing remotely in and of itself does not appear to be a procedural flaw, as the Procedures explain that ‘a Complainant or Respondent is not required to participate in person at the hearing in order for the hearing to proceed.’ But the Policy also provides that ‘all students have the right to ... [p]articipate in a process that is fair, impartial, and provides adequate notice and a meaningful opportunity to be heard.’ As alleged, Plaintiff's ability to participate meaningfully in the hearing was impaired by technical issues.” *Id*. at *17.

3. *Doe v. American Univ.*, No. 19-CV-03097 (APM), 2020 WL 5593909, at *4 (D.D.C. Sep. 18, 2020) (denying MTD on Title IX grounds): “[The investigator] submitted her Investigation Report to AU's office of Student Conduct and Conflict Resolution Services, which convened a sanctioning panel. On June 3, 2019, Doe was informed that he could participate in the sanctioning panel by giving a statement by Skype or phone, or by submitting a written statement. Doe also was told that an ‘advisor [would] be permitted to attend the sanctioning panel.’ Doe was in Kuwait at the time, so he chose to submit a written statement. During the sanctioning panel, the Director of Student Conduct and Conflict Resolution explained that members of the sanctioning panel could be disqualified on the ground of personal bias. She stated, however, that ‘if the Respondent is not here, he does not have the opportunity to recuse anyone.’ To this day, Doe does not know the identities of two of the three sanctioning panel members.”

4. *Doe v. Michigan State University, et al.*, No. 1:18-CV-1430 (W.D. Mich. Sep. 1, 2020) (denying the university’s MTD because Doe plausibly claimed a due process violation):

   a. “Hence, consistent with how Plaintiff has framed the proposed class in this case (‘All MSU students and/or former students ... subjected to a disciplinary sanction ... without first being afforded a live hearing and opportunity for cross[-]examination of witnesses’), Plaintiff’s procedural due process claim is specifically based on his claimed right to ‘a live hearing and cross-examination.’” *Id*. at *12-13.

   b. “In short, at this pleading stage, taking the facts as true and reading all inferences in Plaintiff’s favor, Plaintiff has plausibly demonstrated a violation of a clearly established right.” *Id*. at *15.

5. *Doe v. University of Michigan*, 448 F. Supp. 3d 715 (E.D. Mich. Mar. 23, 2020) (granting Doe’s motion for partial summary judgment and denying the university’s MTD on due process grounds):

   a. “First, the condition under which a hearing is required under the policy is vague. It merely states that a hearing will be provided ‘where warranted,’ without further explanation. (Dkt. 47-3, pg. 32). The Sixth Circuit is clear that a hearing is warranted when a fact finder ‘has to choose between competing narratives to resolve a case’ *Baum*, 903 F.3d at 578. The University's Interim Policy should be similarly clear in order

to dispel confusion and hold their administration accountable to provide a fair process in every case. An accused student's rights must be guaranteed—not left open for interpretation." *Id.* at 733.

b. "Imposing a suspension, prior to a hearing and adjudication is unconstitutional." *Id.*

6. *Doe v. White*, No. BS171704 (Cal. Sup. Ct. Feb. 7, 2019) (Order setting aside Doe's expulsion for failing to assess Jane's credibility): "John was facing potentially severe consequences and the Committee's decision against him turned on believing Jane, the Committee's procedures should have included an opportunity for the Committee to assess Jane's credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee's asking her appropriate questions proposed by John or the Committee itself. That opportunity did not exist here."

7. *Doe v. The Trustees of the State of California*, No. BS167329, at *9 (Cal. Sup. Ct. Feb. 5, 2019) (granting Doe's writ of mandate for lack of fairness during the adjudicative process): "[T]he [adjudicative] Committee's procedures should have included an opportunity for the Committee to assess Jane's credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee's asking her appropriate questions proposed by John [Doe] or the Committee itself."

8. *Doe v. Northern Michigan University*, 393 F. Supp. 3d 683, 694 (W.D. Mich. May 28, 2019) (denying MTD for failure to state due process claim because Doe plausibly stated due process violations): "Plaintiff has made out a plausible claim that he was entitled to a live hearing with an opportunity to cross-examine his accuser. Although he was able to present his version of the facts to [Dean of Students and Title IX Coordinator], he was not able to testify directly to the [hearing board], which was the body that was ultimately responsible for his discharge."

9. *Norris v. University of Colorado, Boulder*, 362 F. Supp. 3d 1001, 1011 (D. Colo. Feb. 21, 2019) (Denying MTD on Title IX grounds): "Plaintiff notes he does not simply disagree with the Investigators' findings, but instead his Complaint sets forth a litany of grievances which he argues denied him of a fair and impartial process. In part, Plaintiff disputes the University's actions of: … denying Plaintiff a hearing"

10. *Doe v. U. of Mississippi*, 361 F. Supp. 3d 597, 611 (S.D. Miss. Jan. 16, 2019) (holding that Doe had raised plausible claims of sex bias and due process violations): "Doe complains that 'prior to the hearing, [he] was not informed that he had the right to know the identity of the panel members or the right to challenge a panel member.' He says when he arrived for his hearing, 'he learned that all the panel members had not yet been selected,' so '[t]he hearing was delayed in order for the University to find a third panel member,' who 'was presented with the case file for the first time' '[a]approximately fifteen minutes before the hearing began.' Doe asserts that 'one of the female panel members selected… to preside over his hearing had previously mocked the defenses raised by men accused of sexual assault.' And he contends that 'one of the panelists did not even identify himself at the hearing' making it impossible for Doe to 'reasonably assess the appropriateness of that panel member."

11. *Doe v. University of Southern Mississippi*, et al., 2:18-cv-00153-KS-MTP, at *10 (S.D. Miss. Sep. 26, 2018) (granting Doe a preliminary injunction on due process grounds): "Without a live proceeding with Plaintiff present, the risk of erroneous deprivation of Plaintiff's interest in his reputation, education, and employment is significant. Additional procedural safeguards such as hearing the testimony and either being able to ask questions or submit questions would both assist the truth-seeking process and help to ensure the protection of Plaintiff's constitutional rights."

12. *Doe v. Pennsylvania State University*, 336 F. Supp. 3d 441, 450 (M.D. Pa. Aug. 21, 2018) (denying defendant's motion to dismiss because of due process violations): "Mr. Doe's main objection to this paper-only Investigative Model is that it prohibited him from telling his story directly to the panel, and from challenging Ms. Roe's version of events before that panel . . . [i]n a case like this, however, where everyone agrees on virtually all salient facts except one—*i.e.*, whether or not Ms. Roe consented to sexual activity with Mr. Doe—there is really only one consideration for the decision maker: credibility. After all, there were only two witnesses to the incident, with no other documentary evidence of the sexual encounter itself. As a result, in this Court's view, the Investigative Model's virtual embargo on the panel's ability to assess that credibility raises constitutional concerns."

13. *Culiver v. U.S.*, No. 2:17-cv-03514-JS-SIL, Document 48, at *13 (E.D.N.Y. July 6, 2017) (requiring the Government to submit charges against plaintiffs within ten days because they have not been afforded due process): "Under your [Marine Acadamy's] own rules and regulations you're supposed to have a hearing. You don't have a hearing. You're supposed to do something. You haven't done a thing, but it's under investigation."

14. *Doe v. Alger*, 228 F. Supp. 3d 713, 730 (W.D. Va. Dec. 23, 2016) (granting Doe summary judgment on his procedural due process claim): "[T]he appeal board effectively reversed the decision of the hearing board . . . without hearing any live testimony[.]"

15. *John Doe II v. The Pennsylvania State University*, No. 4:15-CV-02108, at *1-2 (M.D. Pa. Nov. 6, 2015): (granting Plaintiff's TRO because he demonstrated it was reasonably likely that his due process rights were violated since he was not given a live hearing): "Plaintiff has adequately demonstrated that he is reasonably likely to succeed on the merits of his 42 U.S.C. § 1983 claim brought pursuant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution in light of the potential inadequacy of the procedure afforded him by Defendants during a disciplinary hearing that resulted in his two-semester suspension from The Pennsylvania State University[.]"

16. *King v. DePauw Univ.*, S.D. Ind. No. 2:14-CV-70-WTL-DKL, 2014 WL 4197507, at *13 (S.D. Ind. Aug. 22, 2014) (granting PI enjoining enforcement of King's suspension from university on breach of contract grounds): "First, the delay in the investigation was substantial, and a jury readily could determine that King was prejudiced by the fact that for most of the witnesses the night in question was likely just another Friday night on campus, so there was little reason to remember specific details. By the same token, the jury could find it troubling that after the substantial delay caused by the time J.B. took to decide whether to make a formal complaint, the Board was unwilling to give King an additional week to prepare for the hearing."

Summary

Three appellate courts and 16 trial courts affirmed the need for live hearings, mostly on constitutional due process and statutory grounds. Live hearings are vital because they allow for the decision-maker to evaluate the credibility of the parties in person and allow for the parties to question each other in person.

Recommendation

The revised regulation should retain the provision for live hearings under Section 106.45(b)(6)(i).

Memorable Quote

Doe v. University of Sciences, 961 F.3d 203, 214 (3d Cir. May 29, 2020) (reversing the district court's order dismissing Doe's complaint alleging a Title IX violation and breach of contract and fairness): "In other private-university cases, Pennsylvania courts have similarly determined that fairness includes . . . the ability to participate in a live, adversarial hearing during which the accused may present evidence and a defense."

---

18. Cross-Examination

Introduction

Numerous courts have cited and agreed with Wigmore's assertion that cross examination is "the greatest legal engine ever invented for the discovery of truth."

Regulatory Language

Section 106.45(b)(6)(i): "...cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally."

Appellate Court Decisions

1. *Doe v. University of Sciences*, 961 F.3d 203, 214 (3d Cir. May 29, 2020) (reversing the district court's order dismissing Doe's complaint because of fairness issues and Doe plausibly stating a Title IX claim and a breach of contract claim): "In other private-university cases, Pennsylvania courts have similarly determined that fairness includes the chance to cross-examine witnesses[.]"

2. *Boermeester v. Carry,* 263 Cal. Rptr. 3d 261, 279 (Cal. Ct. App. May, 28, 2020) (finding that credibility was central to a determination of sexual misconduct): "In a case such as this one, where a student faces a severe sanction in a disciplinary proceeding and the university's decision depends on witness credibility, the accused student must be afforded an in-person hearing in which he may cross-examine critical witnesses to ensure the adjudicator has the ability to

observe the witnesses' demeanor and properly decide credibility. In reaching this conclusion, we agree with the prevailing case authority that cross-examination of witnesses may be conducted directly by the accused student or his representative, or indirectly by the adjudicator or by someone else."

3. *Doe v. Westmont College*, 2d Civil No. B287799, at *21 (Cal. Ct. App. Apr. 23, 2019) (affirming the trial court's writ of mandate setting aside Westmont's determination and sanctions against Doe because of fairness issues): "[W]here a college's decision hinges on witness credibility, the accused must be permitted to pose questions to the alleged victim and other witnesses, even if indirectly . . . [t]he Panel denied John [Doe] that right."

4. *Matter of A.E. v. Hamilton Coll.*, 173 A.D.3d 1753 (N.Y. Ct, App. June 14, 2019) (Article 78 Proceeding - reversing the lower court's order and directing respondents to adhere to the College's published rules):

    a. "Although the Policy states that both the complainant and the 'individual whose conduct is alleged to have violated th[e] Policy' are entitled to 'be informed of campus judicial rules and procedures,' the right to submit questions in writing to the accusers or witnesses is not explicitly mentioned anywhere in the Policy and was not mentioned in any communication to petitioner outlining the campus judicial rules and procedures." *Id.* at 1755.

    b. "Inasmuch as the United States Supreme Court has recognized that the right to ask questions of an accuser or witness is a significant and critical right, we conclude that respondents' failure to inform petitioner that he had such a right establishes that they did not substantially adhere to the College's own published rules and guidelines requiring them to inform petitioner of all of the campus judicial rules and procedures." *Id*.

5. *Doe v. Allee*, 242 Cal. Rptr. 3d 109 (Cal. Ct. App. Jan. 4, 2019) (reversing the trial court's judgment against Doe with directions to grant Doe' petition for writ of administrative mandate and set aside the findings that Doe violated the University's sexual assault policy because Doe was denied fundamental fairness throughout his sexual assault allegation):

    a. "The Title IX investigator [Dr. Allee] interviews witnesses, gathers other evidence, and prepares a written report in which the investigator acts as prosecutor and tribunal, making factual findings, deciding credibility, and imposing discipline. The notion that a single individual, acting in these overlapping and conflicting capacities, is capable of effectively implementing an accused student's right of cross–examination by posing prepared questions to witnesses in the course of the investigation ignores the fundamental nature of cross–examination[.]" *Id.* at 135.

    b. "[A] right of "cross–examination" implemented by a single individual acting as investigator, prosecutor, fact finder and sentencer, is incompatible with adversarial questioning designed to uncover the truth. It is simply an extension of the investigation and prosecution itself." *Id.* at 136.

c. "[F]undamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross–examine those witnesses, directly or indirectly . . . before a neutral adjudicator with the power independently to find facts and make credibility assessments." *Id.* at 137.

d. "[Doe] was entitled to a procedure in which he could cross-examine witnesses, directly or indirectly[.]" *Id*. at 138.

6. *Doe v. Univ. of S. California*, 241 Cal. Rptr. 3d 146, 164 (Cal. Ct. App. Dec. 11, 2018) (finding that Doe was denied a fair hearing, which violates Doe's procedural due process rights): "The same considerations underlying the holdings in *Claremont McKenna, Baum*, and *Cincinnati* apply here. 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. This will typically be the case in disciplinary proceedings involving sexual misconduct where there is no corroborating physical evidence to assist the adjudicator in resolving conflicting accounts."

7. *Doe v. Regents of the University of California*, 2d Civ. No. B283229, at *24 (Cal. Ct. App. Oct. 9, 2018) (reversing the trial court's judgment denying Doe a writ of administrative mandate for fairness and procedural due process violations and remanding the case to the superior court with the direction to grant Doe's writ of administrative mandate): "[T]he [Sexual/Interpersonal Violence Conduct] Committee inexplicably allowed Jane to decline to respond to John's questions about the side effects of Viibryd on the ground that it was her 'private medical information.' This deprived John of his right to cross-examine Jane[.]"

8. *Doe v. Baum*, 903 F.3d 575, 583 (6th Cir. Sep. 7, 2018) (reversing district court's dismissal for failure to state because Doe plausibly stated a due process claim): "Universities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment. And in sexual misconduct cases, allowing the accused to cross-examine the accuser may do just that. But in circumstances like these, the answer is not to deny cross-examination altogether. Instead, the university could allow the accused student's agent to conduct cross-examination on his behalf. After all, an individual aligned with the accused student can accomplish the benefits of cross-examination—its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker."

9. *Doe v. Claremont McKenna Coll.*, 236 Cal. Rptr. 3d 655, 667 (Cal. Ct. App. Aug. 8, 2018) (finding that Doe's case hinged on credibility and therefore his hearing should have included the opportunity to cross examine Jane): "CMC argues in the alternative that, even if under *Regents* John was entitled to question Jane indirectly, this was satisfied by CMC's procedures 'allowing [John] to submit questions for the Investigator to ask witnesses based on the PIR.' Setting aside the issue that the investigator did not in fact ask any of John's proposed questions to Jane, CMC's argument ignores the Committee's own need to assess Jane's demeanor in responding to questions generated by the Committee or, indirectly, by John. This was the very benefit to oral testimony underlying the holding of *Cincinnati*."

10. *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. Sep. 25, 2017) (citations omitted) (affirming district court's order enjoining Doe's suspension from University because the University violated Doe's due process protections):

    a. "Ultimately, the [University] must decide whether Doe is responsible for violating UC[incinnati]'s Code of Conduct: whether Roe's allegations against him are true. And in reaching this decision [t]the value of cross-examination to the discovery of truth cannot be overemphasized. Allowing John Doe to confront and question Jane Roe through the [University sex misconduct hearing] panel would have undoubtedly aided the truth-seeking process and reduced the likelihood of an erroneous deprivation." *Id.* at 404.

    b. "[UC[incinnati] assumes cross-examination is of benefit only to Doe. In truth, the opportunity to question a witness and observe her demeanor while being questioned can be just as important to the trier of fact as it is to the accused. A decision relating to the misconduct of a student requires a factual determination as to whether the conduct took place or not. The accuracy of that determination can be safeguarded by the sorts of procedural protections traditionally imposed under the Due Process Clause. Few procedures safeguard accuracy better than adversarial questioning. In the case of competing narratives, cross-examination has always been considered a most effective way to ascertain truth." *Id.* at 401

Trial Court Decisions

1. *Doe v. Texas A&M University – Kingsville, et al.*, no. 2:21-cv-00257, at *3 (S.D. Tex. Nov. 5, 2021) (granting Doe's motion for a temporary restraining order and preliminary injunction to preserve the status quo because Doe was denied due process): "[Doe] was denied a full and fair opportunity to correct his own statement and to test the accuracy of other statements in a matter that is highly dependent on witness credibility."

2. *John Doe v. Michigan State University, et al.,* No. 1:18-CV-1430 (W.D. Mich. Sep. 1, 2020) (denying the university's MTD because Doe plausibly claimed a constitutional due process violation):

    a. "Hence, consistent with how Plaintiff has framed the proposed class in this case ('All MSU students and/or former students ... subjected to a disciplinary sanction ... without first being afforded a live hearing and opportunity for cross[-]examination of witnesses'), Plaintiff's procedural due process claim is specifically based on his claimed right to 'a live hearing and cross-examination.'" *Id.* at *12-13.

    b. "In short, at this pleading stage, taking the facts as true and reading all inferences in Plaintiff's favor, Plaintiff has plausibly demonstrated a violation of a clearly established right." *Id.* at *15.

3. *Messeri v. DiStefano*, 480 F. Supp. 3d 1157, 1165 (D. Colo. Aug. 20, 2020) (holding a reasonable factfinder could find that University's failure to provide Messeri with a neutral arbitrator violated his procedural due process): "As examined above in Part III.B.1, Plaintiff has a substantial interest in avoiding expulsion and continuing his education. The University's interests in limiting

procedural safeguards relating to student's hearing rights are less evident. Although the University correctly points out that it has an interest in avoiding 'convert[ing] its classrooms to courtrooms' to referee cross-examination amongst students and their representatives, this interest truly pales in comparison to the risk of error which may result in the wrongful expulsion of a student."

4. *Doe v. University of Michigan*, 448 F. Supp. 3d 715, 728 (E.D. Mich. Mar. 23, 2020) (granting Doe's motion for partial summary judgment and denying the university's MTD on constitutional due process grounds): "From its inception to the University's appeal in *Baum*, the 2018 Policy was in violation of Circuit precedent. Five months before publishing its 2018 Policy and likely during its drafting, the Sixth Circuit held that cross-examination was 'essential to due process' only where the finder of fact must choose 'between believing an accuser and an accused,' and implored universities to provide a means for decision makers 'to evaluate an alleged victim's credibility.' *Cincinnati*, 872 F.3d at 405-06. The Court of Appeals further emphasized that deciding the plaintiff's fate without a hearing and cross-examination was a 'disturbing...denial of due process.' *Cincinnati*, 872 F.3d at 402. Because the Individual Defendants violated this ruling and Plaintiff's clearly established constitutional rights, the Court finds that they are not entitled to qualified immunity."

5. *Averett v. Hardy*, No. 3:19-CV-116-DJH-RSE, 2020 WL 1033543, at *7 (W.D. Ky. Mar. 3, 2020) (denying MTD due process claim against university administrator because plaintiff plausibly stated a due process claim): "Averett … alleges that his inability to access exculpatory evidence until the day of the hearing impaired his ability to effectively cross-examine witnesses. When sexual misconduct is alleged and the credibility of antagonistic witnesses plays a central role, '[c]ross-examination is essential.... it does more than uncover inconsistencies—it 'takes aim at credibility like no other procedural device.' U of L has a strong interest in handling allegations of sexual misconduct in a fair manner."

6. *Doe v. University of Connecticut*, No. 3:20CV92 (MPS), 2020 WL 406356, at *5 (D. Conn. Jan. 23, 2020) (granting Doe's TRO against the university on constitutional due process grounds): "Here, however, the Plaintiff was denied even the right to respond to the accusations against him in a meaningful way, because he had no opportunity to question or confront two of Roe's witnesses on whose statements the hearing officers chose to rely. Given UCONN's reliance on this testimony and given the importance of credibility evidence to this factual dispute, denying the Plaintiff the opportunity to respond fully to Jane Roe and her witnesses heightened the risk of erroneous deprivation."

7. *L.M. v. S. Ill. Univ. at Edwardsville (SIUE)*, No. 18-cv-1668-NJR-GCS, 2019 U.S. Dist. LEXIS 192800, at *7-8 (S.D. Ill. Nov. 6, 2019) (denying MTD on due process grounds): "The Complaint … does not clearly delineate what allegations relate to a substantive due process claim. L.M. appears to be alleging that the Procedures and Policies violate substantive due process because they did not allow counsel to conduct direct examination of L.M. or cross-examination of C.M., and because counsel could only submit written questions in advance … Defendants have not cited to authority demonstrating why this particular allegation fails to state a substantive due process claim. Thus, L.M.'s substantive due process claim will not be dismissed at this stage of the proceedings."

8. *Doe v. California Institute of Technology*, 2019 Cal. Super. LEXIS 10956 (Cal. Sup. Ct. July 9, 2019) (holding that the administrative procedure provided to Doe was unfair and requiring the sanctions against Doe be set aside):

    a. "We hold that where, as here, John was facing potentially severe consequences and the Committee's decision against him turned on believing Jane, the Committee's procedures should have included an opportunity for the Committee to assess Jane's credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee's asking her appropriate questions proposed by John or the Committee itself. That opportunity did not exist here." *Id.* at *15.

    b. "The credibility of the complainants, multiple adverse witnesses, and Petitioner was at issue. At least one of the complainants, 'SURF,' chose not to participate in the investigation. Nonetheless, the investigators credited her complaint over Petitioner's response based on interviews with other witnesses." *Id*. at *17.

9. *Norris v. Univ. of Colorado, Boulder*, 362 F. Supp. 3d 1001, 1011 (D. Colo. Feb. 21, 2019) (Denying MTD on Title IX grounds): "Plaintiff notes he does not simply disagree with the Investigators' findings, but instead his Complaint sets forth a litany of grievances which he argues denied him of a fair and impartial process. In part, Plaintiff disputes the University's actions of: … denying Plaintiff the right to cross-examine his accuser … precluding Plaintiff from questioning witnesses"

10. *Doe v. University of Mississippi*, 361 F.Supp.3d 597, 611 (S.D. Miss. Jan. 16, 2019) (holding that Doe had raised plausible claims of sex bias and due process violations): "Because neither Roe nor any other witnesses against Doe appeared at the hearing, he was not permitted to cross-examine - either directly or through written questions submitted to the hearing panel - the witnesses whose accounts of the evening led to his discipline."

11. *Doe v. White*, No. BS171704 (Cal. Sup. Ct. Feb. 7, 2019) (Order setting aside Doe's expulsion because of the failure to assess Jane's credibility): "John was facing potentially severe consequences and the Committee's decision against him turned on believing Jane, the Committee's procedures should have included an opportunity for the Committee to assess Jane's credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee's asking her appropriate questions proposed by John or the Committee itself. That opportunity did not exist here."

12. *Doe v. The Trustees of the State of California*, No. BS167329, at *10 (Cal. Sup. Ct. Feb. 5, 2019) (granting Doe's writ of mandate for lack of fairness during the adjudicative process): "Petitioner never had an opportunity to 'cross–examine [Roe 2], directly or indirectly, at a hearing in which the witnesses appear in person or by other means (e.g., videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments.'"

13. *Doe v. Rollins College*, 352 F. Supp. 3d 1205, 1212 (M.D. Fla. Jan. 16, 2019) (denying the university's motion to dismiss because Doe plausibly alleged college acted out of gender bias, violating Title IX, and college violated various provisions in sexual misconduct policy, warranting breach of contract): "Rollins [College] . . . failed to provide Plaintiff the opportunity to cross-examine or otherwise question Jane Roe[.]"

14. *Doe v. University of Southern Mississippi*, et al., 2:18-cv-00153-KS-MTP (S.D. Miss. Sep. 26, 2018) (granting Doe a preliminary injunction on due process grounds):

    a. "Thus, while the Fifth Circuit has not held that cross examination is required, it has certainly never held that it is strictly prohibited. This Court finds that this is a case where cross examination is warranted because such a procedural safeguard would have lessened the risk of an erroneous deprivation." *Id.* at *8.

    b. "[Doe] could not know whether the summary was correct because he never heard the testimony in the first place. Writing a rebuttal after the testimony is complete is not the same as cross examination, which provides the opportunity to assess the person's demeanor when asked certain questions and flesh out inconsistencies in a search for the truth." *Id.* at *9.

15. *Doe v. Brown University*, 327 F. Supp. 3d 397, 411 (D.R.I. Aug. 27, 2018) (denying in part the university's motion to dismiss because Doe plausibly stated a Title IX selective enforcement claim, a Title IX deliberately indifference claim, a Title VI racial discrimination claim, a gender discrimination claim under a Rhode Island state statute, and intentional infliction of emotional distress claim): "In addition, during the disciplinary hearing, John [Doe] alleges that Brown [University] did not allow him to assert any counterclaim or defense regarding the allegations, including being prohibited from posing certain questions to Jane [Roe, the accuser]."

16. *Doe v. Pennsylvania State University*, 336 F. Supp. 3d 441, 450 (M.D. Pa. Aug. 21, 2018) (denying defendant's motion to dismiss because Doe plausibly stated a due process claim): "Mr. Doe's main objection to this paper-only Investigative Model is that it prohibited him from telling his story directly to the panel, and from challenging Ms. Roe's version of events before that panel . . . [i]n a case like this, however, where everyone agrees on virtually all salient facts except one—*i.e.*, whether or not Ms. Roe consented to sexual activity with Mr. Doe—there is really only one consideration for the decision maker: credibility. After all, there were only two witnesses to the incident, with no other documentary evidence of the sexual encounter itself. As a result, in this Court's view, the Investigative Model's virtual embargo on the panel's ability to assess that credibility raises constitutional concerns."

17. *Doe v. Ohio State Univ*., 311 F. Supp. 3d 881, 892 (S.D. Ohio Apr. 24, 2018) (quotations omitted) (denying university MSJ because Doe plausibly stated a due process claim): "In the context of student disciplinary hearings, cross-examination is essential to due process, ... in a case that turns on a choice between believing an accuser and an accused. Here, John Doe couldn't effectively cross-examine Jane Roe on a critical issue: her credibility, and specifically, her motive to lie. This particular situation may indeed demand the procedural protection of the university either correcting a false statement or providing the accused with the necessary information to impeach a critical witness."

18. *Roe v. Adams-Gaston*, No. 2:17-CV-945, 2018 WL 5306768 (S.D. Ohio Apr. 17, 2018) (granting a preliminary injunction because defendant violated Roe's due process rights):

    a. "Roe did not lose her right to cross-examine the complainants by simply admitting that she engaged in sexual conduct with the complainants." *Id.* at *9.

b. “But the hearing officer made those credibility determinations without the benefit of observing Roe (or anyone else) cross-examine the complainants—the only individuals present, other than Roe, when the purported sexual misconduct occurred.” *Id.* at *10.

c. “Given the central role cross-examination has played as a truth-seeking device in our justice system, and given that Defendants have not identified any authority supporting their position, the Court cannot conclude that a pre-hearing investigative process, such as OSU’s, is a constitutionally adequate substitute for cross-examination.” *Id.* at *11.

d. “In the absence of an injunction, Roe would continue to be expelled and suffer significant reputational harm based on the outcome of hearings in which she was denied the opportunity to cross-examine adverse witnesses.” *Id.* at *14.

19. *Doe v. University of Oregon*, No. 6:17-CV-01103-AA, 2018 WL 1474531, at *15 (D. Or. Mar. 26, 2018) (denying defendant’s MTD because Doe plausibly stated a due process claim and a 14th Amendment equal protection claim): “Plaintiff alleges significant and pervasive flaws in the procedures used to investigate and adjudicate Roe's allegations, including that the University denied him a meaningful opportunity to cross-examine and confront witnesses . . . relied on an undisclosed expert whose report plaintiff never had the opportunity to refute[.]”

20. *Gischel v. Univ. of Cincinnati*, S.D. Ohio No. 1:17-CV-475, 2018 WL 9944998, at *8 (S.D. Ohio Jan. 23, 2018) (denying MTD on Title IX grounds): “Significantly, Gischel was denied the opportunity to cross-examine [Accuser] about her level of intoxication because the ARC panel refused to ask [Accuser] the questions Gischel had submitted on the topic.”

21. *Doe v. Ainsley Carry et al*., Case No. BS163736, at *14 (Cal. Sup. Ct. Dec. 20, 2017) (holding that USC did not provide a fair, neutral, and impartial investigation, violating Doe’s due process rights): "[Title IX investigator] Noonan never offered Petitioner an opportunity to submit questions to Roe. In fact, Noonan informed Petitioner that 'this is not the discovery process' and would not permit Petitioner to take notes during his interview, precluding Petitioner from drafting any questions to Roe at his meeting with Noonan."

22. *Doe v. Glick*, No. BS163739, 2017 WL 9990651, at *9 (Cal. Sup. Ct. Oct. 16, 2017) (finding that the University’s adjudicative hearing was prejudicial towards Doe): “The EA [External Adjudicator] appears to have misunderstood the policy allowing Petitioner to suggest additional questions to be asked in response to the Title IX Coordinator's determination. The EA did not analyze whether the questions were appropriate and should be posed to Roe. Further, Respondent appears to have told Roe she could answer Doe's questions in advance in writing, a procedure not found in either the 2013 or 2016 Pomona policy. Finally, the Complainant did not attend the hearing personally, or through Skype, even though the hearing date was arranged to accommodate Roe's schedule. Petitioner was unable to ask the EA to pose questions to Roe at the hearing. It is entirely unclear whether the EA would have made the same credibility determinations had Roe been questioned. The court finds that cumulatively, these conditions were prejudicial to Petitioner and denied him a fair hearing.”

23. *Rolph v. Hobart & William Smith Colleges,* 271 F. Supp. 3d 386, 401 (W.D.N.Y. Sep. 20, 2017) (denying defendant's MTD because plaintiff plausibly stated Title IX erroneous outcome claim): "Here, Plaintiff has adequately alleged facts that plausibly support at least a minimal inference of gender bias on the part of HWS. The allegations which support that inference include the following . . . alleg[ing] that his disciplinary proceedings put him at a disadvantage as compared to Jane Roe. For example, Plaintiff points to the fact that, during the proceeding, he was not allowed . . . to cross-examine Jane Roe[.]"

24. *Nokes v. Miami University*, No. 1:17-CV-482, 2017 WL 3674910, at *12 (S.D. Ohio Aug. 25, 2017) (granting Nokes' motion for a preliminary injunction against defendants on procedural due process grounds): "John Nokes was never able to test the roommate's memory or credibility, including any improper motives for testifying as such."

25. *John Doe v. Pennsylvania State University*, 276 F. Supp. 3d 300 (M.D. Pa. Aug. 18, 2017) (granting Doe's motion for a temporary restraining order against the university because Doe demonstrated likelihood of success on merits of due process claim):

    a. "Penn State's failure to ask the questions submitted by Doe may contribute to a violation of Doe's right to due process as a 'significant and unfair deviation' from its procedures [regarding cross examination]." *Id.* at 309.

    b. "While Penn State's [sexual assault] policy allowing for the submission of questions for review and use by the hearing panel may satisfy an accused's rights to confront and cross examine adverse witnesses, the instant case demonstrates the precarious balance hearing panel members must strike in their review of submitted questions. Here, their erroneous rejection of these questions constitutes a significant and unfair deviation from Penn State's [sexual assault] procedure[.]" *Id.* at 310.

26. *Collick v. William Paterson Univ.*, D.N.J. No. 16-471 (KM) (JBC), 2016 WL 6824374, at *11 (D.N.J. Nov. 17, 2016) (denying MTD on Title IX grounds): "The Complaint [alleges] that '[a]s a purported female victim, the Accuser's allegations against the male plaintiffs were accepted as true without any investigation being performed and without the development of any facts or exculpatory evidence.' And the Complaint does allege that Collick and Williams were not given the opportunity to respond or explain themselves, did not receive proper notice of the specific charges, were not permitted to confront or cross-examine their accuser, were not given a list of witnesses against them, and more generally were not afforded a thorough and impartial investigation."

27. *Doe v. Salisbury University*, no. 1:15-cv-00517-JKB, at *20 (D. Md. Aug. 21, 2015) (denying the university's motion to dismiss because Doe plausibly claimed an erroneous outcome Title IX violation and a negligence violation): "Plaintiffs were told that they would 'have an opportunity to ask questions of the Investigator, Complainant and Witnesses' at the [Community] Board's [or the adjudicative body] hearing (ECF No. 83-5), and yet "Plaintiffs were prohibited from asking many critical questions of witnesses[.]'"

28. *Johnson v. W. State Colorado Univ.*, 71 F. Supp. 3d 1217, 1223 (D. Colo. Oct 24, 2014) (denying the University's MTD on First Amendment grounds seeking injunctive relief): "Neither Angela

Gould nor Onna Gould was present at the hearing, and the only evidence presented by the university was the unsigned, two-page list of events which was allegedly lodged by Onna Gould."

Summary

Ten appellate courts and 28 trial courts have affirmed the essentiality of cross examination. In the Sixth federal circuit, cross examination has been expressly required by due process when credibility is at issue.

Recommendation

Due process requires cross examination. For this reason, the revised regulation must preserve Section 106.45(b)(6)(i), with the exception of the "exclusion provision" that was invalidated by Judge Young's ruling in *Victim Rights Law Center v. Cardona.*

Memorable Quote

Doe v. Baum, 903 F.3d 575, 583 (6th Cir. Sep. 7,2018) (reversing district court's dismissal for failure to state a due process claim): "Universities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment. And in sexual misconduct cases, allowing the accused to cross-examine the accuser may do just that. But in circumstances like these, the answer is not to deny cross-examination altogether. Instead, the university could allow the accused student's agent to conduct cross-examination on his behalf. After all, an individual aligned with the accused student can accomplish the benefits of cross-examination—its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker."

---

19. Conflict of Interest - Single Investigator Model

Introduction

In order to preserve the objectivity and integrity of the process, the investigator must be a different person from the adjudicator.

Regulatory Language

Section 106.45(b)(7)(i): "The decision-maker(s)... cannot be the same person(s) as the Title IX Coordinator or the investigator(s)."

Appellate Court Decisions

1. *Doe v. Westmont College*, 2d Civil No. B287799, at *18 (Cal. Ct. App. Apr. 23, 2019) (affirming the trial court's writ of mandate setting aside Westmont's determination and sanctions against Doe because of fairness issues): "[Associate Dean for Residential Life] Cleek's dual roles as an investigator and adjudicator compounds our concerns with the Panel's credibility determinations."

2. *Doe v. Carry*, Cal. Ct. App. No. B282164, 2019 WL 155998, at *9 (Cal. Ct. App. Jan. 8, 2019) (reversing trial court denial of administrative mandate challenging expulsion because of a lack of due process protections): "As we have explained, in USC's system, no in–person hearing is ever held, nor is one required. Instead, the Title IX investigator interviews witnesses, gathers other evidence, and prepares a written report in which the investigator acts as prosecutor and tribunal, making factual findings, deciding credibility, and imposing discipline. The notion that a single individual, acting in these overlapping and conflicting capacities, is capable of effectively implementing an accused student's right of cross–examination by posing prepared questions to witnesses in the course of the investigation ignores the fundamental nature of cross–examination: adversarial questioning at an in–person hearing at which a neutral factfinder can observe and assess the witness' credibility."

3. *Doe v. Allee*, 242 Cal. Rptr. 3d 109 (Cal. Ct. App. Jan. 4, 2019) (reversing the trial court's judgment against Doe with directions to grant Doe' petition for writ of administrative mandate and set aside the findings that Doe violated the University's sexual assault policy because Doe was denied fundamental fairness throughout his sexual assault allegation):

    a. "[A] right of "cross–examination" implemented by a single individual acting as investigator, prosecutor, fact finder and sentencer, is incompatible with adversarial questioning designed to uncover the truth. It is simply an extension of the investigation and prosecution itself." *Id.* at 136.

    b. "[F]undamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross–examine those witnesses, directly or indirectly . . . before a neutral adjudicator with the power independently to find facts and make credibility assessments." *Id.* at 137.

    c. "Deficiencies . . . in USC's system, which places in a single individual the overlapping and inconsistent roles of investigator, prosecutor, fact finder, and sentencer." *Id.* at 138.

    d. "[Doe] was entitled to . . . a hearing at which the witnesses appeared in person or by other means before a neutral adjudicator with the power to make findings of credibility and facts." *Id.*

4. *Doe v. Claremont McKenna Coll.*, 236 Cal. Rptr. 3d 655, 668 (Cal. Ct. App. Aug. 8, 2018) (finding that Doe's case hinged on credibility and therefore his hearing should have included the opportunity to cross examine Jane): "CMC contends that 'the Committee was able to assess the respective credibility of both parties because the Investigator—*who conducted each of the witness interviews*—was a voting member of the Committee and could answer other Committee members' questions regarding the witnesses' demeanors.' However, CMC's grievance procedures state that 'the Investigator *and* Community Representatives will make ... findings of fact by majority vote and by a preponderance of the evidence.' All three members of the Committee are finders of fact, each with an equal vote. Indeed, CMC emphasized this in denying John's administrative appeal, stating that '[t]he investigator does not lead the Investigation and Review Committee meeting, nor does the investigator draft the Findings Report. Each member of the committee has an equal vote.' Thus, all must make credibility determinations, and not simply approve the credibility determinations of the one Committee member who was also the investigator. Fairness required, therefore, that all three hear from Jane before choosing to

believe her account over John's. Even if CMC's procedures permitted or required the investigator to make an initial credibility finding, we note that in *Regents* the investigator expressly did so in a report presented to the review panel, yet the court nonetheless held that the accused student was entitled to question the complainant indirectly before the review panel at the hearing.

5. *Doe v. Miami University*, 882 F.3d 579, 600 (6th Cir. Feb. 9, 2018) (holding that Doe plead a plausible erroneous outcome claim under Title IX): "John alleges that Vaughn was biased against him because (1) she was his investigator, prosecutor, and judge; and (2) she had predetermined his guilt."

Trial Court Decisions

1. *Doe v. University of Mississippi, et al.*, No. 3:21-cv-00201, at *4-5 (S.D. Miss. Mar. 15, 2022) (denying the university's motion to dismiss because Doe plausibly stated a Title IX claim): "Roe appeared by video, flanked by a UMMC advisor and McClendon, who acted as Roe's 'personal protector, advocate, and prosecutor.'"

2. *Doe v. American Univ.*, No. 19-CV-03097 (APM), 2020 WL 5593909, at *4 (D.D.C. Sep. 18, 2020) (denying defendant's MTD on Title IX grounds): "At the time, [American University] followed a single-investigator model for review of Title IX complaints. Under such (a) model, a single person conducts the investigation, makes findings of fact, and determines whether a violation has occurred."

3. *Messeri v. DiStefano*, 480 F. Supp. 3d 1157, 1164 (D. Colo. Aug. 20, 2020) (holding a reasonable factfinder could find that University's failure to provide Messeri with a neutral arbitrator violated his procedural due process): "Requiring a hearing before a neutral arbitrator would also reduce the risk of error. Here, Polini and Hasselbacher both investigated Plaintiff's case and determined that Plaintiff was responsible for violating the OIEC Process and Procedures. A neutral decisionmaker would provide a fresh perspective on any credibility determinations and decrease the likelihood that a party would be erroneously found responsible. While such a requirement may increase the University's costs and administrative burden, the University does not contend, nor, in the Court's view, could it reasonably contend, that such costs outweigh Plaintiff's interest in avoiding being mistakenly expelled from the University and allowing him to more fully defend himself."

4. *Averett v. Hardy*, No. 3:19-CV-116-DJH-RSE, 2020 WL 1033543, at *7 (W.D. Ky. Mar. 3, 2020) (denying MTD because plaintiff plausibly stated a due process claim against university administrator): "[T]he Court finds that Averett has plausibly alleged that [University Student Conduct Officer] Hardy was … biased. Her role as both investigator and presiding hearing officer contributed to a violation of due process if her involvement in an incident created a bias such as to preclude h[er] affording the student an impartial hearing Hardy was involved in the investigation from the outset."

5. *Norris v. Univ. of Colorado, Boulder*, 362 F. Supp. 3d 1001, 1011-2 (D. Colo. Feb. 21, 2019) (Denying MTD on Title IX grounds): "Plaintiff notes he does not simply disagree with the Investigators' findings, but instead his Complaint sets forth a litany of grievances which he argues denied him of a fair and impartial process. In part, Plaintiff disputes the University's actions of: ... allowing the Title IX Coordinator—who determined the sanction in Plaintiff's case—to conduct an 'administrative review' of her own prior determination."

6. *Jia v. University of Miami et al*, no. 1:17-cv-20018-DPG, at *9-10 (S.D. Fla. Feb. 12, 2019) (denying the university's motion to dismiss because plaintiff sufficiently established a plausible Title IX claim and a defamation claim): "[Irregularities in the investigation process] include . . . (3) providing for a one-person panel [for adjudication] instead of a three-person panel . . . [which] could plausibly affect its disciplinary proceedings against Plaintiff."

7. *Doe v. Rivera*, No. 37-2015-00029558-CU-WM-CTL, at *4 (Cal. Sup. Ct. Feb. 1, 2017) (granting petitioner's writ of mandate order to continue the case on procedural fairness issues): "The record reveals that, during these proceedings, Dr. Mintz wore multiple hats. She was initially Respondents' [school] investigator assigned to this case . . . [s]he became, as Respondents' counsel candidly acknowledged, an 'advocate[.]' She also became, based on the Court's review of the record, Jane's advisor."

8. *Johnson v. W. State Colorado Univ.,* 71 F. Supp. 3d 1217, 1223 (D. Colo. Oct 24, 2014) (denying MTD on First Amendment grounds): "Luekenga issued a letter with his findings for the First Disciplinary Proceeding. . . [a] hearing on the allegations in the Second Disciplinary Proceeding was held on December 10–11, 2013. (*Id*.¶ 112.) The hearing was moderated by Luekenga[.]"

Summary

Five appellate courts and eight trial courts have criticized the Single Investigator Model, an adjudicative model prohibited by Section 106.45(b)(7)(i). The Single Investigator Model is particularly biased because it confers the powers of judge, jury, and executioner upon a single person, opening the door for bias. Because the Single Investigator Model does not entail any opportunity for a live hearing, such a method also violates due process. [we need to add a sentence or two about the conflict of interest issue]

Recommendation

The revised regulation must retain Section 106.45(b)(7)(i)'s prohibition on conflict of interest, including utilization of the Single Investigator Model.

Memorable Quote

Doe v. Miami University, 882 F.3d 579, 600 (6th Cir. Feb. 9, 2018): "John alleges that Vaughn was biased against him because (1) she was his investigator, prosecutor, and judge; and (2) she had predetermined his guilt."

---

20. Informal Resolution

Introduction

Experience reveals that in many cases, both parties are more satisfied with the outcome when the grievance is resolved through an informal process.

Regulatory Language

Section 160.45(b)(9): "...at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process."

Trial Court Decisions

1. *Doe v. Grinnell College*, 473 F. Supp. 3d 909, 934 (S.D. Iowa July 9, 2019) (denying defendant's MSJ because Doe plausibly stated Title IX and breach of contract claims): "Doe alleges specific ways Grinnell deviated from its contract with Doe. Doe provides evidence that the following deviations—among others—occurred during his disciplinary proceeding: [the Dean of Students] did not participate in the decision to pursue informal resolution of Complainant #1's complaint."

2. *Matter of Hall v. Hofstra University*, 101 N.Y.S.3d 699, at *12 (N.Y. Sup. Ct. Apr. 3, 2018) (annulling the sanctions against Hall because the University violated its own policy regarding sexual assault): "The University appears to place great importance on the Petitioner's declination of alternative resolutions that were proffered. Nowhere in its Policy does it warn students that further disciplinary action could result from declining such measures. To the contrary, the Policy provides that any alternative resolution must be voluntarily agreed upon by both parties."

Summary

Two trial courts have held that a school's failure to pursue informal resolution - when it promises in its handbook to do so - can support Title IX and breach of contract claims. Informal resolutions are important because they allow for students to resolve their differences informally and without discipline, if both parties choose to do so, thereby giving the students control over their own cases.

Recommendation

The revised regulation should retain Section 160.45(b)(9)'s provision allowing for elective informal resolution.

Memorable Quote

Matter of Hall v. Hofstra University, 101 N.Y.S.3d 699, at *12 (N.Y. Sup. Ct. Apr. 3, 2018) (annulling the sanctions against Hall because the University violated its own policy regarding sexual assault): "The University appears to place great importance on the Petitioner's declination of alternative resolutions that were proffered. Nowhere in its Policy does it warn students that further disciplinary action could result from declining such measures. To the contrary, the Policy provides that any alternative resolution must be voluntarily agreed upon by both parties."

---

21. Training Materials

Introduction

In order to assure the objectivity of investigators and adjudicators, training materials must be factually accurate and emphasize key due process protections.

Regulatory Language

Section 106.45(b)(10)(i)(D): "A recipient must make... training materials publicly available on its website, or if it does not have a website… must make them open to inspection by the public."

Trial Court Decisions

1. *Doe v. Hobart and William Smith Colleges,* 6:20-cv-06338 EAW. at *33 (W.D.N.Y. June 23, 2021) (denying Defendant's motion to dismiss because Doe plausibly stated a Title IX erroneous outcome claim): "Here, there is no question that is particularly within [Hobart and William Smith College]'s knowledge what training it provided its adjudicators, and it is plausible that the training was not provided."

2. *Doe v. Rollins College*, no. 6:18-cv-01069-Orl-37LRH, at *28 (M.D. Fla. Mar. 9, 2020) (granting in part Doe's partial motion for summary judgment because the university breached its contract with Doe regarding the university's sexual assault policy and denying in part the university's partial motion for summary judgment because Doe plausibly stated an issue of genuine fact regarding fundamental fairness): "Doe presented evidence Rollins [College] didn't treat him fairly or equitably—deciding he was responsible before hearing his side of the story and failing to follow procedures mandated by the Policy and Responding Party Bill of Rights."

3. *Jackson v. The Trustees of the University of Pennsylvania*, no. 2:17-cv-04645-GEKP, at *15-16 (E.D. Penn. Jan. 23, 2019) (denying the university's motion to dismiss because Jackson plausibly stated a possible negligence claim): "Mr. Jackson then claims that [the University of Pennsylvania] breached [an owed] duty by "failing to adequately select, train, and supervise the investigative team . . . [t]he details of the investigation as well as the details concerning Mr. Jackson's alleged damages, if any, can be ferreted out in discovery."

4. *Doe v. University of Mississippi*, 361 F.Supp.3d 597 (S.D. Miss. Jan. 16, 2019) (holding that Doe had raised plausible claims of sex bias and due process violations):

    a. "As to the training, Doe makes the following points, (1) the training material 'provides that just because an individual does not protest or resist sexual activity their silence and lack of resistance does not constitute consent,' (2) it 'provides that when both parties are intoxicated, findings are to be made in favor of the complainant, who is typically female,' and (3) the materials 'advise the panel members that 'victims' sometimes withhold facts and lie about details, question if they've truly been victimized[,] and 'lie about anything that casts doubt on their account of the event.'" *Id.* at 610.

b. “As such, there is a question whether the panel was trained to ignore some of the alleged deficiencies in the investigation and official report the panel considered.” *Id*.

5. *Doe v. University of Mississippi*, No. 3:16-CV-63-DPJ-FKB, 2018 WL 3570229, at *11 (S.D. Miss. July 24, 2018) (denying defendant’s MTD because Doe plausibly stated a Title IX claim and a due process claim): “Taken as a whole, the Court concludes that Doe has stated a plausible claim. This is a he-said/she-said case, yet there seems to have been an assumption under [investigator] Ussery's training materials that an assault occurred. As a result, there is a question whether the panel was trained to ignore some of the alleged deficiencies in the investigation and official report the panel considered.”

6. *Saravanan v. Drexel Univ.*, E.D. Pa. No. CV 17-3409, 2017 WL 5659821 (E.D. Pa. Nov. 24, 2017) (denying MTD on Title IX grounds):

   a. “Mr. Saravanan alleges when he approached [Member of Drexel Staff] with ‘service of process documents to be served on [Complainant] as a result of her violation of the [protection from abuse order], and told him he needed protection from her, which [Member of Drexel Staff] refused to provide, stating with a gender biased deliberate indifference: “I don't think we do that for guys, I am pretty sure that's for girls only, but let me check that and I will get back to you.” *Id.* at *5.

   b. “[Saravanan] … claims Michelle Rovinsky asked him ‘are you here to stalk [Complainant]?’ when he visited Drexel's Title IX office to report [Complainant]'s sexual assault. He pleads Ms. Rovinsky is one of Drexel's ‘staff trainers’ and the ‘staff training materials for taking reports and carrying out investigations on campus sexual assault [...] inherently portray the woman as the victim of the man.’ He claims Drexel did not properly train its staff to not ‘fall prey to its gender … biases.’” *Id.*

7. *Doe v. The Trustees of the Univ. of Pennsylvania*, 270 F. Supp. 3d 799, 816–17 (E.D. Pa. Sep. 13, 2017) (holding that Defendant violated Title IX under an erroneous outcome theory): “Specifically, the Complaint alleges that officials who handled Plaintiff's case were trained with, among other materials, a document called ‘Sexual Misconduct Complaint: 17 Tips for Student Discipline Adjudicators.’ That document warns against victim blaming; advises of the potential for profound, long-lasting, psychological injury to victims; explains that major trauma to victims may result in fragmented recall, which may result in victims ‘recount[ing] a sexual assault somewhat differently from one retelling to the next’; warns that a victim's ‘flat affect [at a hearing] does not, by itself, show that no assault occurred’; and cites studies suggesting that false accusations of rape are not common. At the same time, the document advises that the alleged perpetrator may have many ‘apparent positive attributes such as talent, charm, and maturity’ but that these attributes ‘are generally irrelevant to whether the respondent engaged in non consensual sexual activity.’ It also warns that a ‘typical rapist operates within ordinary social conventions to identify and groom victims’ and states that ‘strategically isolating potential victims can show the premeditation’ commonly exhibited by serial offenders. The Complaint asserts that such guidance ‘encourage[s] investigators and adjudicators to believe the accuser, disregard weaknesses and contradictions in the accuser's story, and presume the accused's guilt.’”

8. *John Doe v. Pennsylvania State University*, 276 F. Supp. 3d 300, at 312 (M.D. Pa. Aug. 18, 2017) (granting Doe's motion for a temporary restraining order against the university because Doe demonstrated likelihood of success on merits of due process claim): "Title IX decision panel chair, Jamey Perry, admitted during the preliminary injunction hearing that he knew nothing about the case itself prior to receiving documentation from the case manager."

Summary

Eight trial court decisions have highlighted the importance of Section 106.45(b)(10)(i)(D). Although none of the cases held that withholding training materials was actionable statutorily or constitutionally, the excerpts from training materials shown above demonstrates that training materials are often steeped in sex bias and discriminatory assumptions. These biases lead to discriminatory discipline in violation of Title IX.

Recommendation

The revised regulation should retain Section 106.45(b)(10)(i)(D)'s requirement to publicly post training materials, so that students can be assured that the persons who are adjudicating their cases are not being trained in archaic or biased stereotypes.

Memorable Quote

Doe v. University of Mississippi, No. 3:16-CV-63-DPJ-FKB, 2018 WL 3570229, at *11 (S.D. Miss. July 24, 2018) (denying defendant's MTD regarding Doe's Title IX claim and due process claim): "Taken as a whole, the Court concludes that Doe has stated a plausible claim. This is a he-said/she-said case, yet there seems to have been an assumption under [investigator] Ussery's training materials that an assault occurred. As a result, there is a question whether the panel was trained to ignore some of the alleged deficiencies in the investigation and official report the panel considered."

---

22. Recordkeeping

Introduction

In order to satisfy the need for accountability and possible future litigation, records must be retained in an accessible manner.

Regulatory Language

Section 160.45(b)(10)(i): "recipient must maintain for a period of seven years records of [all sexual misconduct cases]"

Trial Court Decisions

1. *Doe v. Quinnipiac Univ.*, 404 F. Supp. 3d 643, 656-7 (D. Conn. July 10, 2019) (denying MSJ on Title IX grounds): "[Deputy Title IX Coordinator's] deposition testimony states that as a matter of

general practice, '[a]t the conclusion of the hearing, once the chairperson completes the letter, all of their materials, if they had them, paper materials would be given to me and we would -- I would shred them.' [Deputy Title IX Coordinator] also testified that he did this because he 'didn't want extra copies of the case materials hanging around.'"

2. *Rolph v. Hobart & William Smith Colleges,* 271 F. Supp. 3d 386, 401-02 (W.D.N.Y. Sep. 20, 2017) (denying defendant's MTD because plaintiff plausibly stated a Title IX erroneous outcome claim): "Here, Plaintiff has adequately alleged facts that plausibly support at least a minimal inference of gender bias on the part of HWS. The allegations which support that inference include the following . . . Beatty's investigation was insufficient because she, *inter alia,* failed to review or preserve electronic evidence[.]"

Summary

Two trial courts have recognized the importance of institutional retention of records of sexual misconduct proceedings, on Title IX grounds.

Recommendation

The revised regulation should retain Section 160.45(b)(10)(i).

Memorable Quote

Rolph v. Hobart & William Smith Colleges, 271 F. Supp. 3d 386, 401-02 (W.D.N.Y. Sep. 20, 2017) (denying defendant's MTD regarding plaintiff's Title IX erroneous outcome claim): "Here, Plaintiff has adequately alleged facts that plausibly support at least a minimal inference of gender bias on the part of HWS. The allegations which support that inference include the following . . . Beatty's investigation was insufficient because she, *inter alia,* failed to review or preserve electronic evidence[.]"

---

23. Consent

Introduction

Welcomeness to sexual contact by both parties is essential.

Regulatory Language

106.30(a): "The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section."

Appellate Court Decisions

1. *Matter of Doe v. Purchase Coll. State Univ. of N.Y.,* 192 A.D.3d 1100, 1103 (N.Y. App. Div. Mar. 31, 2021) (citations omitted) (granting Doe's petition to dismiss college hearing panel's finding of fault because of the defendant failed to investigate): "The Board indicated that its finding of nonconsensual conduct was based on the statements of the petitioner and the complainant

'that clear, affirmative consent for these activities was not given.' However, the petitioner, while freely admitting that he did not obtain verbal consent, clearly asserted that the complainant consented with her actions. There was no specific testimony or statements elicited that were adequate to support the conclusion that, although capable of consent, the complainant had not consented, with her actions, to all of the sexual activity in which the parties engaged. Rather, on this record, such a conclusion amounted to surmise, conjecture, [or] speculation."

2. *Doe v. Oberlin Coll.*, 963 F.3d 580, 587-88 (6th Cir. June 29, 2020) (reversing District Court's motion to dismiss because Doe plausibly stated Title IX claim): "But Doe's strongest evidence [regarding sex bias] is perhaps the merits of the decision itself in his case … Per the terms of Oberlin's Policy, intoxication does not negate consent—only 'incapacitation' does. The Policy rather precisely defines that term. And the record here provided no apparent basis for a finding that Roe 'lack[ed] conscious knowledge of the nature of the act' of oral sex, or that she was 'asleep, unconscious, or otherwise unaware that sexual activity [was] occurring[,]' or that she 'no longer underst[ood] who [she was] with or what [she was] doing.' Nor was there any apparent reason for Doe to perceive that Roe was in such a state. To the contrary, Roe was conscious and aware enough to engage in a coherent exchange of texts, to make small talk, and to reason that, '[w]e were no longer clothed and I felt that if anything was to continue happening, I wanted a condom.'"

3. *Doe v. University of Sciences*, 961 F.3d 203, 206 (3d Cir. May 29, 2020) (reversing the district court's order dismissing Doe's complaint because of fairness issues and Doe plausibly stating a Title IX violation and breach of contract): "One form of prohibited conduct is sexual assault, which 'consists of sexual contact and/or sexual intercourse that occurs without affirmative consent.' A student gives affirmative consent 'through the demonstration of clear and coherent words or actions[ ] ... indicat[ing] permission to engage in mutually agreed-upon sexual activity . . . [a]ffirmative consent cannot be gained by taking advantage of the incapacitation of another, where the person initiating sexual activity knew or reasonably should have known that the other was incapacitated.' Incapacitation occurs when 'a person lacks the ability to make informed, rational judgments about whether or not to engage in sexual activity.'"

4. *Doe v. Miami University*, 882 F.3d 579 (6th Cir. Feb. 9, 2018) (holding that Doe had plead a plausible erroneous outcome claim under Title IX):

    a. "Vaughn also allegedly knew that Jane had engaged in non-consensual sexual acts against John, when John was so intoxicated that he was unable to provide consent - as defined by Miami University's consent policy - and Jane had 'kinda sobered up.'" *Id.* at 596/

    b. "Vaughn knew that Jane had potentially violated the University's sexual misconduct provisions at the same time she reviewed the allegations against John… Vaughn chose to pursue disciplinary action against John, but not Jane." *Id*.

Trial Court Decisions

1. *Feibleman v. Trustees of Columbia University in City of New York*, No. 19-CV-4327 (VEC), 2020 WL 882429, at *16 (S.D.N.Y. Feb. 24, 2020) (denying the university's MTD on Title IX and breach of contract grounds): "Based on the foregoing, Feibleman has adequately pleaded a 'minimal

inference' of gender bias and an 'articulable doubt' as to the accuracy of Columbia's determination that he committed sexual assault because Doe was incapable of consent."

2. *Doe v. Syracuse University*, No. 5:18-CV-377, 2019 WL 2021026, at *7 (N.D.N.Y. May 8, 2019) (denying defendant's MTD because Doe plausibly stated Title IX and breach of contract claims): "Specifically, the Conduct Board, in rejecting Jane's allegations of non-consensual oral and anal sex, could not have reasonably found credible her position that she withdrew consent during vaginal sex. In other words, because they did not substantiate two of her claims, they could not find credible her third [claim]. All of these allegations, read together, cast an articulable doubt on the outcome of the disciplinary proceeding and satisfy the erroneous outcome prong of a Title IX claim."

3. *Nokes v. Miami University*, No. 1:17-CV-482, 2017 WL 3674910, at *10 (S.D. Ohio Aug. 25, 2017) (granting Nokes' motion for a preliminary injunction against defendants on procedural due process grounds differentiating between forms of consent): "Defendants asked Plaintiff to admit that the foregoing section contemplates at least two different "situations" where a party cannot give consent. Plaintiff agreed that the Code contemplates a lack of consent where: (1) the person is "coerced or forced"; and (2) the person is "severely intoxicated." Defendants seem to believe that the Code's broad consent definition is a helpful fact for them, seemingly based on the theory that Section 103A should have placed Plaintiff on notice that all forms of consent would be at issue, thus giving him an adequate opportunity to prepare for his defense against the accusation(s) that he forced Jane Roe, and/or coerced Jane Roe, and/or took advantage of Jane Roe while she was severely intoxicated, or some combination of the foregoing. Similar arguments have been rejected by other courts[.]"

4. *Doe v. Amherst College*, no. 3:15-cv-30097-MGM, at *37 (D. Mass. Feb. 28, 2017) (denying the university's motion for judgment on the pleadings because Doe plausibly stated breach of contract, national origin discrimination, and Title IX violations): "[W]hile Doe never filed a formal complaint, [Amherst] College certainly learned that [the accuser] Jones may have engaged in sexual activity with Doe while he was "blacked out" and yet, Doe asserts, the College did not take even minimal steps to determine whether Doe should have been viewed as a victim under the terms of the [the sexual misconduct] Policy."

5. *Doe v. Western New England University, et al.*, no. 3:15-cv-30192-MAP, at *8 (D. Mass. Jan. 11, 2017) (denying part of the university's motion to dismiss because Doe plausibly claimed breach of contract and fairness violations): "Meticulous adherence to definitional boundaries and notification requirements regarding what constituted consent and coercion [in the Student Code of Conduct Handbook] was especially critical in determining whether discipline was appropriate on this record's factual landscape . . . Plaintiff is entitled to discovery before losing his day in court on this issue."

6. *Mock v. University of Tennessee at Chattanooga*, No. 14-1687-II (Tenn. Ch. Ct. Aug. 4, 2015) (granting Mock injunctive relief reinstating UTC's initial finding of Mock being not guilty on procedural due process grounds):

    a. "The [University of Tennessee at Chattanooga] UTC Chancellor's . . . implementation of [a] rule erroneously shifted the burden of proof onto Mr. Mock [by operation of the

university's affirmative consent policy], when the ultimate burden of proving a sexual assault remained on the charging party, UTC." *Id.* at *11.

b. "The position of UTC is that it satisfies its burden of proof by requiring the accused to affirmatively prove consent[.] This procedure is flawed and untenable if due process is to be afforded [to] the accused." *Id.*

7. *Benning v. Corporation of Marlboro College*, no. 2:14-cv-00071-wks, at *3 (D. Vt. Aug. 5, 2014) (denying Marlboro's motion for a protective order preventing Benning from deposing certain employees because those employees did not fall under federal employees): "Benning appealed the Panel's decision to the Dean's Advisory Committee. The Committee found three "serious material errors" in the Panel's proceedings, and reduced Benning's punishment to a three-semester suspension. Despite these material errors, the Committee nonetheless upheld the Panel's first two findings [which included an issue on consent]."

Summary

four appellate courts and seven trial courts have criticized the consent policies implemented by universities, with the harshest criticism directed towards vague applications of affirmative consent policies. Inconsistent applications of these policies and their broad wording can violate Title IX and constitutional rights.

Recommendation

Consistent with Section 160.45(b)(5)(i), which places the burden of proof on the school, 106.30(a) should be amended to prohibit definitions of consent, e.g., so-called "affirmative consent," that improperly shift the burden of proof onto the respondent.

Memorable Quote

Doe v. Oberlin Coll., 963 F.3d 580, 587-8 (6th Cir. June 29, 2020) (reversing district court's motion to dismiss for failure to state a Title IX claim): "But Doe's strongest evidence [regarding sex bias] is perhaps the merits of the decision itself in his case … Per the terms of Oberlin's Policy, intoxication does not negate consent—only 'incapacitation' does. The Policy rather precisely defines that term. And the record here provided no apparent basis for a finding that Roe 'lack[ed] conscious knowledge of the nature of the act' of oral sex, or that she was 'asleep, unconscious, or otherwise unaware that sexual activity [was] occurring[,]' or that she 'no longer underst[ood] who [she was] with or what [she was] doing.' Nor was there any apparent reason for Doe to perceive that Roe was in such a state."

---

24. Geographical/Programmatic Scope

Introduction

Title IX pertains to actions directed against a person within the United States. Institutions cannot be held responsible for preventing or sanctioning sexual misconduct if they cannot exercise substantial control over the respondent or context.

Regulatory Language

Section 106.44(a): "A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent."…"education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."

Appellate Court Decision

1. *Yeasin v. University of Kansas*, No. 113,098, at *11 (Kan. Ct. App. Sep. 25, 2015) (affirming the district court's holding that the University violated its own Student Code and rules because the alleged violations occurred off-campus and must occur on-campus or at campus sponsored activities): "The district court did not err in interpreting the Student Code to mean it applies only to student conduct that occurs on campus or at University sponsored activities."

Trial Court Decisions

1. *Victim Rights Law Center v. Cardona*, no. 1:20-cv-11104-WGY, at *53 (D. Mass. July 28, 2021) (affirming 12 of 13 challenged Department of Education's 2020 Title IX Regulations based on Title IX statutory law): "[T]he challenged provisions fall within the [Education] Department's stated, albeit general, intention to regulate '(1) What constitutes sexual harassment for purposes of rising to the level of a civil rights issue under Title IX; (2) What triggers a school's legal obligation to respond to incidents or allegations of sexual harassment; and (3) How a school must respond.'"

2. *New York v. U.S. Department of Education*, no. 20-cv-4260-JGK (S.D.N.Y. Aug. 9, 2020) (denying the state's motion for preliminary injunction, or in the alternative, stay the 2020 Title IX Regulations because state failed to establish a likelihood of success on the merits and that they were likely to suffer substantial irreparable harm):

    a. "Title IX defines program or activity as 'all of the operations of' the school. 20 U.S.C. § 1687." *Id.* at 17.

    b. "[The Department of Education] will interpret 'program or activity' in accordance with Title IX statutory (20 U.S.C. 1687) and regulatory definitions (34 C.F.R. 106.2(h)), guided by the Supreme Court's language in *Davis*." *Id.*

    c. "The plaintiffs acknowledge that Title IX provides both complainants and respondents with 'the right to attend school free of sex discrimination.'" *Id*. at 19.

3. *Pennsylvania v. DeVos*, no. 1:20-cv-01468-CJN, at *16 (D.D.C. Aug. 12, 2020) (denying the state's motion for preliminary injunction to enjoin the implementation of the 2020 Title IX Regulations because the state failed to establish a likelihood of success on the merits and that they were likely to suffer substantial irreparable harm): "The operative inquiry is not where the sexual harassment occurred, [] but rather, whether it occurred at an operation 'over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs.'"

4. *Doe v. The Trustees of the State of California*, No. BS167329, at *6 (Cal. Sup. Ct. Feb. 5, 2019) (granting Doe's writ of mandate for lack of fairness during the adjudicative process): "In her amended investigation report, [Title IX Investigator] Boele [of California State University (CDU)] described Roe 2 as 'an unenrolled student from Fresno State University' at the time of the incident. [California Executive Order] 1097 only authorizes CSU to investigate sexual misconduct complaints of 'Students' and that an 'unenrolled student' is not a 'Student' within the policy. Accordingly, based on Boele's report and Respondents' lack of opposition, the court concludes that CSU [Fresno] was not authorized to adjudicate Roe 2's complaint."

5. *Doe v. Middlebury College*, No. 1:15-CV-102-JGM, 2015 WL 5488109 (D. Vt. Sep. 16, 2016) (granting a preliminary injunction against the college for Title IX and breach of contract violations):

    a. "This case presents a unique situation where Plaintiff [Doe] was exonerated of the charge of sexual assault [from the school Doe was studying abroad at, the School for International Training.] [F]ollowing an investigation and hearing, [Doe was] allowed to continue his studies the next term, and . . . his college [Middlebury College,] following a second investigation of the same allegation to have committed sexual assault . . . expelled [Doe]. The Court finds Plaintiff is likely to suffer irreparable harm if he is expelled from Middlebury College pending a final determination on the merits in this action." *Id.* at *3.

    b. "Specifically, Middlebury's policies did not authorize a second investigation and de novo evaluation of the allegation of sexual assault after it had been decided in Plaintiff's favor by [the School for International Training], the sponsor of the study abroad program during which the alleged misconduct occurred, to whose discipline Plaintiff was subject." *Id.*

Summary

One appellate court and five trial courts opined on the geographical jurisdiction of university Title IX policies. If a school acts outside of its jurisdiction, such action can violate fundamental fairness and Title IX rights. *Doe v. Middlebury* emphasizes why geographic limits are important; if an incident occurs thousands of miles away, it is likely impossible for the university to obtain all of the necessary evidence to decide the case.

Recommendation

The revised regulation should retain the geographic restrictions in Section 160.44(a), because it is practicable and because such restriction tracks closely with the language of the Title IX statute.

Memorable Quote

Doe v. Middlebury College, No. 1:15-CV-102-JGM, 2015 WL 5488109, at *3 (D. Vt. Sep. 16, 2016) (granting a preliminary injunction against the college for Title IX and breach of contract violations): "Specifically, Middlebury's policies did not authorize a second investigation and de novo evaluation of the allegation of sexual assault after it had been decided in Plaintiff's favor by [the School for International Training], the sponsor of the study abroad program during which the alleged misconduct occurred, to whose discipline Plaintiff was subject."

---

25. Presumption of Innocence

Introduction

The presumption of innocence can be traced through centuries of legal precedent, and is one of the most time-honored precepts of due process.

Regulatory Language

Section 106.45(b)(1)(iv): The grievance process must "Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process."

Appellate Court Decision

1. *Doe v. Miami University*, 882 F.3d 579 (6th Cir. Feb. 9, 2018) (holding that Doe had plead a plausible erroneous outcome claim under Title IX):

    a. "John argues that Vaughn's dual roles undermined her neutrality enough to overcome the presumption of impartiality afforded school officials." *Id.* at 601.

    b. "Vaughn's alleged dominance on the three-person panel raises legitimate concerns, as she was the only one of the three with conflicting roles. Furthermore, John alleges that Vaughn announced during the hearing that 'I'll bet you do this [i.e., sexually assault women] all the time.' This statement implies that Vaughn had determined prior to the hearing that John was responsible for the misconduct alleged in this incident and had a propensity for engaging in sexual misconduct." *Id*.

Trial Court Decisions

1. *Stiles v. Brown University*, No. 1:21-cv-00497 (D.R.I. Jan. 25, 2022) (granting Stiles' motion for preliminary injunction restraining and enjoining Brown University because the university violated Stiles' contractual rights during his Title IX investigation):

    a. "Relevant here, the Student Conduct Procedures entitle the plaintiff [John Stiles] to 'not be presumed responsible of any alleged violations unless so found through the appropriate student conduct hearing' and to be 'afforded an opportunity to offer a relevant response.' The Sexual Misconduct Procedure also 'presumes that the Respondent is not responsible for the alleged Prohibited conduct' and further guarantees John 'meaningful opportunities to participate' in the Title IX process." *Id.* at *4.

    b. "[The] Threat Assessment Team failed to demonstrate anything that would indicate they afforded the plaintiff a presumption that he was not responsible for the alleged conduct as required by contract." *Id.* at *5.

2. *Doe v. Rollins College*, no. 6:18-cv-01069-Orl-37LRH, at *28 (M.D. Fla. Mar. 9, 2020) (granting in part Doe's partial motion for summary judgment because the university breached its contract with Doe regarding the university's sexual assault policy and denying in part the university's partial motion for summary judgment because Doe plausibly stated an issue of genuine fact regarding fundamental fairness): "Doe presented evidence Rollins [College] didn't treat him fairly or equitably—deciding he was responsible before hearing his side of the story and failing to follow procedures mandated by the Policy and Responding Party Bill of Rights."

Summary

The Sixth Circuit in *Doe v. Miami Univ.* and two trial courts found that placing a presumption of guilt upon the respondent raises constitutional concerns and supports an inference of sex discrimination.

Recommendation

The revised regulation should retain the presumption of innocence provision in Section 160.45(b)(1)(iv).

Memorable Quote

Doe v. Miami University, 882 F.3d 579, 601 (6th Cir. 2018) (holding that Doe had plead a plausible erroneous outcome claim under Title IX**)**: "John argues that Vaughn's dual roles undermined her neutrality enough to overcome the presumption of impartiality afforded school officials."

---

26. Equal Opportunity for Parties to Present Evidence

Introduction

A fundamental element of equitable procedures is the opportunity for the parties to present witnesses and evidence.

Regulatory Language

Section 106.45(b)(5)(ii): "The grievance process must "Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence."

Appellate Court Decisions

1. *Doe v. Regents of the University of California* (UCLA), No. 20-55831 (9th Cir. Jan. 11, 2022) (reversing and vacating the order and judgment of the District Court of the Central District of California dismissing a Title IX action brought by Doe because Doe plausibly stated a Title IX claim against the Regents):

    a. "Doe was provided with limited, online access to a summary of information collected during [Title IX Investigator] Ms. Shakoori's investigation and a brief opportunity to comment or provide new information." *Id.* at *7.

    b. "[I]rregular proceedings during the appeal hearing itself, [included] . . . (1) the burden was placed on Doe, not the University; (2) Doe was not permitted to speak at the appeal hearing; (3) fact witness testimony supporting Doe's account of the events was discounted, while witness testimony supporting Roe's account was accepted without the need for an independent interview by the appeal panel[.]" *Id.* at 21.

2. *Doe v. University of Denver,* No. 19-1359, at *20 (10th Cir. June 15, 2021) (reversing the district court's order granting the University summary judgment because Doe satisfies the requirements of the *McDonnell Douglas* test through a Title IX claim to overcome summary judgment): "[I]nvestigators interviewed eleven witnesses proposed by [the accuser] Jane but initially refused to interview all five witnesses proffered by [the accused] John."

3. *Doe v. Baum*, 903 F.3d 575 (6th Cir. June 29, 2018) (reversing district court's dismissal for failure to state a Title IX claim because Doe plausibly stated a Title IX claim):

    a. Specific allegation of adjudicator bias, where male testimony was entirely rejected due to lack of credibility because they were fraternity brothers of accused but female testimony was credited without the adjucator noting the sex (all female) or relation (many were sorority sisters of accuser) of Roe's witnesses, creates a plausible claim of gender bias. *Id.* at 586.

    b. "[T]he Board explained that Doe's witnesses lacked credibility because 'many of them were fraternity brothers of [Doe].' But the Board did not similarly note that several of Roe's witnesses were her sorority sisters, nor did it note that they were female. This is all the more telling in that the initial investigator who actually interviewed all of these witnesses found in favor of Doe. The Board, by contrast, made all of these credibility findings on a cold record." *Id.*

4. *Doe v. Regents of the University of California*, 2d Civ. No. B283229 (Cal. Ct. App. Oct. 9, 2018) (reversing the trial court's judgment denying Doe a writ of administrative mandate for fairness

and procedural due process violations and remanding the case to the superior court with the direction to grant Doe's writ of administrative mandate):

a. "'The accused has the right to due process as outlined in the Campus Regulations. Among these rights are . . . (iv) [t]o produce witnesses and evidence pertaining to the case[.]'" *Id.* at *18-19.

b. "Because no formal right to discovery exists in [the University of California at Santa Barbara's] student conduct hearings, and the formal rules of evidence do not apply, John should have been allowed to introduce evidence of the side effects of Viibryd through his mother's testimony or some other informal method." *Id.* at *23.

c. "[T]he [Sexual/Interpersonal Violence Conduct] Committee inexplicably allowed Jane to decline to respond to John's questions about the side effects of Viibryd on the ground that it was her "private medical information." This . . . impeded [John's] ability to present relevant evidence in support of his defense." *Id.* at *24.

5. *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. July 29, 2016) (reversing the district court's MTD because Doe has a plausible Title IX claim):

a. "Both the investigator and the panel declined to seek out potential witnesses Plaintiff had identified as sources of information favorable to him." *Id.* at 56.

b. "The alleged fact that [investigator] Sessions-Stackhouse, and the panel and the Dean, chose to accept an unsupported accusatory version over Plaintiff's, and declined even to explore the testimony of Plaintiff's witnesses, if true, gives plausible support to the proposition that they were motivated by bias in discharging their responsibilities to fairly investigate and adjudicate the dispute." *Id.* at 57.

Trial Court Decisions

1. *Stiles v. Brown University*, No. 1:21-cv-00497, at *4 (D.R.I. Jan. 25, 2022) (granting Stiles' motion for preliminary injunction restraining and enjoining Brown University because the university violated Stiles' contractual rights during his Title IX investigation): "Relevant here, the Student Conduct Procedures entitle the plaintiff [John Stiles] to 'not be presumed responsible of any alleged violations unless so found through the appropriate student conduct hearing' and to be 'afforded an opportunity to offer a relevant response.' The Sexual Misconduct Procedure also 'presumes that the Respondent is not responsible for the alleged Prohibited conduct' and further guarantees John 'meaningful opportunities to participate' in the Title IX process."

2. *Doe v. Texas A&M University – Kingsville, et al.*, no. 2:21-cv-00257, at *3 (S.D. Tex. Nov. 5, 2021) (granting Doe's motion for a temporary restraining order and preliminary injunction to preserve the status quo because Doe was denied due process): "[Doe] was further prevented from offering evidence that the grand jury had no-billed the criminal complaint against him resulting from the same incident."

3. *Doe v. Embry-Riddle Aeronautical University*, no. 6:20-cv-1220-WWB-LRH, at *15 (M.D. Fla. Nov. 4, 2021) (denying in part the university's motion to dismiss because Doe plausibly presented Title IX selective enforcement and breach of contract violations): "Additionally, both Plaintiff and the counsel that represented him in the proceedings have provided statements from which a reasonable jury could conclude that [Embry-Riddle Aeronautical University] officials did not treat Plaintiff in an impartial manner during and in connection with its investigation. For example, Jane Roe explicitly requested that [investigator] Meyers-Parker not contact any witnesses on her behalf, including her suitemate because they 'no longer g[o]t a long [sic],' and her request was honored. However, when Jane Roe pointed out that Plaintiff had failed to list his roommate as a witness, Meyers-Parker independently contacted that individual for his statement. A reasonable jury could infer this was done in an effort to avoid learning damaging information regarding Jane Roe's claim while seeking evidence to support a finding of guilt by Plaintiff, which would certainly indicate that the investigation was not impartial."

4. *Doe v. Lincoln-Sudbury Regional School Committee*, No. 1:20-cv-11564-FDS, at *16 (D. Mass. Aug. 27, 2021) (denying the school's motion to dismiss because Doe plausibly stated a due process claim): "The complaint alleges that the retraction letter violated plaintiff's right to due process because, among other reasons, defendants [. . .] did not provide him a meaningful opportunity to be heard before issuing that retraction. (See, e.g., Compl. ¶ 154(j)-(p)). The complaint therefore plausibly alleges a claim for a violation of plaintiff's due-process rights as to the 2017 retraction letter."

5. *Moe v. Grinnell College*, No. 4:20-cv-00058-RGE-SBJ, at *24 (S.D. Iowa Aug. 23, 2021) (denying the college's motion for summary judgment on Moe's Title IX claim and breach of contract claim): "Moe provides evidence demonstrating the investigator failed to interview witnesses that could have corroborated aspects of his testimony[.]"

6. *Doe v. Columbia University*, Case 1:20-cv-06770-GHW, at *55 (S.D.N.Y. Aug 1, 2021) (denying the University's MTD Doe's Title IX erroneous outcome claim in imposing interim suspension, Title IX selective enforcement claim in the Jane Doe 1 proceeding, Title IX erroneous outcome claim in the Jane Doe 4 proceeding, and Title IX erroneous outcome claim in the Jane Doe 3 proceeding): "[John Doe] alleges that Columbia ignored evidence contradicting Jane Doe 1's version of events, such as the photographic evidence Jane Doe 1 herself submitted. Compl. ¶ 157. He also alleges that Columbia refused to investigate his claim regarding Jane Doe 1's sexual misconduct or consider evidence indicating that she and Jane Doe 3 were attempting to work together to prevent Plaintiff from graduating . . . [this] support[s] an inference that Columbia was biased against Plaintiff."

7. *Doe v. University of Connecticut*, No. 3:20CV92 (MPS), 2020 WL 406356 (D. Conn. Jan. 23, 2020) (granting Doe's TRO against the university on due process grounds):

    a. "Despite the importance of credibility to the factual dispute, UCONN's disciplinary procedures hampered the Plaintiff's ability to present a meaningful defense on this issue. First, the Plaintiff avers in his affidavit that the hearing officers at his December 16, 2019 administrative hearing refused to hear testimony from four of the five witnesses the Plaintiff attempted to present. Doe Aff., ECF No. 2-3 ¶¶ 42–43. The evidence the Plaintiff has submitted indicates that his witnesses were prepared to offer testimony that would tend to undermine Jane Roe's credibility. Specifically, two witnesses were

prepared to testify that Jane Roe had initiated 'sexual movements' on the Plaintiff's lap in the car on the night of April 5, 2019." *Id.* at *4.

b. "[T]he Plaintiff's proposed witnesses would have provided relevant testimony as to Jane Roe's credibility, but the hearing officers allowed testimony only from 'JM,' refusing to hear testimony from 'FW,' 'KW,' and two other witnesses proposed by the Plaintiff. 'KW' was never even interviewed during the investigation, though the Plaintiff identified him as a potential witness during his interview." *Id.*

8. *Doe v. Rector & Visitors of University of Virginia*, No. 3:19CV00038, 2019 WL 2718496, at *6 (W.D. Va. June 28, 2019) (granting Doe's motion for a TRO and preliminary injunction regarding Doe's due process claim): "Notwithstanding Doe's colorable challenges to the University's jurisdiction and authority to discipline him under the Title IX Policy and Procedures, the University has not afforded him any opportunity to be heard on these threshold issues, and has confirmed that such opportunity will not be provided at the Review Panel Hearing."

9. *Jia v. University of Miami et al*, no. 1:17-cv-20018-DPG, at *9-10 (S.D. Fla. Feb. 12, 2019) (denying the university's motion to dismiss because plaintiff sufficiently established a plausible Title IX claim and a defamation claim): "[Irregularities in the investigation process] include . . . (2) failing to call Plaintiff's available witness . . . [which] could plausibly affect its disciplinary proceedings against Plaintiff."

10. *Doe v. George Washington University*, no. 1:18-cv-00553-RMC, at *14 (D.D.C. Dec. 20, 2018) (denying in part the university's motion to dismiss because Doe plausibly stated a Title IX violation, breach of contract violation, and a D.C. human rights' law violation): "[T]he Appeals Panel only decided that [toxicologist] Dr. Milman's assumptions were incorrect because Ms. Roe was permitted to submit supplemental statements in response to Mr. Doe's appeal . . . this apparent irregularity is glaring."

11. *Doe v. Brown University*, 327 F. Supp. 3d 397, 411 (D.R.I. Aug. 27, 2018) (denying in part the university's motion to dismiss because Doe plausibly stated a Title IX selective enforcement claim, a Title IX deliberately indifference claim, a Title VI racial discrimination claim, a gender discrimination claim under a Rhode Island state statute, and intentional infliction of emotional distress claim): "In addition, during the disciplinary hearing, John [Doe] alleges that Brown [University] did not allow him to assert any counterclaim or defense regarding the allegations, including being prohibited from posing certain questions to Jane [Roe, the accuser]."

12. *Matter of Hall v. Hofstra University*, 101 N.Y.S.3d 699, at *12 (N.Y. Sup. Ct. Apr. 3, 2018) (annulling the sanctions against Hall because the University violated its own policy regarding sexual assault): "[T]he Court finds error in the significant delay [of the proceedings against Hall], one of the results of which was the inability to locate a witness who may likely have been available had the matter been adjudicated promptly."

13. *John Doe v. Pennsylvania State University*, 276 F. Supp. 3d 300, at 309 (M.D. Pa. Aug. 18, 2017) (granting Doe's motion for a temporary restraining order against the university because Doe demonstrated likelihood of success on merits of due process claim): "Penn State's failure to ask the questions submitted by Doe may contribute to a violation of Doe's right to due process as a 'significant and unfair deviation' from its procedures [regarding cross examination]."

14. *Doe v. Amherst College*, no. 3:15-cv-30097-MGM, at *28 (D. Mass. Feb. 28, 2017) (denying the university's motion for judgment on the pleadings because Doe plausibly stated breach of contract, national origin discrimination, and Title IX violations): "[Doe] asserts that a student reading [Amherst College's] Policy and Procedures [on sexual misconduct] would expect the College to conduct its investigation and fact-finding process in such a manner that potentially exculpatory information would be obtained and presented to the Hearing Board in the same manner as inculpatory information, and that this was not done in his case."

15. *Doe v. Brown University*, 210 F. Supp. 3d 310, 340-41 (D.R.I. Sep. 28, 2016) (granting a preliminary injunction against defendant for breach of contract): "Brown must, if requested, allow respondents to give a rebuttal statement at the hearing."

Summary

Five appellate courts and 15 trial courts have affirmed the importance of the parties' equal opportunity to present evidence, finding that unequal opportunities can violate constitutional, statutory, and common law rights.

Recommendation

The revised regulation should retain 106.45(b)(5)(ii).

Memorable Quote

Doe v. Columbia University, 831 F.3d 46, 57 (2d Cir. July 29, 2016) (reversing the district court's MTD because Doe has a plausible Title IX claim): "The alleged fact that [investigator] Sessions-Stackhouse, and the panel and the Dean, chose to accept an unsupported accusatory version over Plaintiff's, and declined even to explore the testimony of Plaintiff's witnesses, if true, gives plausible support to the proposition that they were motivated by bias in discharging their responsibilities to fairly investigate and adjudicate the dispute."

---

27. Materially False Statements Made in Bad Faith

Introduction

Some allegations of sexual misconduct are not made in good faith. Such false allegations endanger the welfare of the accused, harm the credibility of future complainants, and undermine the integrity of the legal process.

Regulatory Language

Section 106.71(b)(2): "Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination

regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith."

Appellate Court Decision

1. *Doe v. University of Denver,* No. 19-1359 (10th Cir. June 15, 2021) (reversing the district court's order granting the University summary judgment because Doe satisfies the requirements of the *McDonnell Douglas* test through a Title IX claim to overcome summary judgment):

    a. "In addition to Jane's conflicting accounts of the alleged assault, the record reveals several examples of Jane making inconsistent statements about other matters to John, her classmates, and the investigators." *Id.* at *21-22.

    b. "In fact, as [the accused] John points out, Jane told an array of inconsistent stories about the alleged incident . . . [a]nd none of [Jane's] witness accounts completely align with the story [Jane] told investigators." *Id.* at *23.

Trial Court Decisions

1. *Doe v. Syracuse University*, 341 F. Supp. 3d 125, 138 (N.D.N.Y. Sep. 16, 2018) (denying the university's motion to dismiss because Doe plausibly stated a Title IX claim under the erroneous outcome theory and a Title IX claim under the selective enforcement theory): "Syracuse 'failed to examine many of the blatant contradictions in [the accuser] Jane Roe's statements;' . . . [this allegation, among others,] meet[s] Plaintiff's minimal burden of casting some articulable doubt on the accuracy of the outcome of the disciplinary proceeding."

2. *Gischel v. Univ. of Cincinnati*, S.D. Ohio No. 1:17-CV-475, 2018 WL 9944998, at *8 (S.D. Ohio Jan. 23, 2018) (denying MTD on Title IX grounds): "Gischel has alleged facts that considered together are sufficient to cast articulable doubt on the outcome of the disciplinary hearing. First, the crux of the charge against Gischel was that [Accuser] was too intoxicated or incapacitated to give consent. Several students at the party where [Accuser] and Gischel met described [Accuser] as highly intoxicated. However, [Accuser] gave investigators erroneous, or at least contradictory, evidence regarding how much alcohol she had consumed. [Accuser] initially told her mother that she remembered nothing after 9:30 p.m., but she told the police that she remembered drinking until 11:30 p.m. She denied drinking enough to black out and suggested that she might have been drugged. Tests confirmed the absence of drugs in her system. Gischel told a friend on the night of the incident and the police afterwards that [Accuser] verbally asked to go to his apartment, and he told the police that [Accuser] verbally consented to intercourse. She left Gischel's apartment alone and made it home."

3. *Doe v. University of Chicago*, 1:16-cv-08298 (N.D. Ill. Sep. 20, 2017) (denying the University's motion to dismiss because Doe plausibly claimed Title IX and intentional infliction of emotional distress violations):

a. "[T]he key allegation that avoids dismissal of the discrimination claim arises from [the University's Dean of Students] Inabinet's meeting with Jane Doe on May 11, 2016. One interpretation of the allegation is that, during the meeting, Inabinet encouraged Jane Doe to file a false complaint—knowing it was false[.]" *Id.* at *11.

b. "The same set of facts that supports a plausible inference of gender bias—that John [Doe] complained of sexual harassment and, shortly after, Inabinet knowingly encouraged Jane to file a false complaint against John—also supports an inference of retaliation." *Id.* at *20.

c. "Inabinet intentionally encouraged the false complaint within days of receiving John Doe's complaint bolsters the inference of retaliation." *Id.* at *21.

4. *Jackson v. Liberty University*, no. 6:17-cv-00041-NKM-RSB, at *28 (W.D. Va. Aug. 3, 2017) (upholding Jackson's Title IX claim because the university did not object to the claim in the university's motion to dismiss and denying the motion to dismiss because Jackson plausibly states defamation claims): "Finally, [accuser and defendant] Browning allegedly cast doubt onto whether she actually believed she was raped by asking Jane Doe before a meeting with Liberty officials: 'Do you think I should say I was raped?'"

5. *Tsuruta v. Augustana University*, No. CIV. 4:16-4107-KES, 2017 WL 11318533, at *2 (D.S.D. June 16, 2017) (denying defendant's MTD because plaintiff plausibly stated a breach of contract claim and a negligence claim): "[T]he investigator failed to consider conflicting evidence and that the complainant had made false accusations of rape in the past."

6. *Doe v. University of Notre Dame*, No. 3:17CV298-PPS/MGG, 2017 WL 7661416, at *10 (N.D. Ind. May 8, 2017) (granting Doe's motion for TRO and preliminary injunction for violations of breach of contract and Title IX): "The utter rejection of evidence shedding light on Jane's behavior, as relevant to her bias and credibility, including evidence that Jane had herself threatened suicide and had falsely claimed that John had violated the No Contact Order, might be thought to contribute to a process that was ultimately arbitrary or capricious in adjudicating John's responsibility for policy violations[.]"

7. *Doe v. Salisbury University*, no. 1:15-cv-00517-JKB, at *21 (D. Md. Aug. 21, 2015) (denying the university's motion to dismiss because Doe plausibly claimed an erroneous outcome Title IX violation and a negligence violation): "[Assistant Vice President of Student Affairs, Dean of Students, and Title IX Coordinator] Randall-Lee and [Student Conduct Administrator] Hill presented "false information" to the [Community] Board [or the adjudicative body]."

Summary

One appellate court and seven trial courts analyzed situations in which complainants likely made materially false statements deliberately. Such manipulation of the Title IX system threatens the rights of the accused and weakens the credibility of future victims of sexual violence.

Recommendation

The revised regulation should retain Section 160.71(b)(2)'s provision.

Memorable Quote

Doe v. University of Chicago, 1:16-cv-08298, at *11 (N.D. Ill. Sep. 20, 2017) (denying the University's motion to dismiss because Doe plausibly claimed Title IX and intentional infliction of emotional distress violations): "[T]he key allegation that avoids dismissal of the discrimination claim arises from [the University's Dean of Students] Inabinet's meeting with Jane Doe on May 11, 2016. One interpretation of the allegation is that, during the meeting, Inabinet encouraged Jane Doe to file a false complaint—knowing it was false[.]"