DUE PROCESS, TITLE IX, THE COURTS, & OCR

Sweet Briar College
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YOUR FACULTY

TANYKA M. BARBER, J.D.

Associate

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OCR-COMPLIANT PROCEDURES

A detailed review of the Proposed Regulations

LAWS, COURTS, AND REGULATIONS

- **Laws** passed by Congress (e.g.: Title IX) – Enforceable by Courts and OCR
  - Federal Regulations – **Force of law**; Enforceable by Courts and OCR
    - Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2001 Guidance)
    - Sub-Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2011 DCL)
- Federal Caselaw – **Force of law** based on jurisdiction
  - Supreme Court – binding on entire country
  - Circuit Courts of Appeal – binding on Circuit
  - District Court – binding on District
- State caselaw – **Force of law**; binding only in that state based on court jurisdiction

STAY ABOVE THE FLOOR

- Law, Caselaw and Federal Regulations set the floor
  - OCR Guidance typically elevates the floor
  - States can pass laws that exceed federal requirements (e.g.: NY's "Enough is Enough" law)
- Regressing to the floor = doing the bare minimum
  - Will continue the cycle of inequity and unfairness
- Civil Rights issues demand more than bare minimum
- Industry standards already exceed the floor
  - Regression to the floor increases risk of lawsuit and negligence-based liability

A BRIEF HISTORY OF TITLE IX 1972-PRESENT

- Key Regulatory and Sub-Regulatory Guidance from OCR
  - 1997 Guidance → 2001 Revised Sexual Harassment Guidance.
  - 2011 Dear Colleague Letter (The "DCL").*
  - Questions and Answers on Title IX and Sexual Violence (April 2014).*
  - 2015 Dear Colleague Letter, Dear Coordinator Letter & Resource Guide.
  - 2016 Guidance on Transgender Students.*
  - 2017 Interim Guide: Q&A on Campus Sexual Violence.
- "Not Alone" – White House Task Force to Protect Students From Sexual Assault (April 2014) (disbanded).
- Also: The Clery Act, VAWA 2013: Section 304.
- *Since rescinded

OVERVIEW OF OCR SEPT. 2017 ACTION

- Sept. 22, 2017 Dear Colleague Letter
  - Withdrew the April 4, 2011 Dear Colleague Letter
  - Withdrew Q&A on Title IX and Sexual Violence (April 29, 2014)
  - Rulemaking: Called for Notice and Comment on "Title IX responsibilities arising from complaints of sexual misconduct"
  - Provided "Interim Guide" on Campus Sexual Misconduct

- OCR's stated reasons for withdrawing 2011 DCL/2014 Q&A
  - Released without providing for notice and comment (APA)
  - "Created a system that lacked basic elements of due process"
  - "Created a system that…failed to ensure fundamental fairness"

OVERVIEW OF PROPOSED REGULATIONS

- November 29, 2018: OCR published proposed amendments to Title IX regulations:
  - Provided 60 days for public comment – open until January 28th
  - OCR will then review comments and finalize the regulations
  - OCR has to respond materially to comments
  - Will amend the Code of Federal Regulations
  - **Will have the force of law once adopted**
  - Proposed amendments are significant, legalistic, and very due process-heavy
  - Will likely go into effect 30 days after final regulations published in Federal Register

ULTRA VIRES ACTION BY OCR?

- OCR can only enforce within the statutory ambit of Title IX
- Any action exceeding this authority is called *ultra vires*
- Many observers concerned that due process elements in the proposed regulations have no legal basis in Title IX
  - Sex-equity based law – not a due process-based law
  - What is source of OCR authority to require a formal hearing, cross examination by advisors, etc.?
  - Shouldn't due process be up to Congress and the courts?
  - Many due process elements are a best practice, but likely will be up to courts to decide if properly within OCR's regulatory purview
  - Obama's OCR also arguably exceeded Title IX's scope, but only in sub-regulatory guidance, not in regulations.

OBAMA OCR: (OVER?) ZEALOUS ENFORCEMENT AND EQUITY IMBALANCE

- Dramatically ramped up enforcement; became feared
- Provided extensive sub-regulatory guidance
- Made investigations and outcomes public
- Had a pro-reporting party imbalance to their approach
- Field shifted from an imbalance toward the responding party to an imbalance toward the reporting party
- Resulted in widespread abrogation of due process rights for responding parties

DUE PROCESS CASE LAW

- The pro-reporting party imbalance prompted hundreds of lawsuits by responding parties
  - Wave of John Doe cases with unfavorable findings toward schools
  - Rise in lawsuits alleging selective enforcement, negligence, deliberate indifference, etc.
- Courts began requiring heightened levels of due process
- Sixth Circuit leads this revolt
- Trump-era OCR shifting imbalance back toward responding parties, using courts and due process as their rationale
- Balance will not result from proposed new regulations

DELIBERATE INDIFFERENCE STANDARD

- In *Gebser* (1998) and *Davis* (1999), the Supreme Court held that a funding recipient is liable under Title IX for deliberate indifference **only** if:
  - The alleged incident occurred where the funding recipient controlled both the harasser and the context of the harassment; AND
  - Where the funding recipient received:
    - Actual Notice
    - To a person with the authority to take corrective action
    - Failed to respond in a manner that was clearly unreasonable in light of known circumstances
- OCR has historically used a broader, less stringent standard

CIVIL LAWSUITS v. OCR ENFORCEMENT & TITLE IX (PRE-2019)

Lawsuit

- File in federal court
- Monetary damages, injunction
- Requires:
  - Actual notice
  - Employee with authority to take action
  - Deliberate Indifference

Administrative Action

- Initiated by OCR
- Voluntary compliance or findings
- Requires:
  - Actual OR constructive notice ("knew or should have known").
  - Investigate
  - End harassment
  - Remedy impact
  - Prevent recurrence

"NOT DELIBERATELY INDIFFERENT"

- Safe Harbors in the Proposed 2019 Regulations:
  - If the school follows procedures (including implementing any appropriate remedy as required), then not deliberately indifferent.
  - If reports by multiple complainants of conduct by the same respondent, Title IX Coordinator must file a formal complaint. If the school follows procedures (including implementing any appropriate remedy as required), not deliberately indifferent.
  - For IHEs, if no formal complaint and school offers and implements supportive measures designed to effectively restore or preserve the reporting party's access, not deliberately indifferent. Must inform reporting party of right to file formal complaint later.
  - No deliberate indifference merely because OCR would come to different determination based on the evidence. Biases process?

UNIFYING STANDARDS?

- Proposed regulations would mostly unify the court and administrative enforcement standards
  - Would raise administrative enforcement standard to match legal standard of deliberate indifference
  - Would significantly limit OCR's authority (and efficacy?)
  - Will likely lead to a wave of litigation by all parties
- In some ways, OCR going beyond court standard. *Davis* notice-based standard vs. formal complaint standard

NOTICE, JURISDICTION, & DELIBERATE INDIFFERENCE

NOTICE TO THE INSTITUTION

- Proposed regulations would not require a Title IX investigation unless the institution receives actual notice through a "formal complaint":
  - Actual notice defined as:
    - The reporting party filing a formal, written, signed complaint with TIX Coordinator; or
    - The TIXC may file a formal written complaint on behalf of reporting party
      - Conflict of Interest? Impartiality concern?
  - Eliminates OCR's constructive notice standard
  - What to do if institution receives notice in some other way?
    - Industry standards

RESPONSIBLE EMPLOYEE SHIFTING?

- Currently, a responsible employee includes any employee who:
  - **Has the authority to take action to redress the harassment;** or
  - Has the duty to report harassment or other types of misconduct to appropriate officials; or
  - Someone a student could reasonably believe has this authority or responsibility;

RESPONSIBLE EMPLOYEES?

- Proposed regulations shift "actual notice" to:
  - Anyone who has the authority to take action to redress the harassment
  - All pre-K-12 teachers when conduct is student-on-student
- This is ONLY the standard for when OCR would deem a school to be on notice; it is the floor.
- ATIXA has not changed its recommendation to require all non-confidential employees to report harassment or discrimination
- Continue to train employees on obligation to report

JURISDICTION

- Jurisdiction
  - *Davis* standard – control over the harasser and the context of the harassment
  - "occurs within its education program or activity"
- Geography should not be conflated with the Clery Act – education programs or activities can be off-campus, online
- Proposed regulations specify "harassment…against a person in the United States"
  - Unclear effect on study abroad programs or school-sponsored international trips – "nothing in the proposed regulations would prevent…"
- Open question of student/employee harassment of non-student/employee

JURISDICTION

- Current requirement to address on-campus effects of off-campus misconduct
  - Even if conduct took place outside education program or activity, schools responsible for addressing effects that manifest in the program/activity
  - Students and/or employee conduct outside program, IPV
- Leaked draft of regulations prior to publication indicated schools "are not responsible" for exclusively off-campus conduct but could be responsible for on-going on-campus /in program effects
- Published proposal eliminated this comment, presume *Davis* standard still applies – "nothing in the proposed regulations would prevent…"

DEFINITIONS

DEFINITIONS: SEXUAL HARASSMENT

- Current OCR Definition of Sexual Harassment is “unwelcome conduct of a sexual nature”
  - Includes quid pro quo “requests for sexual favors”
  - When sexual harassment constitutes sex discrimination by causing a hostile environment (discriminatory effect), prohibited by Title IX
- Proposed regulations
  - Conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (QpQ)
  - Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity (HE)
  - Sexual assault, as defined in 34 CFR 668.46(a)
- No mention of retaliatory harassment in proposed regs

DEFINITIONS: SEXUAL HARASSMENT

- ATIXA model definitions
  - *Quid pro quo* sexual harassment

    Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature by a person having power or authority over another when submission to such sexual conduct is made either explicitly or implicitly a term or condition of rating, evaluating, or providing a benefit to an individual's educational or employment development or performance.
  - *Hostile environment* sexual harassment

    Unwelcome sexual, sex-based and/or gender-based verbal, written, online and/or physical conduct that is severe, or persistent or pervasive, and objectively offensive, such that it unreasonably interferes with, denies, or limits someone's ability to participate in or benefit from the institution's education or employment programs.

DEFINITIONS: SEXUAL HARASSMENT

- ATIXA model definitions (cont.)
  - *Retaliatory* sexual harassment

    When adverse action required by the definition of retaliation takes the form of harassment, the conduct can be both sexual harassment and retaliation. It is also possible that retaliatory actions can take the form of hostile environment harassment.
- Proposed regulations written around a recipient's obligation to respond to sexual harassment
  - Conflate "sexual harassment" with "hostile environment"
- Neglect element of substantial harm within QpQ harassment
- "Unwelcome conduct" lower standard than "hostile environment"

DEFINITIONS: SEXUAL HARASSMENT

- Confusion regarding "hostile environment" remains
  - Proposed regulations adopt problematic *Davis* definition:
    - Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive…
  - Vulnerable to interpretation that conduct must be pervasive **and** severe
  - Neglects the difference between persistent and pervasive
- Industry standard aligns with Title VII caselaw & provides clearer standard
  - Unwelcome *sexual* conduct, *or conduct* on the basis of sex, that is so severe *or* pervasive (*or* persistent) **and** objectively offensive…

DEFINITIONS: NOTICE

- "Notice" is the benchmark indicating when an institution is required to stop, prevent, and remedy
- Current OCR definition of notice – "knew or should reasonably have known"
  - Incorporates both actual and constructive notice
- Proposed regulations restrict to actual notice exclusively
  - *Actual knowledge* means notice to Title IX Coordinator or any official with authority to institute corrective measures
  - *Respondeat superior* or constructive notice insufficient
  - PK-12 teachers are "officials" – post-secondary faculty are not
  - Mere ability or obligation to report does not qualify as "official"

DUE PROCESS

DUE PROCESS OVERVIEW

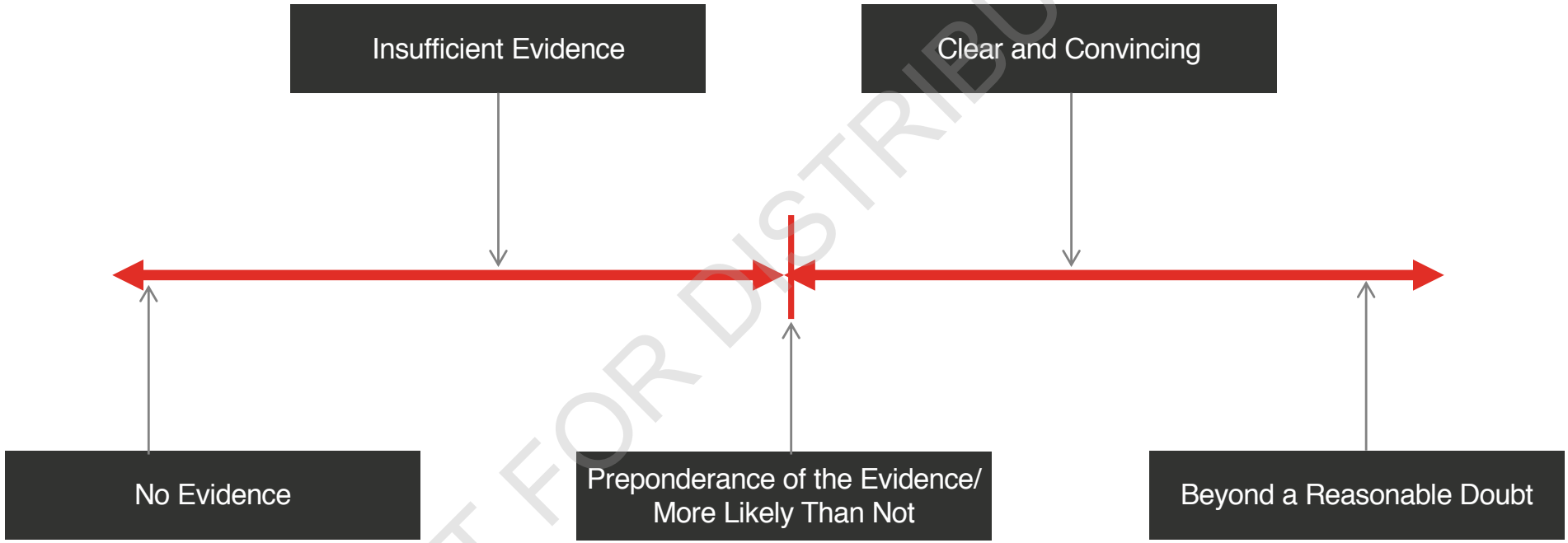
- Proposed regulations place heavy emphasis on due process protections for the responding party
- New standard of proof mandates
- Notice at various investigation stages
- Collection and production of evidence for review
- Mandate for determination and sanction process
- Live hearings with cross-examination
- Schools provide advisor; must allow advisor questioning of parties/witnesses

STANDARD OF PROOF

- Current OCR standard – preponderance of the evidence is standard civil court will use to evaluate school's response
- Proposed regulations allow preponderance only if same for other conduct code violations, otherwise must use clear & convincing
- Effectively mandates clear & convincing for schools with higher standards for other proceedings (i.e. AAUP faculty hearings)
- May create incongruence between school process and court scrutiny (where preponderance will still be the standard)
- ATIXA position – preponderance only equitable standard

UNDERSTANDING EVIDENCE THRESHOLDS

EVIDENTIARY STANDARDS



PROMPT

- Proposed regulations specify “prompt timeframes” written into grievance procedures
- Temporary delays only allowable for “good cause” and with written notice of the delay to parties
- OCR does not appear to contemplate reasonable delays at the earliest points of an investigation
- Responding party may not yet know of investigation or allegations – written notice of delay may be first indication

WRITTEN, DETAILED NOTICE

- Proposed regulations require several written, detailed notices to the parties
  - Any reasonable delay for good cause
  - Upon receipt of a formal complaint
    - Sufficient details – identity of parties, alleged violations, date, location
    - Sufficient time to prepare a response
  - Informal process requirements, if applicable
  - All hearings, interviews, and meetings requiring attendance with sufficient time to prepare
  - Upon determination of responsibility, including sanctions
- Notice requirements may affect industry standard investigative practices
- *Doe v. Timothy P. White, et. al.,* (2018)

INFORMAL RESOLUTION OPTIONS

- Proposed regulations allow informal resolution at any time prior to a final determination, at discretion of TIXC
  - Requires detailed notice to the parties
  - Allegations
  - Requirements of the process
  - Circumstances which would preclude formal resolution
  - Consequences of participation
  - Obtain voluntary, written consent
- Does not preclude certain offenses from informal resolution
- May restrict restorative practices after a determination

SUPPORTIVE MEASURES

- Non-disciplinary, non-punitive individualized services
- Must not unreasonably burden other parties
- Proposed regulations address mutual restrictions, neglect unilateral or individualized restrictions
- Appears to anticipate, but also prohibit, that one party will sometimes be restricted more than the other
- May chill reporting if automatic mutual restrictions limit access to education program

BURDEN OF PROOF ON FUNDING RECIPIENT TO GATHER EVIDENCE

- Burden of proof and burden of gathering evidence on the school, not the parties
- "Sufficient to reach a determination" = appropriately thorough?
- Unclear if all relevant evidence must be collected
- Parties may be able to request certain evidence be obtained
- Evidence collected by law enforcement is admissible
- Who determines what evidence is relevant and sufficient?

"PRESUMPTION OF INNOCENCE"

- Proposed regulations require published grievance procedures include a presumption of innocence for the responding party
- No change from effective procedures – determination has always been based on evidence
- Presumption is a legal framework, may create inequity
- Unclear how presumption will work procedurally
- Should there be an equitable presumption that the reporting party is telling the truth?

CONFLICT OF INTEREST, OBJECTIVITY, AND BIAS

- Existing mandate for impartial resolutions with fair procedures
- Proposed regulations prohibit conflicts-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or an individual party
- Training mandates apply to PK-12 as well as higher ed
- Unclear how prohibition of bias against reporting/responding parties establishes equity under Title IX or falls within OCR's statutory authority
- Due process mandate does not distinguish public v. private

INVESTIGATION AND RESOLUTION MODELS

- Treatment of reporting/responding parties may constitute discrimination
- The end of the single investigator model – live hearing required for all postsecondary resolution proceedings
- Must allow advisor to be present at all meetings, interviews, hearings
- If no advisor, school must provide one
- Statutory authority exceeded with procedural mandates?

PROVIDING PARTIES WITH COPIES OF ALL EVIDENCE

- All relevant evidence considered – inculpatory and exculpatory
- No restriction on discussing case or gathering evidence
- Equal opportunity to inspect all evidence, including evidence not used to support determination
- May chill reporting if irrelevant information must be provided to either party
- Unclear at what point in process evidence must be provided
- No limits on types/amount of evidence offered
- Creates possible equitable limits on evidence for both parties

PROVIDING COPIES OF INVESTIGATION REPORT FOR REVIEW AND COMMENT

- Proposed regulations mandate creation of an investigation report
- Must fairly summarize all relevant evidence
- Provided to parties at least 10 days before hearing or other determination
- Parties may review and submit written responses to report
- Unclear if analysis (including credibility) and findings of fact should be included
- Unclear if a full report or a summary is required

LIVE HEARING

- Proposed regulations mandate live hearing for postsecondary institutions, optional for PK-12
- Parties must attend hearing, otherwise all testimony submitted by absent party must be excluded
- Hearing administrator may not be Title IX Coordinator or the investigator
- Must allow live cross-examination to be conducted exclusively by each party's advisor (separate rooms still allowed)
- Unclear how irrelevant questions will be screened, but rationale for excluding questions required (verbal or written?)

ADVISORS

- Advisor can be anyone – no restrictions in proposed regulations
- If a party does not have an advisor to conduct cross-examination, the school must provide one
- Advisor must be "aligned with the party"
  - "Defense" and "prosecution" advisors?
- No prior training required, no mandate for school to train
- ED presumes no financial impact because all parties retain counsel; not at institutional expense
- Mandate for higher education only – PK-12 may still conduct indirect cross-examination through hearing administrator

APPEALS

- If schools offer appeals (not required), must be made available equitably
- All parties receive notification of any appeal
- Opportunity for all parties to support or oppose outcome
- Written decision with rationale delivered simultaneously to all parties
- Appeal decision-maker cannot have had any other role in the investigation or resolution process
- “Reasonably prompt” timeframe for producing appeal decision

IMPACT ON EMPLOYEES

- Proposed regulations often refer exclusively to "students," but employees are also affected
- Tenured faculty cross-examining students at a live hearing
- Faculty found responsible – sanctions affirmed by committee?
- Union employees – diminished right to an advisor because of union representation?
- Extensive due process protections for at-will employees accused of misconduct
- Potential inequity in employee processes for Title VII-based sexual harassment
  - More due process for sex discrimination than race discrimination

OPERATING OUTSIDE THE TIX FRAMEWORK

- *Ultra vires?*
  - Require signed formal complaint rather than actual notice
  - Prescribed standard of evidence for Title IX procedures
  - Mandated standard of proof for other conduct procedures
  - Extension of Clery/VAWA definitions and requirements to PK-12
  - Require live hearings for Title VII sexual harassment procedures
  - Individualized safety and risk analysis prior to interim suspension on an "emergency basis"
  - Treatment of responding party may constitute discrimination
  - Regulation of due process elements in internal procedures – blanket application to public and private institutions
  - Notice requirement upon receipt of formal complaint
  - Mandatory live hearing at public and private higher education institutions
  - Recordkeeping requirements

KEY CASE LAW

Gender Bias

Erroneous Outcome

Disparate Impact or Treatement

JOHN DOE v. PENN STATE UNIVERSITY
U.S. DIST. CT., M.D. PA. (JAN. 8, 2018)

- Incident involved a male and a female student and an allegation of non-consensual sexual penetration in Sept. 2016.
- Investigation began in Sept. 2016; Jane Roe never provided a written statement.
- Investigator allowed Doe to view a draft copy of the report in her office in his **sixth** meeting, but he could not take the report with him. This was also the first time he had seen the incident reports from Res. Life and Univ. PD. (the documents that represented the formal complaint).
- In May 2017, Administrative Hearing officer found him responsible and recommended suspension until the end of 2017.

JOHN DOE v. PENN STATE UNIVERSITY
U.S. DIST. CT., M.D. PA. (JAN. 8, 2018)

- Hearing held in June 2017.
  - Hearing Panel adhered strictly (and to its detriment) to the information contained in the investigator's flawed report (which excluded key evidence) and did not allow Doe to submit key evidence or have his questions asked.
- Doe was not allowed to see Roe while she testified via webcam transmission; PSU policy required that Doe be allowed to see her.
- Found responsible.
  - Suspended through the end of 2017; required to undergo counseling; lost on-campus living privileges; and panel recommended his removal from the accelerated pre-med program (a significant sanction).

JOHN DOE v. PENN STATE UNIVERSITY
U.S. DIST. CT., M.D. PA. (JAN. 8, 2018)

- Doe sued PSU, the TIX Coordinator, the Investigator, Administrative Hearing officer, Student Conduct administrator, and obtained a TRO against PSU prohibiting implementation of the sanctions.
- Among his allegations, Doe alleged violations of Due Process, Title IX, and Section 1983.
- PSU filed a Motion to Dismiss, which was denied in part and granted in part.
- Section 1983 claim: MTD denied in relation to the TIXC, Hearing Officer, and Investigator --> allowed to proceed against them in their individual capacities.
  - E.g.: Doe alleged lack of notice of the charges, lack of rationale in the "cursory and perfunctory decision letter".

JOHN DOE v. PENN STATE UNIVERSITY
U.S. DIST. CT., M.D. PA. (JAN. 8, 2018)

- Title IX claim of Erroneous Outcome
  - Alleged PSU's process was unfair and biased toward the accuser – Court dismissed this argument, stating this may be a pro-victim bias, but not a sex or gender bias.
  - Alleged the DCL and external social and political pressure, including OCR investigation of PSU → Court said this does not infer gender bias, rather a pro-victim bias.
  - Alleged all students suspended or expelled for sexual misconduct were male → Court said this allegation was enough to survive the Motion to Dismiss.

JOHN DOE v. MIAMI UNIVERSITY, ET AL.

U. S. Ct. of Appeals, 6th Circuit (Feb. 9, 2018)

- John Doe alleged that he was found responsible for sexual misconduct because he was male.
  - Erroneous Outcome claim. Requires plaintiff to show:
    - 1) facts sufficient to cast some doubt on the accuracy of the discipline proceeding, and
    - 2) a causal connection between the flawed outcome and gender bias.
- Both Doe and the reporting party were highly intoxicated. Miami U's policy reads, "an individual cannot consent who is substantially impaired by any drug or intoxicant…"
  - BUT only Doe was charged, despite evidence he may have been more intoxicated.

JOHN DOE v. MIAMI UNIVERSITY, ET AL.

U. S. Ct. of Appeals, 6th Circuit (Feb. 9, 2018)

- Miami U.'s process was very quick and Doe had 48 hrs. to provide evidence and witnesses.
- Doe sought and obtained a medical leave due to stress of the process.
- Prior to hearing, Doe was not provided the names of witnesses, nor given access to the investigation report.
- Investigator that provided him the charges was a member of the hearing board and allegedly dominated the hearing and stated to him, "I bet you do this (i.e. sexually assault women) all the time" during the hearing.
- Doe was found responsible and suspended for 3 terms.

JOHN DOE v. MIAMI UNIVERSITY, ET AL.

U. S. Ct. of Appeals, 6th Circuit (Feb. 9, 2018)

- Court held in Doe's favor:
  - Transcript notation and Liberty Interest → heightened impact necessitates heightened due process.
  - Conflict of Interest: Administrator served conflicting roles. (investigator, hearing panel member, sanctioning agent)
  - Lack of Impartiality: Administrator had pre-determined Doe's guilt as demonstrated by her conduct in the hearing.
  - Withholding report reflected bias.

JANE ROE v. UNIVERSITY OF CINCINNATI
U.S. DIST. CT., S.D. OHIO (AUG. 21, 2018)

- Facts
  - UC students, Jane Roe and John Doe attended a party where they consumed alcohol.
  - Roe walked Doe home from the party because she was worried about his level of intoxication.
  - Doe's roommates were also concerned, asked Roe to leave, but she said she was dizzy and did not leave.
    - Roe allegedly told Doe's roommates, "I promise you, nothing is going to happen. I'm just gonna give him his water, look him over, that's it."
  - After arriving at home, Doe vomited.

JANE ROE v. UNIVERSITY OF CINCINNATI
U.S. DIST. CT., S.D. OHIO (AUG. 21, 2018)

- Roe allegedly locked the door, took off her clothes, "made out" with Doe, and was digitally penetrated by him. In the morning, Doe woke to find Roe in his room and blood on his hands and sheets.
- Doe was very upset and asked roommate to get Roe to leave.
- He reported the incident to military personnel that day (10/1/17).
- On 10/2/17, he filed a complaint with UC's Title IX office; an investigation ensued.
- UC held an in-person hearing, after which the panel determined Doe was incapacitated and Roe should have known. She was suspended until Doe graduated.

JANE ROE v. UNIVERSITY OF CINCINNATI
U.S. DIST. CT., S.D. OHIO (AUG. 21, 2018)

- Roe filed an injunction against UC to keep the finding and sanction from going into effect.
  - § 1983 claim, citing equal protection and due process violations

- Equal Protection
  - Roe claimed inequity because UC did not investigate her level of intoxication – Ct rejected this argument.
    - However, throughout UC's process, Roe claimed the sex was consensual, that she was able to consent, and fully recalled the incident.
  - Roe also claimed UC was motivated to find women in violation of Title IX because of extensive TIX litigation against UC and public pressure.
    - She provided no statistics or evidence, so the court rejected this argument.

JANE ROE v. UNIVERSITY OF CINCINNATI
U.S. DIST. CT., S.D. OHIO (AUG. 21, 2018)

- Due Process claim
  - Roe felt she was not allowed sufficient opportunities for cross-examination
    - Court refused to adopt the 6th Circuit standard, stating that schools should be able to conduct hearings with greater flexibility
    - Not solely a credibility-based determination
      - There was a contemporaneous text message from Roe to a friend saying how intoxicated Doe was at the time of the incident.

NOTE: This case concluded a few weeks before the Baum decision, which may or may not have impacted the court's decision.

SNYDER-HILL, ET AL. v. THE OHIO STATE UNIVERSITY
U.S. DIST CT., S.D. OHIO (COMPLAINT FILED JULY 2018)

- In July 2018, 10 former OSU students – Steve Snyder-Hill and nine other men – filed a lawsuit against OSU.
- The men alleged extensive sexual misconduct and assault by former OSU athletic team doctor, Student Health Services physician, and Assistant Professor, Dr. Richard Strauss:
  - Inappropriately touched and fondled their genitals during examinations.
  - Digitally penetrated their rectums, touched their bodies in other inappropriate ways, moaned during examinations
  - Made sexualized comments and asked inappropriate sexual questions.
  - Found reasons to examine their genitals even when the scope of their visit did not require such examination (example: an appointment for an ankle injury).
  - Plaintiffs also alleged Dr. Strauss completed rectal examinations when not medically necessary.

SNYDER-HILL, ET AL. v. THE OHIO STATE UNIVERSITY
U.S. DIST CT., S.D. OHIO (COMPLAINT FILED JULY 2018)

- Administrators, coaches, and Athletic Directors are alleged to have known about the abuse but failed to take corrective action leading to more victimization
  - Allegations span from 1978-1998.
- Since its initial filing, the number of plaintiffs has grown to thirty-nine (39) former OSU students
- Dr. Strauss committed suicide in 2005.
- As evidence of an ongoing culture of abuse, Plaintiffs referenced:
  - OSU's decision to close its sexual assault prevention and response unit.
  - How OSU instructed students to see Dr. Strauss for exams after they had reported complaints of misconduct by Dr. Strauss.
  - OSU's pattern of permitting other sexual predators within the campus community.

SNYDER-HILL, ET AL. v. THE OHIO STATE UNIVERSITY
U.S. DIST CT., S.D. OHIO (COMPLAINT FILED JULY 2018)

- Many plaintiffs were unable to identify what happened to them as sexual assault until reports came out in 2018.
- The plaintiffs allege there could be thousands of victims given Dr. Strauss' 20 year tenure at OSU, as well as his prominent roles as an OSU Student Health Services physician and athletic teams doctor.
- Plaintiffs alleged that coaches and other professional staff members knew that Dr. Strauss was committing the abuse and that students regularly called him nicknames such as Dr. Balls, Dr. Nuts, Dr. Jelly Paws, and Dr. Cough.

DUE PROCESS

WHAT IS DUE PROCESS?

- Two overarching forms of due process:
  - Due Process in Procedure:
    - Consistent, thorough, and procedurally sound handling of allegations.
    - Institution substantially complied with its written policies and procedures.
    - Policies and procedures afford sufficient Due Process rights and protections.
  - Due Process in Decision:
    - Decision reached on the basis of the evidence presented.
    - Decision on finding and sanction appropriately impartial and fair.

JOHN DOE v. BRANDEIS UNIVERSITY
U.S. DIST. CT., MASS. (MARCH 31, 2016)

- **Facts**
  - John Doe and J.C. met at new student orientation in Fall 2011.
  - They became close friends and began a 21-month "intimate, sexually active, and…exclusive dating relationship"
  - After their relationship ended, they maintained a friendship for four months, but their friendship deteriorated.
  - Both John and J.C. were attracted to the same person, who rejected J.C.'s friend request.
  - The next day (6 months after relationship ended), J.C. filed a two sentence complaint: "Starting in the month of September 2011, the Alleged Violator of Policy [John] had numerous inappropriate, nonconsensual sexual interactions with me."

JOHN DOE v. BRANDEIS UNIVERSITY
U.S. DIST. CT., MASS. (MARCH 31, 2016)

- **Facts**
  - Upon receipt of this complaint, and without any additional information, Brandeis' Dean of Students immediately removed John from the residence halls, classes, his campus job and his student leadership position.
  - Two days later, John was charged with six potential violations:
    - Sexual misconduct
    - Taking sexual advantage of incapacitation
    - Lack of consent to sexual activity
    - Sexual harassment
    - Causing physical harm to another
    - Invasion of privacy

JOHN DOE v. BRANDEIS UNIVERSITY
U.S. DIST. CT., MASS. (MARCH 31, 2016)

- Brandeis had recently changed its procedures for sexual misconduct allegations that relied on the investigation and findings of a "Special Examiner" and:
  - Did not provide for a hearing
  - Did not allow the accused to know the details of the charges
  - Did not allow the accused to see the evidence prior to a decision
  - Did not allow the accused to see the Special Examiner's report until the process had concluded (including appeal)
  - Did not allow for cross-examination of the parties or witnesses (even through an intermediary)

JOHN DOE v. BRANDEIS UNIVERSITY
U.S. DIST. CT., MASS. (MARCH 31, 2016)

- Appeals
  - "There was no right of appeal on the grounds
    - That there was insufficient evidence to sustain the findings
    - That the Special Examiner was mistaken as to any factual issue
    - That the Special Examiner acted arbitrarily or capriciously;
    - Moreover, the accused was expected to prepare his appeal without access to the Report on which the finding of responsibility was based."

JOHN DOE v. BRANDEIS UNIVERSITY
U.S. DIST. CT., MASS. (MARCH 31, 2016)

- Doe was not provided with the Special Examiner's report
- Had a summary read to him after the Special Examiner determined a finding
  - The Special Examiner's finding was technically a "recommendation" to an administrator or panel, but in practice the recommendation was always adopted.
- John Doe was found responsible by the Dean of Students and a panel of three met privately to determine sanction.
- They sanctioned John with a disciplinary warning, a requirement to undergo sensitivity training, and a permanent notation on his transcript.
- An appellate group of three faculty denied John Doe's appeal.

JOHN DOE v. BRANDEIS UNIVERSITY
U.S. DIST. CT., MASS. (MARCH 31, 2016)

- The Special examined 12 incidents and found John Doe responsible for four of them:
  - Touching J.C.'s groin while they watched a movie (they had sex for the first time the next night)
  - Looking at J.C.'s privates when they showered together.
  - Kissing J.C. to wake him up (something he did over the course of their relationship; S.E. rigidly determined J.C. was incapacitated and could not consent)
  - An incident where John allegedly attempted to perform oral sex on J.C. when he didn't want it.
- The S.E. relied heavily on the fact that John's answers to questions were inconsistent; **however, the questions were rarely specific enough to allow John to even know what he was supposed to address in his response.**

JOHN DOE v. BRANDEIS UNIVERSITY
U.S. DIST. CT., MASS. (MARCH 31, 2016)

- John Doe sued Brandeis citing eight causes of action, of which four survived Brandeis' motion to dismiss:
  - Breach of contract – Motion denied
  - Breach of the implied covenant of good faith and fair dealing – Motion denied
  - Estoppel and reliance – Motion granted
  - Negligence – Motion granted in-part (negligent supervision claim survives)
  - Defamation – Motion granted
  - Invasion of privacy – Motion granted
  - Intentional infliction of emotional distress – Motion granted
  - Negligent infliction of emotional distress – Motion denied
- *Note: While John Doe did not make a Title IX claim, this case is significant because of the due process and procedural elements involved in sexual misconduct cases.*

JOHN DOE v. BRANDEIS UNIVERSITY
U.S. DIST. CT., MASS. (MARCH 31, 2016)

- The court wrote a blistering and chastising decision, ultimately concluding that the composite picture painted by the numerous failures to provide a fundamentally fair process led to a denial of Brandeis's motion to dismiss.
- The court listed distinct issues of procedural fairness:
  - No right to counsel
  - No right to confront accuser
  - No right to cross-examine witnesses
  - No right to examine evidence or witness statements
  - Impairment of the right to call witnesses and present evidence
  - No access to Special Examiner's report
  - No separation of investigatory, prosecution and adjudication functions
  - No right to effective appeal
  - Burden of proof

JOHN DOE v. BRANDEIS UNIVERSITY
U.S. DIST. CT., MASS. (MARCH 31, 2016)

- **Key Takeaways**
  - Provide a responding party with detailed allegations and allow them to respond to each of the allegations prior to rendering a finding.
  - **Stop hiding the ball** – let the parties review reports
  - Ensure appellate procedures allow a party to appeal on the basis that the decision "was not supported by the evidence, unfair, unwise or simply wrong."
  - It is not always enough to follow your procedures if those procedures are deficient in providing basic due process or fundamental fairness protections.
    - "Brandeis appears to have substantially impaired, if not eliminated an accused student's rights to a fair and impartial process." (p.12).

DOE v. UNIVERSITY OF CINCINNATI
U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)

- **Facts**
  - John Doe was a graduate student at UC
  - Aug-Sept 2015: John Doe met Jane Roe on Tinder and after a few weeks, met in person, then went to his apartment, where they engaged in sexual intercourse
  - Three weeks later, Roe reported to UC's Title IX office that Doe had sexually assaulted her.
  - UC's Title IX office investigated the allegation (took nearly 5 months), then referred the matter to a faculty/student hearing board
  - Evidence is disclosed to the accused in advance of the hearing

DOE v. UNIVERSITY OF CINCINNATI
U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)

- **Facts**
  - Hearing provided a "circumscribed form of cross-examination" --> provide written questions to the panel who determine relevance and whether the question will be asked.
  - Hearing held on June 27, 2016, but Roe did not attend
  - Doe did not know Roe would not attend
  - UC altered its procedures in her absence and Doe was unable to ask her any questions
  - Chair read Roe's closing statement into evidence

DOE v. UNIVERSITY OF CINCINNATI
U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)

- **Facts**
  - Hearing board deliberated, found Doe responsible, and recommended a 2-year suspension, which UC's Asst. Dean accepted.
  - Appellate administrator recommended that UC lessen the suspension to 1 yr.
  - UC's Dean of Student accepted this recommendation
  - Doe informed of final decision in Sept. 2016, with sanction to start at the end of Fall 2016.

DOE v. UNIVERSITY OF CINCINNATI
U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)

- Doe sued UC for violation of Title IX and violation of due process and moved for preliminary relief enjoining UC from enforcing the decision
  - Doe argued UC's action was unconstitutional, as he was provided no opportunity to cross-examine Roe, per UC procedures.
  - Dist. Ct. agreed.
- UC appealed the District Court's decision on the preliminary injunction
- 6th Circuit upheld the District Court's decision

DOE v. UNIVERSITY OF CINCINNATI
U.S. CT. OF APPEALS, 6TH CIR. (SEPT. 25, 2017)

- **6th Circuit's decision**
  - Due process: **Where credibility is the deciding factor/pivotal issue**, the Complainant's absence from the hearing made it difficult and problematic for the "trier of fact" to assess credibility
  - The inability to confront one's accuser rendered the process fundamentally unfair.
  - Cross examination in some form is essential to due process, even if indirect or via video conferencing; does not have to be at the same level as a judicial trial
  - Limited their decision to the facts of the case and UC's procedures, but it is a reflection of the due process needed when a student is facing suspension or expulsion.

JOHN DOE v. CALIFORNIA STATE UNIVERSITY
SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)

Due process-based case

- **Facts**
  - Doe expelled from Cal Poly, San Luis Obispo in 2016 for sexual assault
  - Call Poly received notice from Jane Roe's roommates
  - Doe and Roe attended a fraternity party, danced and kissed
  - Roe alleged they went to a room at the party where Doe:
    - Forcibly kissed Roe
    - Held her down on a bed
    - Bit her lip until it bled, and removed her shirt.
  - Roe alleged she fought back and was able to leave the house.

JOHN DOE v. CALIFORNIA STATE UNIVERSITY
SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)

- Roe was reluctant to participate and provided a statement
- Roe refused to provide Doe's name, related text messages, or to participate in a formal resolution
- University initiated a "confidential resolution"
- Doe alleged encounter was consensual
- Eye witness walked in on Doe and Roe and said it appeared consensual
- Doe provided text messages after alleged incident between him and Roe
- Doe recommended three additional witnesses, who were not interviewed

JOHN DOE v. CALIFORNIA STATE UNIVERSITY
SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)

- Doe was expelled and his appeal was denied
- In his filing, Doe cited due process issues, such as:
- Three additional witnesses who were not interviewed
- Doe was not able to pose questions to Roe because she did not participate in the process
- Doe was not able to pose questions, directly or indirectly, to Roe's roommates or other witnesses.
- Several key pieces of evidence were misrepresented in the investigation report
- Doe was informed of the determination of responsibility, but was told the investigation report was not yet complete
- Not allowed to review report

JOHN DOE v. CALIFORNIA STATE UNIVERSITY
SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)

- Judge ordered the expulsion be reversed.
- Judge noted that the University:
  - Failed to inform Doe of the complete allegations, including policies violated.
  - Failed to disclose all evidence on which the determination relied.
  - Failed to allow Doe to question Roe or witnesses, directly or indirectly, despite the university's reliance on the credibility of testimony.
  - Reached a determination that was not supported by substantial evidence.

JOHN DOE v. CALIFORNIA STATE UNIVERSITY
SUPERIOR COURT OF CALIFORNIA (JULY 12, 2018)

- **Key Takeaways**
  - Reporting party's lack of participation is a significant due process concern.
  - Provide parties an opportunity to review and respond to all relevant evidence.
  - Question reporting and responding party's witnesses. If witnesses are not interviewed, document the rationale.
  - Provide for direct or indirect questioning between the parties and of witnesses
  - Provide an opportunity to review the investigation report once all evidence is collected.

JANE ROE v. JAVAUNE ADAMS-GASTON, ET AL.

U.S. Dist. Ct., S. Dist. Ohio, E Div. (April 17, 2018)

- This case involved an Ohio State University student who was charged twice for sexual misconduct. She was initially suspended, then expelled following the second hearing.
- Roe argued that she was denied her right to due process because she was unable to cross-examine adverse witnesses during the hearing.
- She sought, and was awarded, a preliminary injunction against the university for her expulsion.
- In this case Ohio State conducted a thorough investigation and provided a written report to the hearing board including interview notes taken by the investigator.

JANE ROE v. JAVAUNE ADAMS-GASTON, ET AL.
U.S. Dist. Ct., S. Dist. Ohio, E Div. (April 17, 2018)

- Both parties attended the first hearing.
- Hearing panel felt Roe was not credible and her account was not plausible, as compared to the complainants and witnesses.
- In the second hearing, the complainant did not attend, but sent a statement directly to hearing officer and asked that statements be read aloud during the hearing; Roe objected to the statements being read, but the statements were in the hearing packet.
- 3 adverse witnesses did not attend, but their statements were in the hearing packet.
- Hearing officer found Roe in violation; found her statement lacked credibility as compared with the credible and plausible statements of witnesses.
- Roe was expelled.

JANE ROE v. JAVAUNE ADAMS-GASTON, ET AL.

U.S. Dist. Ct., S. Dist. Ohio, E Div. (April 17, 2018)

- Roe sued, stating OSU deprived her of due process because she could not cross examine the reporting party and the witnesses.
- The Court held that a hearing was necessary.
- The hearing does not need to have the formalities of a criminal trial but the accused student must be given an opportunity to respond, explain and defend herself.
- Due process requires an opportunity to confront and cross examine adverse witnesses, especially where the evidence consists of the testimony of individuals whose memory might be faulty or motivated by malice or vindictiveness.
- Hearing panel should be given an opportunity to assess demeanor.

JOHN DOE v. UNIVERSITY OF MICHIGAN, ET AL.
U.S. DIST. CT., E. DIST. MICHIGAN, S DIV. (JULY 6, 2018)

- Doe completed all graduation requirements then was accused of sexual assault. He sought a preliminary injunction preventing the investigation, indicating Michigan's policy violated due process rights.
  - Doe alleged that due process requires a live hearing and an opportunity for cross examination.
- Michigan's policy provides for an investigation. The investigator provides the opportunity for the parties to pose questions to each other or to witnesses; investigator makes a finding and provides a rationale to the TIXC and General Counsel.
- Court found in Doe's favor, citing the high risk of harm (expulsion).

JOHN DOE v. UNIVERSITY OF MICHIGAN, ET AL.
U.S. DIST. CT., E. DIST. MICHIGAN, S DIV. (JULY 6, 2018)

- Court said Michigan's method of private questioning through an investigator leaves Doe with no way of knowing which questions are actually being asked of adverse witnesses or their responses.
- Without a live proceeding, the court said the risk of an erroneous deprivation of Doe's interest in his reputation, education and employment is significant.
- Interestingly, court did not require Michigan to change its process.

JOHN DOE v. CLAREMONT MCKENNA COLLEGE
CAL. CT. APP., 2ND DIST. (AUGUST 8, 2018)

- May 2015, John Doe was found responsible for nonconsensual sexual intercourse with Jane Doe, a student from Scripps College.
- He was suspended for one year.
- The decision was made as a result of an "Investigation Findings and Review" committee – two CMC faculty/staff and the investigator.
- Procedures for the Committee "meeting" did not allow for questioning by the Committee or the parties.
- Jane did not attend the Committee meeting.
- The Investigator also did not ask Jane the questions John requested the investigator ask.

JOHN DOE v. CLAREMONT MCKENNA COLLEGE
CAL. CT. APP., 2ND DIST. (AUGUST 8, 2018)

- He petitioned in state court for a writ of administrative mandate to set aside the decision.
- Trial court denied the petition. Appellate court reversed.
- Court approvingly cited 6th Circuit's Cincinnati decision regarding credibility determinations and the ability of the parties to pose questions to each other.
  - *"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. "*
-

JOHN DOE v. CLAREMONT MCKENNA COLLEGE
CAL. CT. APP., 2ND DIST. (AUGUST 8, 2018)

- Court recognized a college is not a court, that it cannot compel people to appear at a hearing, the burden of added procedures on the college, and the possibility of intimidating or retraumatizing the complainant.
  - *"In light of these concerns we emphasize, as did Cincinnati, that the school's obligation in a case turning on the complaining witness's credibility is to "provide a means for the [fact finder] to evaluate an alleged victim's credibility, not for the accused to physically confront his accuser."*
  - "While we do not wish to limit the universe of ideas of how to accomplish this, we note that the mechanism for indirect questioning in *Regents*, including granting the fact finder discretion to exclude or rephrase questions as appropriate and ask its own questions, strikes a fair balance among the interests of the school, the accused student, and the complainant."

JOHN DOE v. BAUM, ET AL.

U. S. Ct. of Appeals, 6th Circuit (Sept. 7, 2018)

- Jane Roe accused John Doe of sexual misconduct – claiming she was incapacitated.
- The University of Michigan investigated over the course of 3 months, interviewing 25 people.
- "The investigator was unable to say that Roe exhibited outward signs of incapacitation that Doe would have noticed before initiating sexual activity. Accordingly, the investigator recommended that the administration rule in Doe's favor and close the case."
- Roe appealed.

JOHN DOE v. BAUM, ET AL.

U. S. Ct. of Appeals, 6th Circuit (Sept. 7, 2018)

- The 3-member Appellate Board reviewed the evidence and reversed the investigator's decision (did not meet with anyone or consider any new evidence). They felt Roe was more credible.
- Before sanctioning, Doe withdrew, one semester shy of graduation.
- Doe sued, alleging Title IX and Due process violations.
- On a Motion to Dismiss by Michigan, the District Court dismissed the case, but 6th Circuit reversed.
- The Due Process and the Title IX Erroneous Outcome claims survived.

JOHN DOE v. BAUM, ET AL.
U. S. Ct. of Appeals, 6th Circuit (Sept. 7, 2018)

- **Due Process**
  - "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."
  - "If a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."
    - Either directly by the accused or by the accused's agent.

JOHN DOE v. BAUM, ET AL.
U. S. Ct. of Appeals, 6th Circuit (Sept. 7, 2018)

- Title IX Erroneous Outcome
  - The due process issues cited above inform their finding.
  - The attention gained because OCR launched an investigation two years ago that garnered and continued to garner attention, the complaint was filed by a female, Michigan could lose all of its funding, the news media beat up Michigan for not supporting victims enough,
  - The Appellate Board dismissed all the evidence provided by male witnesses (caser was basically men on Doe's side, women on Roe's side) stating that they were biased because they were fraternity brothers of Doe, but made no such qualification for her witnesses (all of whom were her sorority sisters, but their decision made no mention of that).
  - The Appellate Board made these judgments on a "cold record."
- "Taken together, male bias is a plausible explanation that is better explored in discovery."

JOHN DOE v. U. OF SOUTHERN MISSISSIPPI
S.D. MISS. (NOV. 27, 2018)

- In July 2018, John Doe, a scholarship athlete, was accused of sexual misconduct
- The University conducted an investigation and sent Doe a summary of the interviews, requesting a response
- Doe did not respond and was subsequently found responsible and suspended for one year
- In September he successfully filed for an injunction, prohibiting the University from implementing the sanction
  - He cited the draft, leaked regs as entitling him to more due process than the University provided him → Court rejected that claim
  - However, Court had concerns about the process, reinstated Doe as a student and a scholarship athlete.

JOHN DOE v. U. OF SOUTHERN MISSISSIPPI
S.D. MISS. (NOV. 27, 2018)

- University conducted a new hearing under substantially revised and enhanced procedures:
  - University updated based on Doe v. Cincinnati and U. of Miss. caselaw
  - Each party provided a separate room to observe entire proceedings
  - Advisors (as well as any attorneys)were allowed to observe as well
  - Parties could request a digital recording of the hearing
  - Parties received written summaries of evidence and provided an opportunity for review and response.
  - Parties could email follow-up questions to hearing panel, who would ask the questions, or reject a question at their discretion.

JOHN DOE v. U. OF SOUTHERN MISSISSIPPI
S.D. MISS. (NOV. 27, 2018)

- Doe filed a second injunction, citing especially the Proposed Regs., the 6th Circuit's *Baum* decision
  - Cited the inability to be in-person during questioning limited ability to determine credibility
  - Hearing Panel's ability to reject certain questions limited ability to cross-examine

- Court denied the injunction request, stating that the revised procedures "appear to adequately satisfy due process"

JOHN DOE v. U. OF SOUTHERN MISSISSIPPI
S.D. MISS. (NOV. 27, 2018)

- **Court's decision**
  - *Doe v. Baum* went "well beyond what was required" and declined to decide the current case consistent with *Baum*
  - University's revised procedures were consistent with Doe v. Cincinnati, which required the *decision-maker* to see the parties
  - Extensively analyzed 6th Circuit's overreach in *Baum*
  - *Due process does not require asking ALL questions posed by the parties*
  - Rejected Proposed Regs argument
    - "[T]here is no guarantee, or even probability, that the proposed regulations will be adopted wholesale as proposed."
    - "[I]t is not the federal agency's role to determine what constitutes adequate due process—such a determination remains the role of the courts."

JOHN DOE v. U. OF SOUTHERN MISSISSIPPI
S.D. MISS. (NOV. 27, 2018)

- **Key Takeaways**
  - Splits with the *Doe v. Baum* decision, citing Baum's overreach
  - Recognizes greater flexibility of due process in a school setting
  - Credibility does not require physical presence, as long as decision-maker can see them
  - Failure of injunction to require the University to wait for the Proposed Regs to be finalized likely chilled other similar injunctions
  - Highlights possible Ultra Vires actions by Dept. of Ed.

JOHN DOE v. U. OF SOUTHERN CALIFORNIA
CA. COURT OF APPEAL, 2ND APP. DISTRICT (DEC. 11, 2018)

- **Facts**
  - April 2014, Doe and Roe attended a paint party
  - Both had consumed alcohol prior to and during the party
  - They went to Roe's apartment where Roe alleges Doe sexually assaulted her and engaged in nonconsensual vaginal and anal intercourse
  - Investigation begun by USC investigator (April) → outsourced to an outside atty (May) → transferred back to USC investigator (June)
  - USC investigator did not re-interview key witnesses
  - USC admin. determined Doe knew or should have known Roe could not consent.

JOHN DOE v. U. OF SOUTHERN CALIFORNIA
CA. COURT OF APPEAL, 2ND APP. DISTRICT (DEC. 11, 2018)

- **Facts**
  - Roe did not remember much of what happened, but reconstructed events based on three witnesses interviewed by other investigator.
  - USC administrator felt other witnesses were not "sufficiently reliable."
  - Doe was expelled from USC.
  - USC denied Doe's appeal.

JOHN DOE v. U. OF SOUTHERN CALIFORNIA
CA. COURT OF APPEAL, 2ND APP. DISTRICT (DEC. 11, 2018)

- Trial court denied Doe's petition to set aside his expulsion
- Ct. of Appeals:
  - Reversed, citing credibility of witnesses as a key issue → USC administrator should have interviewed key witnesses because their credibility was central to the finding.
  - Key discrepancies in testimony and evidence required further examination.
    - E.g.: there were red substances in Roe's apt; were they paint or blood?
    - USC did not ask Roe to provide her clothes.
    - USC did not obtain, or seek to obtain rape treatment center medical records.

JOHN DOE v. U. OF SOUTHERN CALIFORNIA
CA. COURT OF APPEAL, 2ND APP. DISTRICT (DEC. 11, 2018)

- **Key Takeaways**
  - A California state Ct of Appeals cited favorably to *U. of Cincinnati*, *Baum* and *Claremont McKenna.*
  - Possibility of severe sanctions in a credibility-based case warrants a fair hearing to allow the decision-maker to determine witness credibility.
    - In-person in order to observe demeanor.
    - Directly address the witnesses and parties.
  - When you are aware evidence exists, ask for it!
    - Thoroughness, fairness, and impartiality demand it.

LEE v. UNIVERSITY OF NEW MEXICO
U.S. DIST. CT., DISTRICT OF NEW MEXICO (SEPT. 20, 2018)

- UNM student, J. Lee was found responsible for sexual misconduct and expelled from UNM.
- Lee sued under Title IX, Breach of Contract, violation of due process, gender discrimination, and violation of NM Constitution.
- Due process claims to survived a motion to dismiss
  - UNM provided an evidentiary hearing for non-sexual misconduct related resolutions, but not for sexual misconduct.
  - UNM failed to properly inform Lee of all of the allegations (underage drinking)
- The court stated an ***investigation that relies on credibility requires a formal or evidentiary hearing including cross-examination of witnesses and presentation of evidence to preserve basic fairness.***

LEE v. UNIVERSITY OF NEW MEXICO
U.S. DIST. CT., DISTRICT OF NEW MEXICO (SEPT. 20, 2018)

- Court stated that preponderance of the evidence standard is inappropriate where serious sanctions are possible, including expulsion and permanent transcript notation.
  - This is the first ruling to explicitly hold that the preponderance standard is constitutionally improper.
  - Favorably cited in the DOE's proposed Title IX regulations to justify assertion that preponderance is inadequate "where the consequences of a finding of responsibility would be significant, permanent, and far-reaching." (https://www.federalregister.gov/d/2018-25314/p-142)
- This decision falls in line with the 6th Circuit decision *Doe v. Cincinnati* relating to a formal evidentiary hearing when credibility is at issue and serious sanctions are possible.

QUESTIONS?

CONTACT INFORMATION

TANYKA M. BARBER, J.D.

Tanyka.Barber@tngconsulting.com