COMMENT ON PROPOSED TITLE IX REGULATION

44 Judicial Decisions Have Documented Sex Bias Against Male Students in Campus Title IX Adjudications

Submitted by SAVE

This Comment, along with the cited lawsuits, are to be included as part of the Administrative Record

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Because of innate anatomical differences, men and women experience sexual victimization in different ways. For women, sexual victimization usually involves unwelcome vaginal penetration. For men, sexual victimization typically involves being made to sexually penetrate. For these reasons, the CDC National Intimate Partner and Violence Survey (NISVS) revised the wording of its national survey, using the term, "made to penetrate" to describe male sexual victimization.

As a result of this new wording, the 2011 NISVS reported that 1.267 million men responded affirmatively to being asked whether they had been made to sexually penetrate during the previous 12 months, compared to 1.270 million women who reported they were victims of rape.[1] *In other words, men and women experienced nearly identical levels of sexual victimization.*

In response, UCLA researchers Lara Stemple and Ilan Meyer commented on the factors that perpetuate the neglect of male sexual victimization: "reliance on traditional gender stereotypes, outdated and inconsistent definitions, and methodological sampling biases that exclude inmates."[2]

Unfortunately, these "traditional gender stereotypes" have served to shape the broad narrative on campus sexual misconduct and to bias the campus response to alleged incidents. A lawsuit against Michigan State University illustrates the pervasive problem:[3]

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[1] Centers for Disease Control: Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization— National Intimate Partner and Sexual Violence Survey, United States, 2011. https://www.cdc.gov/mmwr/pdf/ss/ss6308.pdf

[2] Lara Stemple, Ilan H. Meyer (2014). The Sexual Victimization of Men in America: New Data Challenge Old Assumptions. American Journal of Public Health. https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2014.301946?journalCode=ajph

[3] *Doe v. Michigan State University.* https://api.knack.com/v1/applications/56f5e6b2c3ffa97c68039523/download/asset/5f5e740deb3cf00017f58485/314opinionordermtdordertofiledoc77.pdf

During an on-campus sexual encounter, the female student took the initiative to remove the man's clothing, perform oral sex on him, and engage in other sexual actions. The woman did not seek the man's permission or consent to engage in the sexual activities.

But inexplicably, the female student later decided to file a Title IX complaint, claiming to be the victim of sexual misconduct. In response, the college conducted a "victim-centered," guilt-presuming investigation. MSU also failed to conduct a live hearing and provided no opportunity for cross-examination. As a result, the man was found to be "responsible" and suspended for a two-year period.

The man filed a lawsuit against the school. Given the numerous and egregious due process violations by the school, Judge Janet Neff ruled in favor of the male student. Earlier this year, Michigan State agreed to a confidential settlement[4] that likely involved a payment in the upper six figures.

Despite this case and dozens of others like it -- which are cited below -- the paradigm of male perpetration and female victimization has continued to drive the policy narrative on campus sexual misconduct. This false narrative has served to discourage reporting by male victims, and to bias the investigation and adjudication of cases. Indeed, the NISVS data are seldom, if ever highlighted in campus Title IX fact sheets. In addition, some institutions have created programs with sex-biased titles such as "Healthy Masculinity," but no corresponding programs about "Healthy Femininity."[5]

Such sex discriminatory practices contravene the very purpose of the Title IX law.

As of March 2022, eight appellate decisions and 36 trial court decisions had affirmed the necessity of avoiding sex discrimination in campus adjudications, relying upon Title IX statutory law to reach their conclusions.[6] Two of the decisions also cited constitutional due process grounds: *Doe v. University of Mississippi* and *Doe v. University of Oregon*.

But with apparent disregard for these judicial decisions, the proposed Title IX regulation seeks to *remove* a number due process protections for accused students, who are usually males:

1. The proposal would allow the same official to serve as both the investigator and decision-maker, what is known as the "single-investigator" approach – see §106.45(b)(2). Conflating these two roles constitutes a conflict of interest and leads to biased investigations. Indeed, 47 judicial decisions specifically highlighted the problem of investigative bias.[7]

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[4] *Doe v. Michigan State University.* https://api.knack.com/v1/applications/56f5e6b2c3ffa97c68039523/download/asset/626713d2a570460021af5d5f/314ordermtdstipdoc115.pdf

[5] https://www.du.edu/news/update-ending-sexual-assault-and-gender-violence

[6] https://www.saveservices.org/wp-content/uploads/2022/04/Analysis-of-Title-IX-Regulation-3.24.2022.pdf

[7] https://www.saveservices.org/2022/02/7-appellate-court-and-42-trial-court-decisions-have-documented-biased-campus-investigations/

2. Under the proposed rule, respondents would be allowed access only to a "description of the relevant evidence," which could be provided either "orally or in writing" – see §106.45(f)(4) & (b)(7)(iii). But 27 judicial decisions called out schools for restricting student's access to relevant evidence.[8]

3. The proposed approach would dispense with the right to cross-examination and hearings – see §106.46(f)(1), (f)(3). Instead, adjudicators would be permitted to ask their questions "during individual meetings with the parties." But 38 judicial decisions highlighted schools' lack of adequate cross-examination procedures, and 24 decisions specifically called out the failure of schools to assure adequate credibility assessment of the parties.[9]

SAVE is concerned that the proposed regulation ignores the many judicial decisions that found sex discrimination against male students in campus Title IX proceedings, and is baffled by the fact that the proposed regulation would actually serve to worsen sex discrimination against male students.

A recent *Wall Street Journal* editorial decries, "By proposing to jettison fair proceedings, the Education Department is setting colleges and universities on a collision course with the courts."[10]

SAVE recommends that the 2020 Title IX regulation, which reflects this extensive body of case law, be retained and vigorously enforced by the Department of Education.

[8] https://www.saveservices.org/wp-content/uploads/2022/04/Analysis-of-Title-IX-Regulation-3.24.2022.pdf
[9] https://www.saveservices.org/wp-content/uploads/2022/04/Analysis-of-Title-IX-Regulation-3.24.2022.pdf
[10] https://www.wsj.com/articles/biden-renews-obama-attack-campus-due-process-title-ix-sexual-assault-harrasment-civil-rights-11656020306

APPELLATE AND TRIAL COURT DECISIONS THAT FOUND SEX DISCRIMINATION AGAINST MALE STUDENTS

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-fiancéwhen 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 1070.23

b. “OSU has affirmatively stated that it promises to continue to aggressively discipline malestudents 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 24 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 25 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."