UE on Appeal

Significant appeals undertaken by United Educators (UE) on behalf of our members

May 2023

Decisions Featured in This Issue:

United Educators

Warning: This newsletter contains references to graphic content.

Supreme Court of Colorado

State Supreme Court Grants University of Denver's *Certiorari* Petition Related to its Sexual Misconduct Policies

After two parallel lawsuits were filed in federal and state court and appealed, the Supreme Court of Colorado will now consider the plaintiff's state law claims. The issues turn on whether a university is required to adopt "fair" policies for investigating and adjudicating claims of sexual misconduct and whether such a policy is "sufficiently definite" to give rise to an enforceable contractual obligation.

UNIVERSITY'S INVESTIGATIVE PROCEDURES PROMISE FAIRNESS AND IMPARTIALITY

Plaintiff John Doe enrolled at University of Denver, a private institution, and was expelled after being found responsible for sexually assaulting another student — in violation of the university's Office of Equal Opportunity Procedures. The university's then-procedures contained a detailed written process for responding to a complaint involving sexual assault allegations as well as aspirational language describing the explicit steps that followed as "thorough, impartial, and fair."

The investigation involving Doe included, among other procedural protections:

- Promptly giving Doe notice of the complaint
- Explaining the investigatory procedures and his rights as a student
- Providing university resources including counseling services
- Interviewing and collecting signed statements from his accuser and 11 other witnesses
- Taking a written statement from Doe
- Considering evidence Doe provided

- Providing Doe with a preliminary report for review and input
- Reopening the investigation to interview Doe's therapist at Doe's request

Doe subsequently filed suit in federal court against the university and various administrators asserting federal and state law claims. The court granted summary judgment on the federal law claims, including Title IX and due process, but declined to exercise jurisdiction over Doe's state law claims.

Doe filed an action in state court reasserting those state law claims for breach of contract and breach of the duty of good faith. The university defendants moved for summary judgment, and the state court granted their motion, finding allegations that the investigation wasn't fair were too vague to be enforceable in contract, and the "contractual commands" in the university's procedures were merely vague, aspirational goals too indefinite to support a claim for breach of the implied covenant of good faith and fair dealing.

The court also held that universities owe no extra-contractual duty to adopt and follow "fair" policies and procedures for investigating claims of sexual assault by one student against another. Doe appealed, and the Court of Appeals reversed. The university then petitioned the Supreme Court of Colorado for a *writ of certiorari*.

CONTRACT AND TORT CLAIMS TO BE CONSIDERED BY SUPREME COURT OF COLORADO

The Supreme Court of Colorado granted the university's petition for a *writ of certiorari* on the following issues:

(1) "Whether a sexual misconduct policy required by federal and Colorado law can constitute a contract between an institution of higher education and its students."

(2) "Whether a statement in a university's sexual misconduct policy that student sexual misconduct investigations will be 'thorough, impartial, and fair' is sufficiently definite to support a claim for breach of contract."

(3) "Whether a statement that sexual misconduct investigations will be 'thorough, impartial, and fair' in a university's procedures is sufficiently definite to support a claim for breach of the implied covenant of good faith and fair dealing."

(4) "Whether a university owes its students a duty in tort to adopt fair policies and procedures for investigating and adjudicating claims of student sexual misconduct and to exercise reasonable care in following those procedures."

The university filed its initial brief in April 2023.

THE BOTTOM LINE

Institutions' policies regarding sexual misconduct may be found in their codes of conduct, student handbooks, or other policies. The Supreme Court of Colorado is considering threshold issues raised in many lawsuits brought by Title IX respondents, such as whether sexual misconduct policies required under Title IX constitute contracts whose terms are enforceable and whether universities have a duty to adopt fair processes for investigating sexual misconduct allegations. Stay tuned for an update on the Supreme Court of Colorado's decision in a future issue of *UE on Appeal*.

Univ. of Denver v. Doe, Case No. 22SC499 (Colo. Mar. 6, 2023).

RELATED UE RESOURCES

- Higher Education Checklist: Title IX-Compliant Sexual Harassment Grievance Procedures
- Higher Education Checklist: Title IX-Compliant Policies Against Sexual Harassment
- Checklist: Sexual Harassment Investigations

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Contact UEsupport@ue.org to learn how your institution can access these resources.

Receipt of Federal Funds Under Title IX Doesn't Transform Private College Into a State Actor

In this decision, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's dismissal of a federal due process claim against a private institution, holding the requirement that all colleges and universities receiving federal funds must comply with Title IX doesn't transform a private actor into a public actor subject to federal due process requirements.

MALE STUDENT ACCUSED OF SEXUAL MISCONDUCT CHALLENGES INVESTIGATION AND DISCIPLINARY PROCESS UNDER TITLE IX

Plaintiff John Doe was a sophomore at Oberlin College, a private institution in Ohio, when another sophomore, Jane Roe, reported to Oberlin's Title IX office that two of her sexual encounters with him amounted to sexual misconduct.

Although Roe made her report Dec. 12, 2019, Doe wasn't advised of the complaint until Feb. 4, 2020. During the intervening weeks — which included Oberlin's winter break — Oberlin didn't investigate Roe's allegations. According to Doe, this resulted in a failure to preserve exculpatory security camera footage. Oberlin later explained it hadn't immediately notified Doe or investigated the allegations because its sexual misconduct policy allows the reporting party to decide when to begin an informal or formal resolution process.

On Feb. 10, 2020, Roe met with Oberlin's Title IX Coordinator to provide a more detailed statement against Doe. At the same time, Doe hired a private investigator who went to Oberlin's campus to interview witnesses and gather information. Roe allowed the investigator into her dorm room, and during the interview, she said she planned to use Oberlin's informal Title IX resolution process, which didn't include an investigation or hearing. The informal process was meant to result in "the identification of remedies to stop the sexual misconduct, address its effects, and prevent its recurrence," rather than any disciplinary action against the accused student.

Doe also retained an attorney, who complained to Oberlin's Title IX office that Roe was telling other Oberlin students about her complaint and asked Oberlin to "take any and all measures available" to protect Doe's privacy and tell Roe to stop discussing the proceedings.

On Feb. 25, 2020, the Title IX Coordinator gave Doe and his attorney official notice that Roe had requested an informal resolution. However, the next day, Roe changed her mind and decided to pursue a formal resolution of her allegations. Oberlin's policy provided that participating in the informal resolution process was voluntary for all parties, and that the reporting party could request to end the informal process at any time, resulting in a referral for formal resolution.

Under the formal resolution process, Doe would be subject to an investigation and possible hearing before a panel of trained staff, which could result in disciplinary action if the hearing panel found him responsible for sexual misconduct.

Doe then made his own complaint against Roe, claiming her decision to pursue a formal resolution was retaliation for his complaint that she slandered him to other students, and that Oberlin was required under its policy to "take immediate and responsive action to any report of retaliation."

On March 20, 2020, while the investigation by an independent consultant Oberlin retained was pending and before any formal hearing process had begun, Doe filed suit seeking a temporary restraining order and preliminary injunction for alleged violations of federal due process, Title IX, and various state law claims.

On April 7, 2020, the court denied Doe's motions, dismissed his federal due process claim on the merits with prejudice, and dismissed the remaining Title IX and state law claims without prejudice as premature. Doe timely appealed.

On July 2, 2020, while the appeal was pending, Oberlin officially concluded proceedings against Doe, finding he hadn't violated Oberlin's sexual misconduct policy. Doe, however, continued to pursue his appeal.

TITLE IX OBLIGATIONS DON'T TRANSFORM A PRIVATE COLLEGE INTO A STATE ACTOR

The Sixth Circuit affirmed the district court's decision to dismiss Doe's federal due process claim with prejudice, agreeing Oberlin was a private college and not a state actor subject to federal due process requirements.

Courts may attribute state action to a nominally private actor when (1) its activity "results from the State's exercise of coercive power," (2) the State provides "significant encouragement, either overt or covert," or (3) the private actor operates as a "willful participant in joint activity with the State or its agents."

Doe asserted a "close nexus" between Oberlin and the State of Ohio because Oberlin can investigate, discipline, and sanction students it finds responsible for sexual misconduct, powers usually reserved to state actors. He also contended state and federal officials used "coercive power" — the threat of lost federal funding — to influence Oberlin to impose unconstitutional procedures, including rapid and harsh Title IX investigations that discriminate against male students.

However, the court found Doe's allegations didn't satisfy any of the state-actor tests and that each such allegation was "intimately intertwined with a college's obligation under Title IX to investigate allegations of sexual misconduct and the federal government's power to punish noncompliant colleges with the withdrawal of federal funds."

Without more allegations showing state action, such as allegations the federal government participated in the proceedings against Doe or dictated a finding of responsibility in his specific case, the court found no reason to deviate from the weight of case law within and outside the Sixth Circuit. The court concluded private colleges aren't transformed into state actors by conducting investigations under Title IX or being subject to the risk of losing federal funding for noncompliance.

Doe also challenged the district court's dismissal without prejudice of his remaining claims for "lack of ripeness." He alleged Title IX violations under two separate theories: "erroneous outcome" and "selective enforcement." To state a Title IX claim for erroneous outcome, a plaintiff must plead facts "sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding" and a specific "causal connection between the flawed outcome and gender bias." Because at the time of Doe's appeal there was no outcome to challenge and Oberlin ultimately found in his favor, the court held that Doe's "erroneous outcome claim has transitioned from being unripe before the district court to being moot before this court."

The Sixth Circuit held that the district court was correct to dismiss Doe's Title IX selective enforcement claim — that Roe was treated more favorably than Doe due to his gender — and his state law claims for lack of ripeness because the claims depended on contingent future events that might or might not occur. The court, however, found that subsequent factual developments, including the closing of Oberlin's investigations into the incidents involving Doe and Roe, had ripened those claims on appeal.

The Sixth Circuit remanded those remaining claims to the district court for further proceedings.

THE BOTTOM LINE

Plaintiffs challenging an institution's sexual misconduct process often allege violations of federal due process and/or Title IX because even a modest verdict on these claims may include a substantial award of reasonable attorney's fees and costs. However, even if a litigant is unsuccessful in stating a federal due process claim against a private college or university, such complaints typically include additional claims, such as breach of contract, that may survive a motion to dismiss.

John Doe v. Oberlin College, 60 F.4th 345 (6th Cir. Feb. 14, 2023).

RELATED UE RESOURCES

- Review of Student-Perpetrator Sexual Assault Claims With Losses
- Checklist: Informal Resolution of Sexual Harassment Complaints

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Eighth Circuit Confirms a 13-Month Delay in Seeking a Preliminary Injunction Undermines Plaintiff's Claim for Irreparable Harm

A male gymnast failed to secure a preliminary injunction compelling the University of Minnesota to reinstate the men's gymnastics team because his 13-month delay in seeking a preliminary injunction was unreasonable and therefore he couldn't demonstrate irreparable harm.

UNIVERSITY OF MINNESOTA CUTS MEN'S GYMNASTICS TO COMPLY WITH TITLE IX AND REDUCE COSTS

In 2020, the University of Minnesota responded to substantial losses caused by the COVID-19 pandemic by implementing a hiring freeze and by furloughing and dismissing some athletics department employees. The university also developed a Title IX compliance plan that proposed cutting four men's teams: indoor track and field, outdoor track and field, tennis, and gymnastics.

Before deciding to eliminate men's teams, the university considered creating new women's teams to achieve the "substantial proportionality" Title IX required. However, after determining doing so would cost about $3.5 million, the compliance plan instead proposed cutting the four men's teams, reducing annual costs by $1.6 million. Upon consideration, the university's board voted 7-5 to approve much of the compliance plan but retained the men's outdoor track and field team.

Evan Ng enrolled at the university and received a scholarship to participate on the men's gymnastics team beginning in fall 2020. Just before he arrived on campus, he learned the team would be eliminated at the end of the 2020-21 season. Nonetheless, he arrived on campus as planned and competed in two meets in the 2020-21 season before suffering a shoulder injury. Despite the team's elimination, he chose to stay at the university and is in his third year.

Ng filed an initial complaint Oct. 19, 2021, alleging sex discrimination in violation of the Equal Protection Clause and Title IX. On Nov. 8, 2021, he moved for a preliminary injunction seeking reinstatement of the men's gymnastics team pending a decision on the merits.

The district court denied Ng's motion for a preliminary injunction. He appealed to the Eighth Circuit.

UNREASONABLE 13-MONTH DELAY IN SEEKING INJUNCTION DEFEATS A SHOWING OF IRREPARABLE HARM

In reviewing a motion for a preliminary injunction, the Eighth Circuit requires courts to consider each of the following:

(1) The threat of irreparable harm to the plaintiff

(2) The state of balance between this harm and the injury that granting the injunction will inflict on other parties

(3) The probability that the plaintiff will succeed on the merits

(4) The public interest

The university argued that, among other things, Ng unreasonably delayed in filing his motion for a preliminary injunction.

The court explained that although no single factor is dispositive, the absence of a finding of irreparable injury is alone sufficient to deny a motion for a preliminary injunction. The court noted that students who are denied an opportunity to join their school's sports teams because of their sex may suffer an irreparable injury even if the students are permitted to retain their scholarships. However, here, Ng couldn't show irreparable harm because his unreasonable delay in seeking a preliminary injunction belied his claim of an irreparable injury.

According to the court, the mere length of a delay isn't, by itself, determinative. Rather, "[d]elay is only significant if the harm has occurred and the parties cannot be returned to the status quo." In this case, Ng learned the team would be disbanded Sept. 10, 2020, filed his initial complaint in this action on Oct. 29, 2021, and sought an injunction in November 2021.

The court concluded that even if Ng could explain that a portion of the 13-month delay was spent pursuing other avenues to reinstate the team, his delay was unreasonable because he didn't seek a preliminary injunction until a month or two before the 2021-22 gymnastics season would have begun and, by then, most of the coaching staff and gymnasts had left the university. Given these facts, the Eighth Circuit concluded it was "improbable at best" that the team could have competed in the 2021-22 season if the preliminary injunction was issued.

Because the preliminary injunction wasn't sought until it was no longer possible "to preserve the status quo," the Eighth Circuit held that Ng's delay was unreasonable. Thus, Ng couldn't demonstrate irreparable harm, which was a sufficient reason to deny the preliminary injunction. Finding no need to examine other factors, the Eighth Circuit affirmed the district court's decision.

THE BOTTOM LINE

Athletes seeking a preliminary injunction to reinstate an eliminated college athletic team may be able to show they suffered an irreparable injury as required for a preliminary injunction even if they have retained their athletic scholarship. However, at least in the Eighth Circuit, a delay in seeking such an injunction that renders it impossible to return the parties to the status quo is unreasonable and may undermine their ability to demonstrate they suffered an irreparable injury.

Ng v. Bd. of Regents of the Univ. of Minn., Case No. 22-1505, 64 F.4th 992 Cir. Apr. 5th, 2023).

RELATED UE RESOURCES

- Title IX at 50/Part I: Athletics
- Title IX & Collegiate Athletics Under the Biden Administration

ABOUT UE'S RESOLUTIONS PROCESS:

Resolutions Philosophy | Claims Handling | How to Report a Claim

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