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Higher Education

When it comes to helping your higher education institution stay on the right side of the law with your faculty, staff, and students, including Title IX compliance, you'll want lawyers who are at the head of the line when it comes to understanding the unique issues and dynamics presented by

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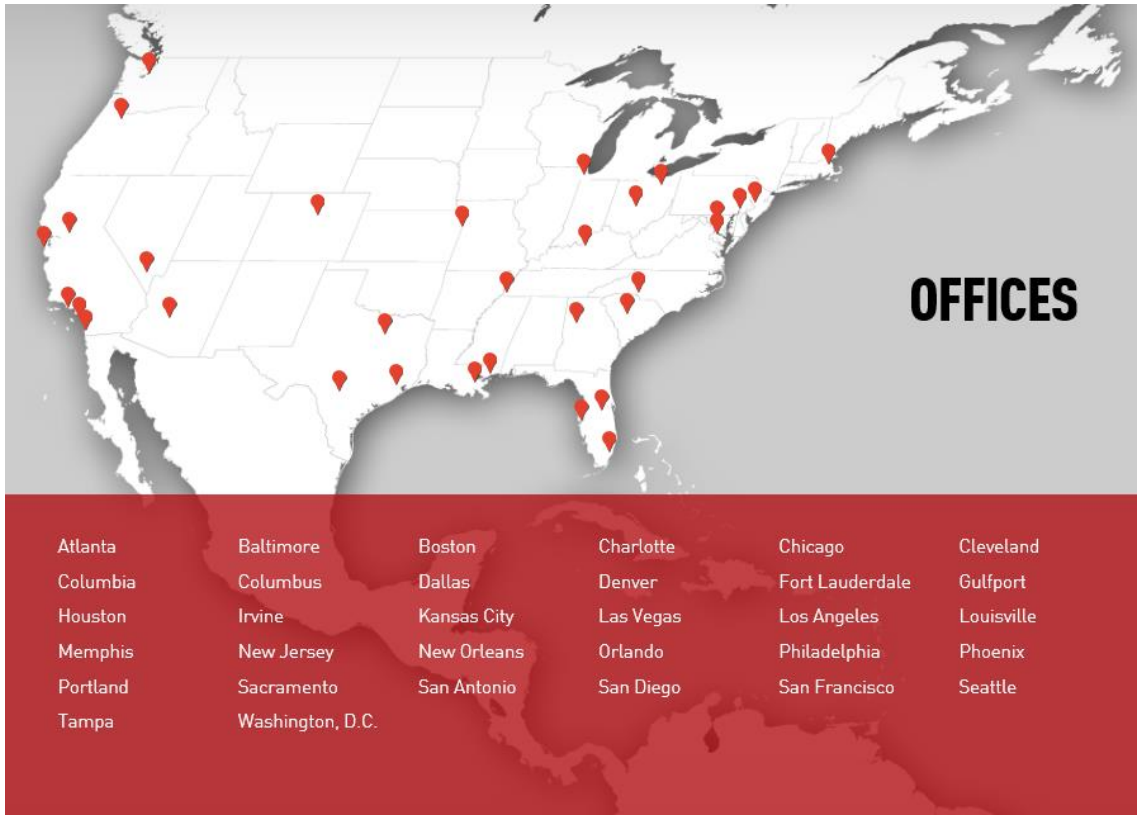


WHAT IS THIS BIRD DOING?

NEW "DEAR COLLEAGUE" LETTER ON TRANSGENDER STUDENTS

- http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf
- Title IX prohibits discrimination on the basis of gender identity, including transgender status
- Schools must treat the student consistent with student's gender identity
- No medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity

THREE PRACTICAL TAKEAWAYS

- **Restrooms and Locker Rooms**: A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.
- **Athletics**: Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport. A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (*i.e.*, the same gender identity) or others' discomfort with transgender students.
- https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf

THREE PRACTICAL TAKEAWAYS

- **Housing and Overnight Accommodations**: Title IX allows a school to provide separate housing on the basis of sex. But a school must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students.

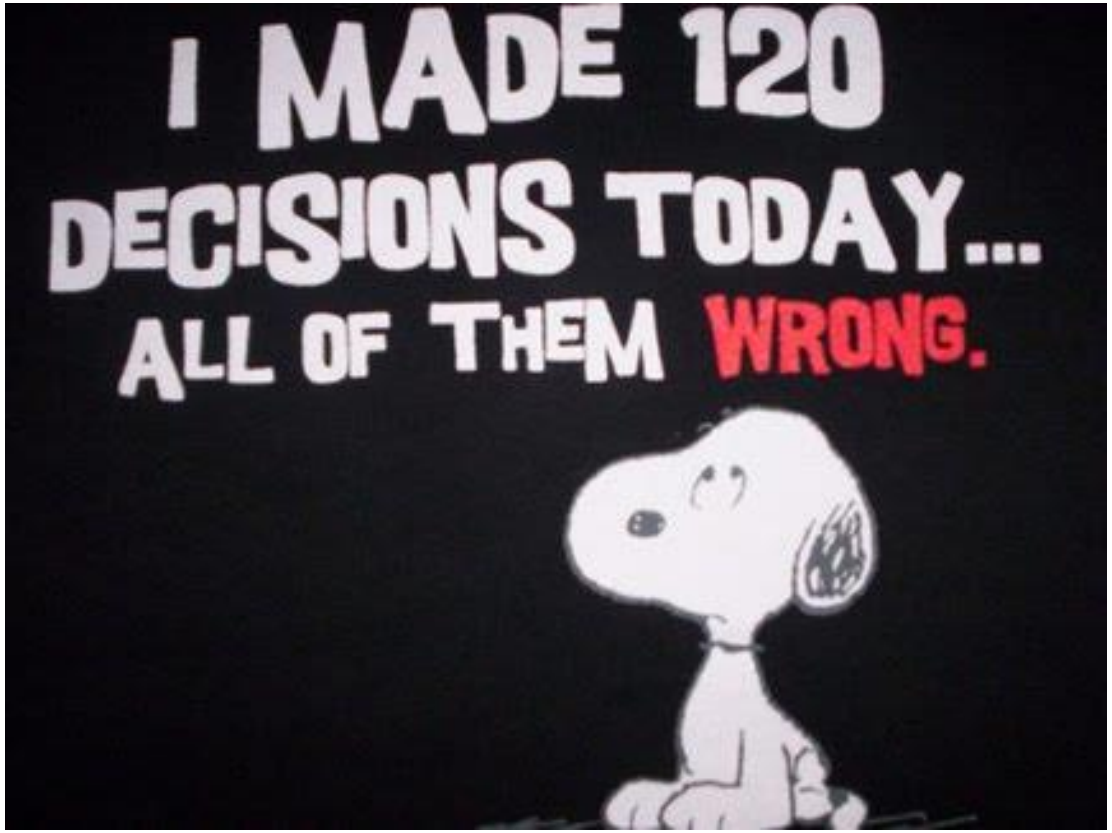
LAW BLOG

Obama Administration Guidance on Transgender Students Likely to be Litigated

PHOTO: REUTERS

U.S.

SUSPENDED COLLEGE ATHLETE SUING U.S. OVER SEXUAL ASSAULT 'GUIDANCE'


I MADE 120
DECISIONS TODAY...
ALL OF THEM WRONG.


©1999 JOHN S. PRITCHETT

A MOMENT ON MOTION PRACTICE

COMPLAINANT LITIGATION

Harvard, Dartmouth, Princeton: Why Are So Many Elite Schools Being Investigated for Mishandling Sexual Assault?

By Amanda Hess

465 230 249

Reporting Rape, and Wishing She Hadn't

How One College Handled a Sexual Assault Complaint

'Campus Cover-Up' Goes Inside Sexual Assault Hearings

HEALTH

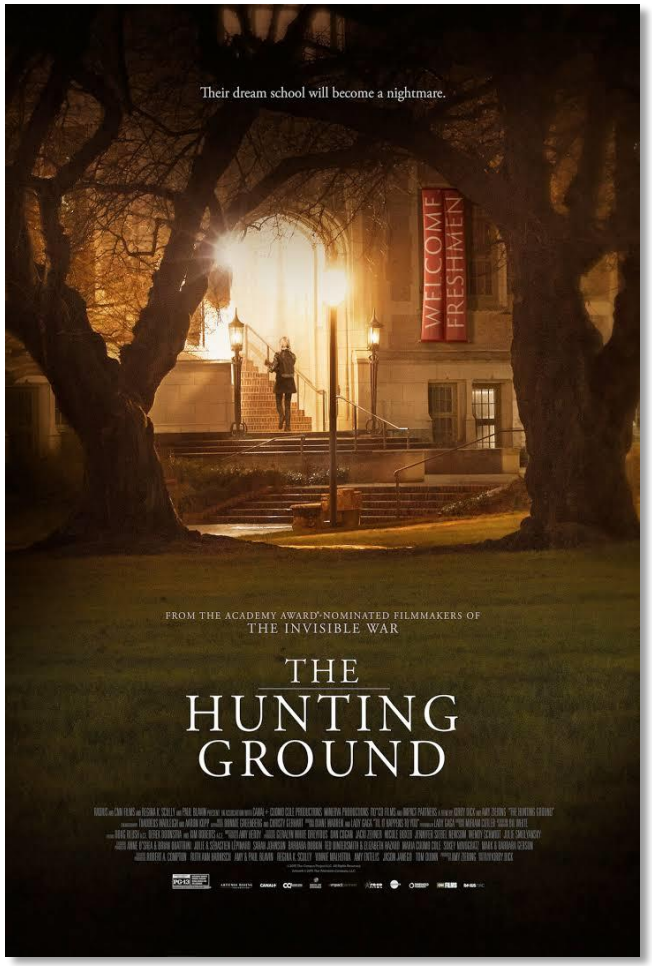
Confirmed: Colleges Are Deliberately Downplaying Sexual Assaults

BY TARA CULP-RESSLER POSTED ON FEBRUARY 4, 2015 AT 2:59 PM

Report: Universities try to cover up rapes

Cuomo: Colleges 'tend to cover up' sexual assaults

Posted on June 8, 2015 at 7:08 pm by Chris Bragg in Andrew Cuomo, Bulletin, General



MOTION TO DISMISS GRANTED

Facchetti v. Bridgewater College (W.D. Va., Mar. 30, 2016)

- Argument: College violated its own sexual misconduct policy in the advising, investigatory, and disciplinary processes surrounding Plaintiff's sex assault.
- Violation of policy is not deliberate indifference.
- College not deliberately indifferent when it promptly conducted an investigation, held a disciplinary hearing, and suspended the respondent after he was found responsible.

MOTION FOR SUMMARY JUDGMENT GRANTED

Ross v. University of Tulsa (N.D. Okla., Apr. 15, 2016)

- Argument: Former student claimed to be the victim of sexual misconduct by a student-athlete who was later found not responsible for violation of sexual misconduct policy based on insufficient evidence. University knew of a prior accusation against alleged attacker.
- Court found that although Defendant knew of prior accusation, knowledge was insufficient to provide actual notice of a substantial risk because previous accusation involved a victim who was unwilling to file criminal charges or initiate a student conduct complaint, and who stated only that the alleged attacker "took advantage of" her.
- Court further found that Plaintiff could not satisfy the deliberate indifference element because the University conducted an investigation, held a student conduct hearing, and issued written findings setting forth reasons for its decision in favor of the alleged attacker, all in accordance with Title IX requirements.
- See also, Jenkins v. University of Minnesota (D. Minn. Sep. 18, 2015)

COURTS REFUSE TO GRANT MOTIONS TO DISMISS

- Butters v. James Madison University, (W.D. Va. Nov. 6, 2015)
- Takla v. Regents of the University of California,(C.D. Cal. Nov. 2015)
- Spencer v. Univ. of New Mexico Bd. of Regents, (D.N.M., Jan. 11, 2016)
- Jane Doe v. University of Alabama in Huntsville, (N.D. Ala., Mar. 31, 2016)
- Jane Doe v. University of Tennessee, (M.D. Tenn., May 3, 2016)
- Tubbs v. Stony Brook University, (S.D.N.Y., Mar. 4, 2016)

WHEN COURTS DON'T GRANT MOTIONS TO DISMISS

KINSMAN V. FLORIDA STATE

- COURT DENIES FSU'S MOTION TO DISMISS
- FSU SETTLES FOR $950,000 ($700,000 FOR ATTORNEYS)
- FSU DOES NOT ADMIT LIABILITY
- LAWSUIT CONTINUES BETWEEN KINSMAN AND WINSTON

$250,000 for Kinsman's alleged damages; and
$700,000 for Kinsman's attorneys' fees.

The Parties understand and agree that the foregoing representation does not necessarily reflect the actual allocation between Kinsman and her counsel. Accordingly, nothing in this Agreement shall be construed as allocating or in any way controlling in determining the actual amounts due and payable to either Kinsman or her counsel from the lump-sum payment under this Section 2 (whether as damages, attorneys' fees or otherwise). Such matters shall continue to be controlled exclusively by separate agreements between Kinsman and her counsel.

RESPONDENT CASES

Backlash: College men challenge 'guilty until proven innocent' standard for sex assault cases

BY ASHE SCHOW | AUGUST 11, 2014 | 6:00 AM

Title IX witch hunts in higher education

Expelled under new policy, ex-Amherst College student files suit

Amherst accused of ignoring evidence in alleged sexual assault

Amherst Student Was Expelled for Rape. But *He* Was Raped, Evidence Shows.

The accused is the victim.

Saint Joseph's University Sued for Bias by Accused Rapist

Dez Wells' expulsion from Xavier 'fundamentally unfair,' prosecutor says

Some Accused Of Sexual Assault On Campus Say System Works Against Them

SEPTEMBER 03, 2014 3:31 AM ET

More Men Fight College Allegations of Sexual Assault

A COUPLE OF BROAD POINTS

Oregon State takes stand on transfers, will call upon Pac-12 to follow

TWO PRIMARY CLAIMS

NOT ALL BAD NEWS . . .

- Salau v. Denton (University of Missouri), (W.D. Mo. Oct. 15, 2015)
- Nungesser v. Columbia University, (S.D.N.Y., Mar. 11, 2016)
- Doe v. University of Cincinnati, (S.D. Ohio, Mar. 23, 2016)
- John Doe v. Ohio State University, (S.D. Ohio, Apr. 20, 2016)

ENHANCED "DUE PROCESS" PROTECTIONS?

Ritter v. Oklahoma (W.D. Okla., May 6, 2016) – Breach of Contract Claim

Contract: OCU's Discrimination Policy provides that any person accused of violating the Policy has the right to an "equitable resolution of the complaint."

When the penalty is as severe as that imposed in this case, with its potentially devastating consequences, the accused is entitled to more process than plaintiff was afforded:

- limited opportunity to rebut the charges made against him (one meeting with Title IX Coordinator)
- no opportunity to challenge certain conclusions she apparently reached & relied on in recommending the penalty that was eventually imposed and of which he learned only after filing his lawsuit
- "because any appeal that is filed is based on the record, it is critical that the accused have a reasonable opportunity to present his version of the events, particularly as to those adverse 'findings' which were the apparent basis for the substantial penalty meted out here. Anything less than that cannot be an 'equitable resolution of the complaint.'"

ENHANCED "DUE PROCESS" PROTECTIONS?

John Doe v. Alger (W.D. Va., Mar. 31, 2016)

After initially being found not responsible for sexual misconduct against a fellow student, Plaintiff's accuser appealed. The appellate board reversed the decision and suspended Plaintiff for five-and-a-half years.

Claim: Plaintiff not provided sufficient due process. The Court concluded that Plaintiff had a viable DP claim.

Finding: Plaintiff claimed that he was not allowed to appear before the appeals board; was not shown new evidence submitted by his accuser on appeal; was not given the names of the people hearing his appeal; and was not given notice of the appeals board's meeting, all of which the Court found indicative of a due process violation.

THE BDSM CASE

Doe v. Rector and Visitors of George Mason University (E.D. Va, Apr. 14, 2016)

Plaintiff was expelled from George Mason University (GMU) after it found him responsible for sexual misconduct and for sending electronic communications likely to cause distress.

- "Plaintiff alleged that shortly after his matriculation at GMU, he entered into a consensual BDSM relationship with Jane Roe, a student at another university. An important rule of the relationship involved the use of a safe word— 'red' —which was what plaintiff and Roe agreed that Roe would say to signal that she wanted sexual activity to cease. In other words, as agreed between plaintiff and Roe, 'no' did not mean 'no' in the course of their BDSM activity, only 'red' meant 'no.' This rule proved consequential; on October 27, 2013, during their relationship, plaintiff continued sexual activity with Roe despite her equivocation as to whether she consented and despite the fact that she tried to push plaintiff away. Because Roe never said 'red,' plaintiff thought she was consenting within the terms of their relationship."

THE BDSM CASE (FACTS CONT'D)

- A few months after the October 27 incident, plaintiff and Roe ended their approximately one-year relationship. Plaintiff occasionally attempted to reconnect with Roe, including one incident in March 2014 in which plaintiff sent Roe a text message indicating that he would shoot himself if Roe did not speak with him.

A MEDIA DARLING IS BORN

"defendants violated plaintiff's right to due process (i) by failing to provide adequate notice of the full scope of the factual allegations in issue in the disciplinary proceeding, (ii) by permitting Roe, without a proper basis in GMU's internal disciplinary procedures, to appeal the finding of no responsibility, and (iii) by depriving plaintiff of an opportunity to mount an effective defense, including by prejudging his case and by holding off-the-record and ex parte meetings with Roe. Moreover . . .defendants infringed on plaintiff's freedom of speech by penalizing him for his March 2014 text message to Roe in which plaintiff threatened suicide."

50 Shades of Legally Grey: Federal court strikes down consensual kink

Published time: 8 Mar, 2016 03:53
Edited time: 8 Mar, 2016 22:32

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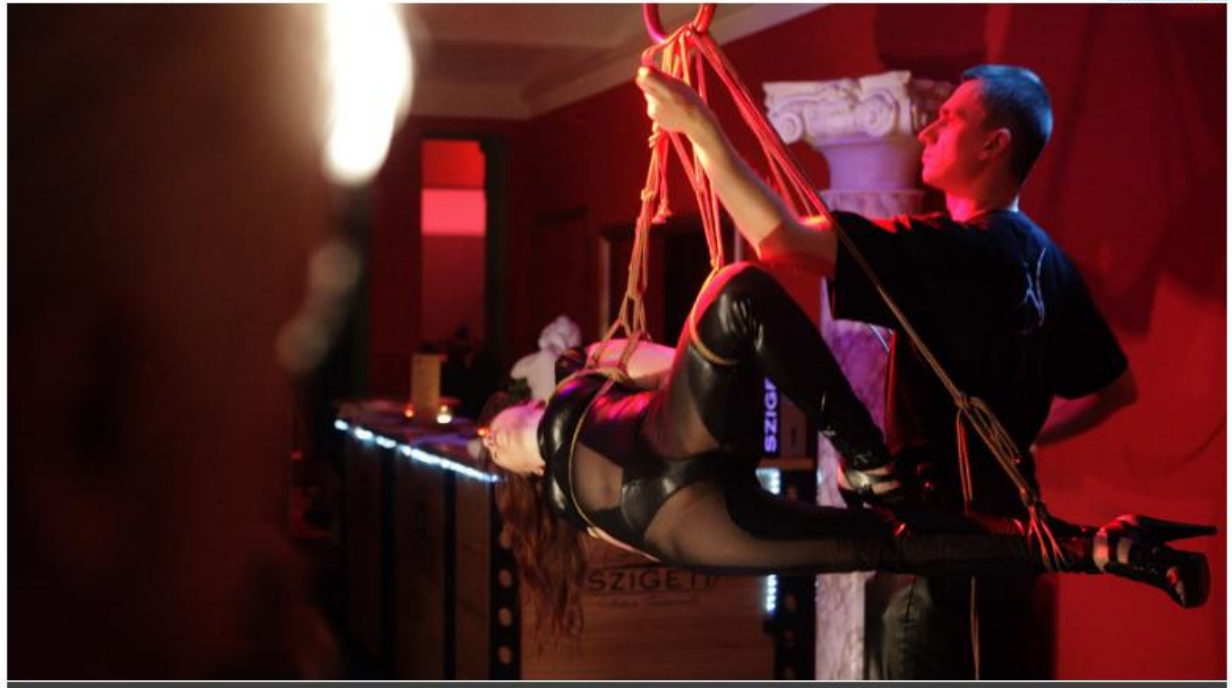

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QUASI-DUE PROCESS PROTECTIONS

John Doe v. University of Southern California (Cal. Ct. App., Apr. 5, 2016)

http://www.courts.ca.gov/opinions/documents/B262917.PDF

Facts: Conduct panel found that while there was insufficient evidence indicating that Plaintiff committed a sexual assault during a group sexual encounter at a fraternity party, Doe had violated two sections of the student conduct code by "encourage[ing] or permit[ing]" other students to engage in nonconsensual contact with his female accuser and endangering her by leaving her alone in the bedroom when the involved parties dispersed.

Ruling: Plaintiff was not afforded a meaningful opportunity to defend himself because he was investigated for one conduct violation—engaging in nonconsensual sexual activity—but was disciplined for another—encouraging others and endangering the alleged victim.

QUASI-DUE PROCESS PROTECTIONS

John Doe v. Brandeis University (D. Mass., Mar. 31, 2016)

https://apps.fastcase.com/Research/Public/ExViewer.aspx?LTID=zAxqUevc7kWeonwSTOv3JIGgqlZ5lxOcx4LvA1VTdPVnJsArlCnepuacHHB4kIUtYf9LlsY6pQ5HWWOaeyUlh1DnLDCy3F+9xYa+jvpAddtc+vdBmjjmGJnTBDMw2I+uzFu1LCyeXc3ltpjHbZf3Fa9xbWjKab1MLbohFETv1qU=

Facts: University found that Plaintiff was responsible for sexual misconduct over the course of a long-term relationship between Plaintiff and his ex-boyfriend.

Quasi-DP: Although Brandeis, as a private university, is not subject to constitutional requirements of due process, the Court determined that it was required to treat its students with “basic fairness” in procedure as well as substance as a matter of contract. Applying that standard, the Court allowed Plaintiff's procedural defects claims to move forward. It further found the allegation that the University applied "novel notions of consent, sexual harassment, and physical harm" that are "at odds with traditional and legal and cultural norms and definitions" could constitute a breach of contractual right to basic fairness.

RESPONDENTS AS VICTIMS OF DISCRIMINATION

Marshall v. Indiana University (S.D. Ind., Mar. 15, 2016)

Plaintiff provided sufficient evidence to survive a motion to dismiss in regard to his claim of intentional gender discrimination, based on the fact that Defendants expelled him for allegedly committing a sexual assault but failed to even investigate a reported sexual assault committed against Marshall by a female student. It thus allowed his Title IX selective enforcement claim to proceed.

Prasad v. Cornell University (N.D.N.Y., Feb. 24, 2016)

Motion to dismiss denied.

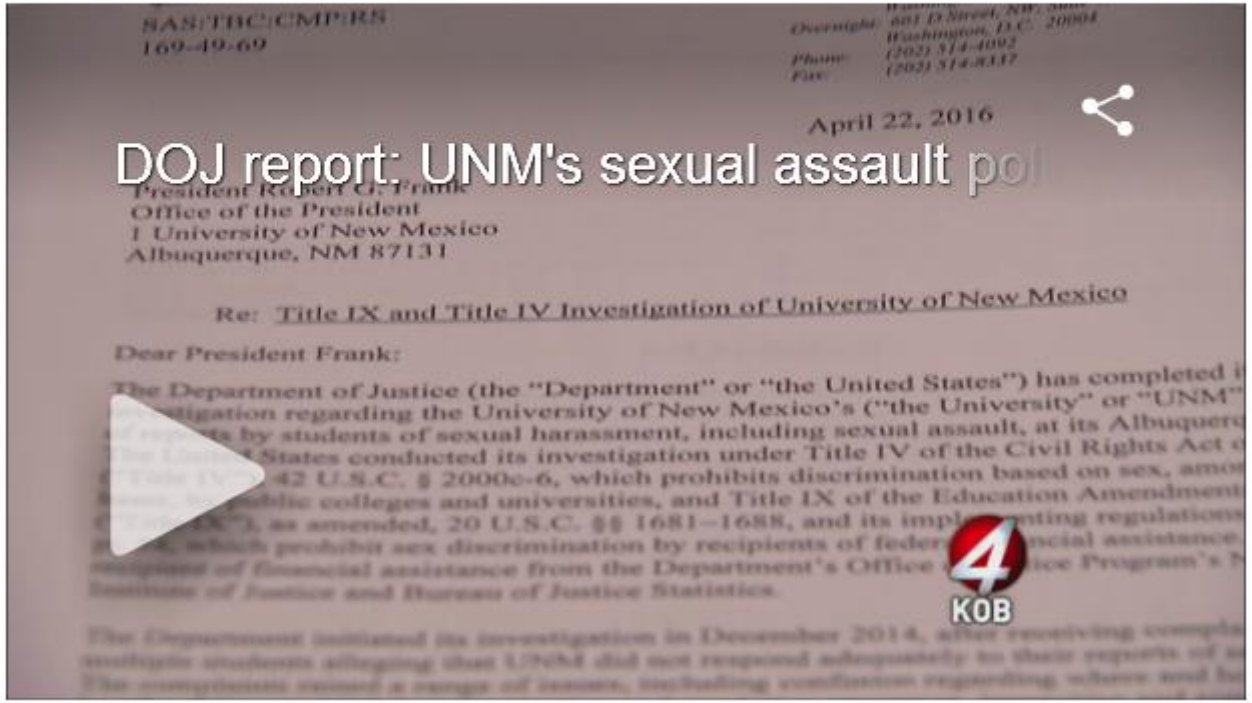
Court found Plaintiff's Title IX erroneous outcome complaint sufficient to survive a motion to dismiss based on the "totality of the circumstances" described in Plaintiff's Complaint, including facts indicating a differential treatment of Plaintiff and the complainant during the adjudicatory process, a seemingly biased investigative report, a dramatic change in one investigator's position during the final weeks of the investigation, and the possibility that Cornell "invariably" finds male respondents accused of sexual misconduct to be responsible.

See also, Doe v. Brown University (R.I., Feb. 22, 2016)

FIVE BROAD LITIGATION TAKEAWAYS

1. Counsel on both sides are becoming more skilled in pleading facts to survive motions to dismiss
2. Courts are not providing same degree of historical deference afforded universities & here's hoping cases start getting decided by appellate courts
3. Important to know and apply jurisdiction-specific case law esp. with respect to due process (publics) and quasi-due process (privates) protections
4. Equitable, Thorough, Prompt
5. There is no silver bullet here (and anyone who says there is a silver bullet is lying)

DOJ report: UNM's sexual assault policies not compliant with Title IX, need improvement



THE DEPARTMENT OF JUSTICE WEIGHING IN ON STUDENT DISCIPLINARY PROCEEDINGS IS HISTORICALLY UNPRECEDENTED.

UNIVERSITY OF NEW MEXICO/DEPARTMENT OF JUSTICE

- https://www.justice.gov/opa/file/843901/download
- Pages 16 – 23
- File review for six academic years
- “also conducted more than 50 interviews with current and former students and their parents, current and former faculty and staff, community members, and University officials, and held six focus group meetings and multiple open office-hours sessions in Albuquerque to hear directly from students, staff and faculty.”

DOJ: "INEFFECTIVE INITIAL EVIDENCE GATHERING"

- Policy does not require investigators "to ask a respondent (1) any question about the incident(s) at issue, or (2) to explain his or her own version of events. Instead, during their initial meeting, the DCP requires OEO only to advise the respondent about the investigative process and provide him or her with a written copy of the complainant's specific allegations. The respondent then has seven working days to provide a written response to the allegations."
- "Because most incidents of sexual harassment, including sexual assault, occur in private with no witnesses, initial interviews of both complainants and respondents are important to determining what occurred. Witness accounts of events often diverge as to location, statements made, and/or actions taken. If one witness is not solicited to provide an independent account before being provided with a written copy of the other witness' statement, important physical evidence or potential additional witness testimony pertaining to the incident, or surrounding events, may be overlooked."
- "Yet after OEO's initial in-person interview of a complainant and meeting with the respondent to explain the process and provide the complainant's written statement, OEO communicates to all parties almost exclusively in writing, rarely conducting follow-up interviews."

CREDIBILITY ASSESSMENT

"OEO adheres to an **unwritten policy** that a finding of probable cause requires corroboration of the alleged incident by an eyewitness, tangible evidence, or admission by the respondent of the offending behavior, including a lack of consent. OEO rarely **attempts to identify witnesses or obtain physical evidence on its own**, and does not alert complainants to the need for, and value of, witness testimony. As a result, in cases where complainants did not suggest any potential witnesses, OEO appears not to credit the complainant's allegation. Even in matters where complainants do offer relevant witness testimony, OEO typically does not credit the information unless it is direct eyewitness information."

"LACK OF PROCEDURES TO ENSURE IMPARTIALITY"

- "The United States learned that in at least two instances, high-level administrative offices pressured the OEO to get the investigation 'done' - in one case, because it was in the media and in another, because the respondent in a case was 'well positioned, politically, in the state.' In another case, a UNM Dean requested an internal audit delay because a high profile guest was visiting the respondent (who was an employee), stating that, should the guest become aware of the investigation it would cause embarrassment to the University. Such intervention by university administrators is entirely improper."
- "Additionally, we note that, until the current school year, OEO reported directly to the Office of University Counsel ("OUC"), which had final review authority over Title IX investigations. This management structure created a conflict between OEO 's stated goal of eliminating and redressing harassment and OUC's role in limiting the University's liability. For example, when a medical licensing board contacted UNM for information regarding a former UNM student who had been the subject of a sexual misconduct investigation, OUC noted that the respondent's lawyer had threatened legal action and therefore recommended that UNM limit its liability by not informing the medical board that the misconduct allegation involved harassment of a sexual nature."

"INADEQUATE TIMEFRAMES FOR RESOLUTION OF COMPLAINTS"

"OF THE 13 INVESTIGATIONS CONDUCTED BY OEO FOR WHICH FINDINGS HAD BEEN ISSUED AS OF JUNE 30, 2015, THE ENTIRE PROCESS, FROM RECEIPT OF COMPLAINT TO ISSUING OF THE FINAL LETTER OF DETERMINATION, TOOK AN AVERAGE OF 137 DAYS."

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Gophers target of federal gender-equity investigation

By John Shipley
jshipley@pioneerpress.com

POSTED: 01/23/2015 12:01:00 AM CST | UPDATED: 6 MONTHS AGO

The University of Minnesota's athletics department is the target of a federal gender-equity investigation by the U.S. Department of Education's Office for Civil Rights.

According to several sources, the complaint is related to the U's Athletes Village project, specifically about a football "performance center" that will displace the men's and women's track and field teams.

A spokesperson for the Department of Education said the Office of Civil Rights has two Title IX investigations open at the University of Minnesota-Twin Cities, one involving athletics.

U's review of gender equity in sports, begun in 2013, is still incomplete

Chris Werle, senior associate athletic director for strategic communications, said: "I don't know that there is ever going to be any findings."

By Amelia Rayno Star Tribune | JUNE 12, 2015 — 8:42AM

FEED LOADER, PROVIDED

Kimberly D. Hewitt urged the U to launch a review of Title IX compliance.

In March 2013, Kimberly D. Hewitt, the University of Minnesota's director of equal opportunity and affirmative action, was concerned enough by what she saw in the athletic department's annual report that she recommended the school conduct an internal review of gender equity in sports.

That review began in October 2013, but no findings have been announced. Hewitt, who oversees campuswide Title IX compliance, was under the impression that a February meeting stood as a final report on equity in Gophers athletics, but university officials said this week that the review is "ongoing."

LADY VOLS BASKETBALL

Athletics department lawsuit settlement to cost UT at least $1.05M

Jan. 04, 2016

16 Comments

SHARE

By MJ Slaby of the Knoxville News Sentinel

The University of Tennessee will pay at least $1.05 million to a trio of former athletic trainers in a settlement of a pay discrimination lawsuit.

UT agreed to $750,000 in payments to Jenny Moshak, former associate director of sports medicine, and Heather Mason and Collin Schlosser, former Lady Vols strength coaches in addition to their attorneys' fees.

According to court documents filed Monday, those fees will be no less than $300,000 and no more than $475,000. A judge will decide the exact amount within that range after lawyers for the three former UT employees file a formal bill.

The three former employees filed internal pay discrimination complaints in 2010 and then filed a lawsuit after departmental consolidation in 2012, suing UT for discrimination and retaliation. The trial was set for April 19.

The three alleged that UT gave less compensation to employees who were female

PREGNANCY CASE

Varlesi v. Wayne State University (6th Cir., Mar. 7, 2016)

Affirming judgment entered according to a jury verdict in favor of Plaintiff. Tina Varlesi, a graduate student at Wayne State University, became pregnant before her final year of school. During her field work assignments that year, her supervisors made troubling remarks about her pregnancy and marital status. After receiving a failing grade and being denied her degree despite outstanding academic performance in prior years, Varlesi brought suit against WSU and various directors and staff members, claiming pregnancy discrimination in violation of Title IX in addition to retaliation. A jury found Defendants liable and awarded Varlesi $848,690 in damages.

Pregnant-belly-rubbing advice costs WSU $850,000 payout to student

David Jesse, Detroit Free Press 5:05 p.m. EST March 7, 2016

Student says she was told not to rub her pregnant belly and to wear looser clothing

(Photo: Patricia Beck, Detroit Free Press)

A federal appeals court has upheld an $850,000 judgment for a former social work student at Wayne State University who was told to wear looser clothing and not to rub her pregnant belly because it might excite the male clients she was working with at a rehab center.

Monday's ruling refused to set aside the $848,690 jury award in U.S. District Court against the university in a lawsuit filed by former graduate student Tina Varlesi, who contended she was the target of discrimination during a social work internship at the Salvation Army that led to her being denied the chance to graduate. Varlesi has previously settled with the Salvation Army, which also was named in her lawsuit.

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