

# UE on Appeal

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



Summer 2021

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U.S. Court of Appeals for the Eighth Circuit

## Court Revives Title IX Sex Discrimination Complaint by University of Minnesota Football Players

*Reversing the district court’s dismissal of the lawsuit on the university’s motion to dismiss, the Eighth Circuit determined that plaintiffs sufficiently asserted a Title IX claim in their complaint. Plaintiffs alleged that the university disciplined them because they are male and citing allegations of investigator bias, dubious investigative procedures, and external pressures.*

### ALLEGATIONS OF BIASED TITLE IX INVESTIGATIVE PROCESS

Ten former University of Minnesota football players (the “Does”) appealed the district court’s dismissal of their amended complaint against the university and two university officials arising from the university’s investigation of a complaint of sexual assault and harassment by a female student and cheerleader, Jane Doe. The former players are African American males who alleged the university targeted them on the basis of their sex and race and unfairly punished them in response to Jane’s accusations. In considering the appeal, the Eighth Circuit accepted the men’s allegations as true and in the light most favorable to them to determine whether they stated facially plausible claims.

The men alleged that five of the plaintiffs and a recruit engaged in consensual sex with Jane in fall 2016. Jane reported to Minneapolis Police Department that her recollection was hazy but she recalled being assaulted by a number of players after consensual sex with JD1 and the recruit. After learning of the sexual assault allegations, the university suspended the plaintiffs “because of optics,” according to the plaintiffs’ allegations in their complaint.

The campus department tasked with investigating complaints of student sexual misconduct, the Office of Equal Opportunity and Affirmative Action (EOAA), also commenced an investigation into Does 1-5. EOAA’s assigned investigator, Tina Marisam, had conducted an investigation of

complaints of sexual misconduct against football players in 2015 and found that the failure to ultimately corroborate those accusations was due to a cover-up by team members. The EOAA Director subsequently advised the university's President and Athletic Director of a concerning pattern of misconduct among football players, which posed a risk for women on campus.

During Marisam's initial interview of Jane, she provided more detail than was given to the police. This led Marisam to also investigate Does 6-11. Marisam requested they come in for an interview but didn't disclose they were targets of an investigation. Marisam held multiple interviews with Jane but only met with each accused Doe for 15 to 30 minutes. She didn't record their statements, let them review or respond to Jane's or other witnesses' statements, or let them confirm the accuracy of Marisam's summary of their statements.

After receiving the EOAA report, which recommended expulsion or a one-year suspension for most of the men, the university suspended all of them from the football team except for Doe 6, who was found not to have violated the student conduct code. Reacting to the suspensions, the team boycotted its upcoming bowl game.

The university President issued statements to local press, which the men contended contributed to a "poisoned well" prior to a hearing. The men further claimed that the EOAA report contained several troubling features, including attributing statements to a former player that he contended he never made. After a hearing and appeal to the university's Provost, Does 1-5 were found to have sexually assaulted or harassed Jane and there was insufficient evidence Does 7-11 committed sexual misconduct. There were no further appeals within the university or to the Minnesota Court of Appeals.

### **CIRCUMSTANCES, TAKEN TOGETHER, SUPPORT INFERENCE OF SEX DISCRIMINATION**

On appeal, the men argued their complaint stated plausible claims of sex discrimination and retaliation in violation of Title IX, race discrimination in violation of Title VI and the Equal Protection Clause, and violations of their constitutional right to procedural due process. They further asserted

the district court erred in granting the university Eleventh Amendment immunity from the men's state law claims.

With respect to their Title IX claim, the Eighth Circuit concluded that the men allege a number of circumstances which, taken together, were sufficient to support a plausible inference that the university discriminated against them on the basis of sex.

First, they contended the university was biased against them because of pressures from the campus community and federal government that included public criticism for the university's alleged mishandling of prior sexual assault complaints and the 2011 "Dear Colleague" letter.

The court determined that it could be plausibly inferred that these pressures influenced the university based on the initial suspension of the men, given the university's statement referencing "optics."

Second, the men alleged historical facts that reinforced the inference of gender bias. In addition to a 2014 Department of Education Office of Civil Rights (OCR) investigation into potential Title IX violations at the university, the men specifically alleged that Marisam wanted to punish as many of them as possible after her 2015 investigation. Because of the men's detailed allegations of investigator bias and dubious investigative procedures, the Eighth Circuit reversed the district's courts dismissal of their Title IX discrimination claims and remanded the case for further proceedings.

The dismissal of the men's remaining claims for Title IX retaliation, due process violations, and state law violations was affirmed. The Eighth Circuit concluded that the former players didn't plausibly allege that their request for a sexual misconduct hearing was tantamount to a complaint of sex discrimination. The court went on to note that, even if a request for a hearing made by a person accused of sexual misconduct could amount to protected activity, the alleged public statements by the university's President and hearing panel's rulings were insufficient to state a plausible retaliation claim.

The men's race discrimination claims also failed because they didn't sufficiently allege a similarly situated comparator, pointing to prior court opinions holding that university employees, to whom the men made comparisons, aren't similarly situated to students.

Finally, the Eighth Circuit affirmed the dismissal of the men’s due process claims on the grounds that certain plaintiffs failed to exhaust state administrative remedies and also hadn’t sufficiently alleged that their rights to pre-deprivation process were unconstitutionally denied.

## THE BOTTOM LINE

When considering a motion to dismiss a Title IX complaint, the Eighth Circuit, joined by the Third, Fourth, Seventh, and Ninth, simply asks whether a plaintiff’s alleged facts, if true,

raise a plausible inference that the university discriminated against the plaintiff “on the basis of sex.” Irrespective of whether a circuit has adopted a doctrinal test to categorize sex discrimination in the context of university discipline, educational institutions should remain mindful of the delicate balance between their obligation to investigate complaints of sexual misconduct as well as the process rights, whether conferred by university policy or law, of the accused.

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*John Does 1-2 and 4-11 v. Regents of the Univ. of Minnesota, et al., 999 F.3d 571 (8th Cir. June 1, 2021).*

## RELATED UE RESOURCES

- [Higher Ed Checklist: Title IX Compliant Sexual Harassment Grievance Procedures](#)
- [Campus Sexual Harassment: Title IX Training Requirements](#)

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*U.S. Court of Appeals for the Eighth Circuit*

## Court Emphasizes “Onerous” Actual Notice Standard for Title IX Liability

*Citing Gebser, the Eighth Circuit reinforced the actual notice standard applicable to a complaint involving allegations against school officials brought under both Title IX and Section 1983. Because there was no evidence that the school’s Principal had actual notice of sexual abuse of a student by a teacher, summary judgment was appropriate.*

### PRINCIPAL RECEIVES MULTIPLE REPORTS OF QUESTIONABLE INTERACTIONS BETWEEN TEACHER AND STUDENT

In 2014, LD was a seventh-grade female student at Alfonza Davis Middle School in Omaha, Neb., and enrolled in two classes Brian Robeson taught. A school employee notified Principal Dan Bartels in spring 2014 that Robeson was mentoring LD, one-on-one, in his classroom. All mentoring relationships in the school district were facilitated through the TeamMates program, which required same-sex mentor-mentee pairings. At some point, LD’s parents gave consent for Robeson to have lunchtime mentoring meetings with LD. Bartels instructed Robeson that all such meetings were to

occur in the school’s administrative offices.

In fall 2014, another school employee noticed LD – then in eighth grade – visiting the seventh-grade floor where Robeson taught. On a separate occasion, the same employee found LD in Robeson’s classroom, alone with him and crying. She reported both events to administration, which responded to each. Bartels then observed LD and Robeson alone in his classroom eating lunch in November 2014. He reminded both that all mentoring sessions were to occur in the administrative offices and later counseled Robeson again individually.

Bartels continued to receive reports regarding Robeson’s interactions with LD during spring 2015 including: an anonymous note advising him of LD and Robeson being absent on the same day; Robeson grabbing LD’s phone from the back pocket of her pants; eating lunch together with dimmed classroom lights; and concerns regarding the amount of time Robeson spent with LD. Bartels followed up on all these reports and again counseled Robeson regarding appropriate interaction with students.

Bartels also received a report from a teacher, with an accompanying photograph, of Robeson hugging a different female student for a long time. He advised the teacher that she should report Robeson to Child Protective Services (CPS) if she believed he was engaging in inappropriate sexual contact with students. The teacher did so and, in her report to CPS, also expressed concern about Robeson's behavior toward LD.

After LD graduated from Davis and started high school, Robeson's sexual misconduct was discovered by LD's parents. Robeson was arrested and has since been convicted of sexually assaulting LD.

LD's parents filed suit against the district and Bartels raising Title IX claims, among others. The district court granted defendants' motions for summary judgment and entered a default judgment against Robeson. It also held a damages hearing, absent a jury, and awarded plaintiffs damages against Robeson. Plaintiffs appealed to the Eighth Circuit.

## COURT REAFFIRMS "ONEROUS" TITLE IX ACTUAL NOTICE STANDARD

In the Eighth Circuit, a school official must have actual notice of alleged sexual harassment or sexual assault to be held liable for a Title IX violation. The court, affirming the dismissal, reiterated that the "actual notice standard" is quite onerous, and favoritism toward the student, inordinate time spent with the student, unprofessional conduct toward the student, and vague complaints about the teacher's behavior toward the student (which don't *expressly* allege sexual abuse) fall short of creating actual notice.

Plaintiffs argued that a genuine issue of fact existed as to whether Bartels had actual notice of the sexual abuse and adequately failed to respond. The court, applying facts of the case to the actual notice standard, agreed that the district court's grant of summary judgment was appropriate. Bartels received complaints from employees about LD visiting the

seventh-grade classroom floor, LD alone with Robeson in his classroom, Robeson tying her shoelace in the hallway, Robeson grabbing LD's phone out of her pants' back pocket, and the amount of time they were spending together.

Although Bartels looked into each complaint, he obtained no information sufficient to actually place him on notice of Robeson's sexual abuse of LD. For example, Bartels sent the school's security officer in response to a complaint that LD and Robeson were in his classroom eating lunch with the lights dimmed; however, the classroom appeared to be empty when the officer arrived. When LD and Robeson were absent from school on the same day, Bartels contacted her parents and confirmed she was home sick.

The court also rejected plaintiffs' argument that the district's policies required a prompt and thorough investigation where the district knows or reasonably should know about possible harassment, finding that this would be akin to transforming the "actual notice" standard into one of mere negligence. It also affirmed dismissal of plaintiffs' state law claims and the amount of damages awarded by the district court against Robeson as a result of his default.

### THE BOTTOM LINE



In addition to potential claims against school districts, public school supervisory administrators may be held liable for a Title IX violation pursuant to 42 U.S.C. § 1983. While the actual notice standard is a high threshold, school principals have the obligation to address complaints of harassment of which they have actual notice and schools should be sure to have policies for reporting and addressing suspected misconduct, and training to prevent sexual misconduct.

*KD, et al. v. Omaha Public Schools, et al., 1 F.4th 591(8th Cir. June 16, 2021) petition for cert. filed (Sept. 14, 2021).*

## RELATED UE RESOURCES

- [Protecting Children From Educator Sexual Misconduct: A Series of Checklists](#)
- [Educator Sexual Misconduct at Independent Schools: Insights from UE Claims](#)
- [Protecting Children Online Courses: K-12](#)
- [Checklist: Title IX Compliant Policies Against Sexual Harassment in K-12 Schools](#)

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## Title IX: Up to Jury Whether University's Bias in Investigation and Disciplinary Decision Was Gender-Based

*The Tenth Circuit expanded its 2020 ruling in Doe I v. University of Denver, which held that evidence of anti-respondent bias alone doesn't create a reasonable inference of anti-male bias. Here, the court found that such evidence combined with other circumstantial evidence of bias in a sexual assault investigation and disciplinary proceeding could establish a prima facie case of sex discrimination. Because the plaintiff relied on indirect proof of discrimination, the court applied the McDonnell Douglas test to determine whether the university's proffered reasons for its actions were pretext for discrimination.*

### STUDENT CHALLENGES EXPULSION ON THE BASIS OF ANTI-MALE BIAS IN THE SEXUAL MISCONDUCT INVESTIGATION

John Doe was expelled from the University of Denver after being found responsible for sexually assaulting a female classmate, Jane Roe. Doe and Roe were romantically involved, but Roe expressed an interest in an exclusive relationship, which Doe didn't want. One night, Roe became intoxicated after drinking with friends and brought Doe, also intoxicated, to her dorm room. The next morning, Doe and Roe had sex. Doe's account was that the sex was consensual, while Roe's version was that she was drunk and didn't consent. Roe and Doe had several subsequent discussions regarding the encounter.

Three weeks later, Roe filed a Title IX report with the university after learning Doe told other students what happened. A sexual misconduct investigation commenced. The investigators interviewed 11 witnesses Roe presented but initially refused to interview all five witnesses Doe presented. It was only after issuing the preliminary report, and at Doe's urging, that the investigators interviewed one of Doe's witnesses – his psychologist.

The psychologist, after seeing a summary of her statement, followed up with the university and expressed concern about the investigator's integrity. The final report didn't

mention her concerns about the investigation. In addition, although Roe's witnesses provided inconsistent statements about Roe's account of the incident, and Roe's own statements also were inconsistent, the final report didn't mention these inconsistencies. The hospital's report was only partially produced, omitting the portions concluding that most of Roe's bruises and abrasions were consistent with a fall, like scraped knees. The final report found Doe responsible, and the university disciplinary review committee expelled Doe after adopting the investigation findings.

Doe sued the university for various causes of action, including Title IX violations. Doe alleged the university's sexual misconduct investigation was tainted with pervasive anti-male bias, resulting in his expulsion. The district court granted the university's motion for summary judgment on all claims. Regarding the Title IX claim, the court concluded Doe failed to establish that the university's conduct was motivated by anti-male bias; instead, the court found the university's policies were, at most, pro-complainant and anti-respondent, regardless of sex.

Shortly after the district court's summary judgment order, the Tenth Circuit decided a factually similar case against the university, *Doe I v. Univ. of Denver*, 952 F.3d 1182 (10th Cir. 2020). In *Doe I*, the court held that generalized evidence of anti-respondent bias, standing alone, doesn't create a reasonable inference of anti-male bias to satisfy a Title IX plaintiff's summary judgment burden, unless it is combined with something more to indicate the decision was gender-based.

Doe appealed his summary judgment ruling on two grounds: first, the record contains sufficient evidence to create a genuine dispute of material fact as to his Title IX claim and, second, the district court erred in failing to analyze his Title IX claim under the burden-shifting framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Tenth Circuit agreed and reversed the district court's grant of summary judgment and remanded the case to the district court.

## MCDONNELL DOUGLAS BURDEN SHIFTING APPLIES WHERE A TITLE IX PLAINTIFF RELIES ON INDIRECT PROOF OF DISCRIMINATION

Although Doe and the university framed their arguments around the analytical framework of two theories of Title IX liability: “erroneous outcome” and “selective enforcement,” the Tenth Circuit concluded the better approach is to analyze whether a reasonable jury presented with the facts alleged would find that sex was a motivating factor in the university’s disciplinary decision. In distinguishing its previous holding in *Doe I*, the Tenth Circuit determined that Doe’s evidence of procedural deficiencies in the sexual misconduct investigation, combined with additional statistical evidence of sex bias, was sufficient to establish a *prima facie* case of sex discrimination.

The court also reasoned that, unlike in *Doe I*, because Doe established a *prima facie* case, the application of the burden-shifting *McDonnell Douglas* framework was necessary. In response, the university presented a legitimate, non-discriminatory reason for its conduct: University employees were biased against sexual misconduct respondents, regardless of their sex. Given this showing, the court assessed whether Doe sufficiently raised an inference that the university’s explanation is merely pretext for covering up sex-based discrimination. The court concluded Doe

had, because the university’s investigation was replete with procedural deficiencies.

In addition to the errors in the investigation, Doe pointed to evidence that the university treated males less favorably than females in investigating and disciplining allegations of sexual misconduct. The court was persuaded that the evidence didn’t just reflect a disparity between the gender makeup of the complainants and respondents, but identified a number of statistical anomalies that raised an inference of anti-male bias, far greater than what was presented in *Doe I*. The court concluded that Doe satisfied the *McDonnell Douglas* test to overcome summary judgment.

### THE BOTTOM LINE

The Tenth Circuit’s holding in *Doe v. Univ. of Denver* expands its ruling in *Doe I*, where a one-sided sexual misconduct investigation alone was found to be insufficient to raise a reasonable inference of gender bias. Where some additional evidence exists that sex may have played a role in the disciplinary decision, it is up to the jury to decide whether the university’s decision was on the basis of sex in violation of Title IX.

*Doe v. Univ. of Denver, et al., No. 19-1359 (10th Cir. June 15, 2021).*

### RELATED UE RESOURCES

- [Checklist: Sexual Harassment Investigations](#)
- [Title IX Supportive Measures, Remedies and Sanctions: After the Regulations](#)

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*Court of Appeals of Indiana*

## University Not to Blame for Student Hit by Car on Campus Adjacent to Public Road

*The Court of Appeals of Indiana clarifies that a university doesn’t owe its students a duty to install sidewalks on its campus to protect students from injury on an adjacent public road.*

### STUDENT HIT BY CAR ON PUBLIC ROAD SEEKS TO FIND UNIVERSITY AND CITY RESPONSIBLE

A pick-up truck struck Ball State University student Sarah

Swingley while she was walking on the pavement of a public road abutting campus. The campus property adjacent to the road didn’t have a sidewalk. Swingley filed a negligence action against the university and the City of Muncie, arguing the university owed a duty to protect its student pedestrians walking near campus and, therefore, also had a duty to install a sidewalk alongside its property. The Delaware Circuit Court

granted the university's and the city's motions for summary judgment. Plaintiff appealed.

The Court of Appeals of Indiana affirmed the granting of summary judgment to both the university and the city. As to the city, the court found that absent any notice of a defect, the city owed no duty to Swingley and therefore wasn't negligent.

## **NO DUTY OWED BY UNIVERSITY TO PEDESTRIANS ON PUBLIC ROADS OR TO STUDENTS TO PROVIDE A SIDEWALK ON CAMPUS**

In granting summary judgment to the university, the trial court found the university couldn't be held liable for negligence because it did not owe any duty to Swingley. The Court of Appeals of Indiana analyzed the issue of the duty the landowner university owed.

It was undisputed that the accident occurred on a public roadway and that the university had no ownership or control over the roadway. In support of her argument that the university should have installed a sidewalk on its property adjacent to the public road, Swingley cited Indiana Supreme Court cases holding that a landowner had breached its duty

to pedestrians and passengers of public roads by creating a dangerous condition on the roadway.

The appellate court rejected this argument. Unlike the cases Swingley cited, here the university had no control over the public roadway where the plaintiff was struck. The court concluded that the absence of a sidewalk on an owner's land didn't create a dangerous condition or make any adjacent roadway unsafe. Swingley was injured on a public road by a third-party motorist over whom the university had no control.

### **THE BOTTOM LINE**



The Court of Appeals of Indiana ruling in *Swingley v. City of Muncie et al.* clarifies that the university's duty to people traveling on a road adjacent to its campus is limited to refraining from creating or maintaining a hazardous condition that impacts the road itself, and there is no duty imposed on a landowner to protect a person traveling off-premises from negligent acts of a third-party over whom the university has no control.

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*Swingley v. City of Muncie, et al., Ind. Ct. App. 20A-PL-1797 (April 22, 2021).*

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## **SUPREME COURT UPDATE**

In the Spring 2020 issue of *UE on Appeal*, we reported on the Fifth Circuit Court of Appeals' decision in *Wilson v. Houston Community College System*. The decision held that injury stemming from a legislative censure of an elected college board member is enough to confer standing in a First Amendment Claim. The U.S. Supreme Court granted the college's petition for *certiorari*. The issue before the Supreme Court is whether the First Amendment restricts the au-

thority of an elected body to issue a censure in response to a member's speech. The college filed its opening brief, and several amicus briefs have been filed in support, including by the United States. The Supreme Court set the argument for Nov. 2, 2021. UE will continue monitoring and reporting on further developments in the Supreme Court.

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*Houston Cmty. Coll. Sys. v. Wilson (No. 20-804).*



## STAY TUNED

**Pleading Title IX deliberate indifference claims:** The United States filed a statement of interest in a Title IX case against the University of Nebraska. Nine student plaintiffs allege that the university's deliberately indifferent responses to the sexual misconduct and retaliation by peers created a hostile educational environment. In response to the university's motion to dismiss for failure to state a claim, relying in part on the Eighth Circuit's decision in *Shank v. Carleton College*, the U.S. argues that a college or university simply making a plaintiff

"more vulnerable" to harassment and/or discrimination is sufficient to state a claim under Title IX. The university filed a response to the statement and emphasized Shank's holding that the university's actions must cause or make the individual more vulnerable to "actual" further harassment.

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*Thomas, et al. v. Bd. of Regents of the Univ. of Nebraska, et al., No. 4:20-cv-03081 (D. Neb. June 11, 2021).*

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