

# UE on Appeal

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



Spring 2021

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U.S. Court of Appeals for the Sixth Circuit

## A Public University Can't Compel Academic Speech of Professor That Conflicts With his Religious Beliefs

Addressing the perennial clashing protected interests in a university classroom, the Sixth Circuit joined the Fourth, Fifth, and Ninth Circuits in answering whether principles applicable to public employee speech articulated by the U.S. Supreme Court in *Garcetti v. Ceballos* apply to a speech case related to scholarship or teaching. In this case, the Sixth Circuit found a professor's interest in not being compelled to use a student's preferred gender pronouns due to the professor's religious beliefs outweighed the university's interests.

### PROFESSOR REFUSES TO ADDRESS STUDENT BY PRONOUN REQUESTED

Nicholas Meriwether is a devout Christian and Professor of philosophy at Shawnee State University, a small public university in Ohio. The university had instituted a gender-identity policy requiring professors to address students by their preferred pronouns. One day in class, Meriwether responded to a student with "Yes, sir."

After class, the student (Jane Doe) requested Meriwether use feminine titles and pronouns when addressing her because the student identified as woman. Meriwether responded that because his sincerely held religious beliefs prevented him from communicating messages about gender identity that he believes are false, he wasn't sure he could comply with the student's request.

The student then allegedly became hostile. Meriwether reported the incident to senior university officials. The university initially proposed to Meriwether that he eliminate all use of gender pronouns when teaching. As a compromise, he proposed referring to Doe by her last name only.

Two weeks into the semester, Doe complained to university officials again. This time, the university told Meriwether that if he didn't address

Doe as a woman, he would be in violation of the gender-identity policy. Meriwether accidentally referred to Doe as “Mr.” shortly thereafter, before immediately correcting himself.

Soon after, Doe filed a complaint with the Title IX coordinator and threatened to retain legal counsel if the university didn’t act. The university again demanded Meriwether comply with its gender identity policy and threatened disciplinary action.

Attempting resolution, Meriwether inquired whether the policy permitted his inclusion of a disclaimer in his syllabus noting that his use of students’ preferred pronouns was “under compulsion” and “setting forth his personal and religious beliefs about gender identity.” The university responded that this, too, would violate its policy. For the rest of the semester, Meriwether called on Doe using her last name. Doe excelled in his class, participated frequently, and received a high grade.

The university continued to reiterate its demand that Meriwether use students’ preferred gender pronouns. Meriwether again asked whether an accommodation would be possible given his sincerely held religious beliefs. The university provided him two options — stop using all sex-based pronouns (which Meriwether viewed as a practical impossibility that would alter the classroom environment) or refer to Doe as a female (which Meriwether said violated his religious beliefs).

Meanwhile, the university’s Title IX office investigated Doe’s complaint and concluded Meriwether created a hostile environment based on his disparate treatment of Doe in violation of the university’s nondiscrimination policies. The university ultimately placed a written warning in Meriwether’s file.

Meriwether filed a lawsuit alleging the university violated his constitutional rights under the Free Speech and Free Exercise Clauses of the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Doe and an organization, Sexuality and Gender Acceptance, moved to intervene. The magistrate judge granted their motions. The district court granted the intervenors’ and university’s motions to dismiss based on lack of standing.

Meriwether appealed dismissal of all claims, except equal protection, to the Sixth Circuit. Numerous briefs by *amici curiae* were filed in relation to the appeal.

## **PROFESSOR’S DISCUSSION AND USE OF GENDER PRONOUNS IN CLASS IS PROTECTED SPEECH**

Because the university is a public institution, the initial question before the Sixth Circuit was whether the free speech principles applicable to government employees articulated by the Supreme Court in *Garcetti v. Ceballos* apply. The *Garcetti* decision expressly declined to address whether its analysis would apply to a case involving speech related to scholarship or teaching.

Turning to prior decisions of the Supreme Court for guidance, the Sixth Circuit highlighted previous recognition of the “special niche” institutions of higher education occupy in our constitutional tradition. In particular, academic freedom is of special concern since a classroom is a unique “marketplace of ideas.”

Joining the Fourth, Fifth, and Ninth Circuits, the court held that professors at public universities retain First Amendment protections, at least when engaged in core academic functions such as teaching and scholarship. Accordingly, the *Garcetti* case didn’t bar Meriwether’s free speech claim, and the court found its holding can’t apply to teaching and academic writing that are performed pursuant to a professor’s official duties.

Applying the longstanding *Pickering-Connick* framework, the Sixth Circuit also held that Meriwether had plausibly alleged that the First Amendment protected his in-class speech.

The test these Supreme Court decisions created asks:

1. Was the speech on a matter of public concern?
2. Was the speaker’s interest greater, on balance, than the university’s interests?

In this case, the court found Meriwether’s interests outweighed those of the university. The court noted the “robust” tradition of academic freedom at post-secondary schools and highlighted that First Amendment interests are especially strong in this instance because Meriwether’s speech also related to his core religious and philosophical beliefs.

Importantly, potentially compelled speech on a matter of public concern — here, Meriwether being required to use certain pronouns or face possible discipline — does additional damage. The university argued it also had a compelling interest: Stopping discrimination against transgender students.

On balance, the court determined Meriwether had stronger interests. Based on the allegations in the complaint, which must be taken as true at the motion to dismiss stage of the proceedings, the court found no suggestion that Meriwether's speech inhibited his duties in the classroom, hampered university operations, or denied Doe educational benefits.

## UNIVERSITY CAN'T BE HOSTILE TO RELIGION WHEN ENFORCING NONDISCRIMINATION POLICIES

The court also held that Meriwether had sufficiently alleged the university violated the Free Exercise Clause when it disciplined him for not following the university's pronoun policy. Meriwether contended that throughout the process, university officials made non-neutral statements regarding his religious views, including that religious presence at universities is counterproductive and that Meriwether's convictions were no better than religiously motivated sexism and racism.

Allegations regarding irregularities in the university's Title IX investigation and adjudication process also permitted an inference of non-neutrality. The university's basis for disciplining Meriwether changed from a finding that he violated the university's gender-identity policy by creating a "hostile educational environment" to a finding of "disparate treatment."

The court also concluded that Meriwether respectfully sought an accommodation that would protect his religious beliefs and

make the student feel more comfortable, but the university responded with a plausible inference of religious hostility.

Coupled with the alleged religious hostility, the court found there existed a plausible inference that the university wasn't applying a preexisting policy neutrally. Also, the court determined the university's policy on accommodations was a moving target, as the responses to Meriwether's suggestions to accommodate his religious beliefs kept changing. The court found non-neutrality could be inferred from the Title IX adjudication process itself and, combined with the other allegations, could provide circumstantial evidence of discrimination.

On the other hand, the court affirmed the district court's dismissal of Meriwether's procedural due process claim. While Meriwether had attacked the policy as unconstitutionally vague, the court disagreed. Meriwether knew the policy prohibited his conduct. The university had repeatedly advised Meriwether to use the student's preferred pronouns and, when he didn't comply, disciplined him in the specified manner.

### THE BOTTOM LINE



The Sixth Circuit's holding is limited to public institutions of higher education. While this was a significant decision, the court's analysis could yield a different result in the face of different facts. Public institutions should be mindful of balancing protected interests of their students and faculty when confronted with clashing viewpoints.

*Meriwether v. Hartop, et al., No. 20-3289 (6th Cir. March 26, 2021).*

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

## Title IX Employment Discrimination: Rumors and Complaint Regarding Alleged Affair Between Professor, Student Weren't Based on Gender

*Reminding us that not all hurtful or offensive conduct within the workplace is actionable, the Tenth Circuit affirms dismissal of a male professor's Title IX gender discrimination and hostile work environment claims where a university had expressed concerns regarding appropriate professor-student interactions with a female student and warned against continuing the relationship.*

### COLLEAGUES' CONCERN ABOUT PROFESSOR-STUDENT RELATIONSHIP PROMPTS INVESTIGATION

Ronald Throupe, a Professor of real estate at the University of Denver (DU), began his employment as an Associate Professor in 2007 and was promoted to a tenured position in 2013. In 2013, DU considered Throupe among other

candidates to serve as Director of the Real Estate and Construction Management department. DU ultimately hired outside the school, bringing in Barbara Jackson to lead the department. According to Throupe, Jackson quickly announced her intent to significantly reduce the real estate portion of the department.

In May 2014, Throupe attended a gala for departmental faculty accompanied by a former female undergraduate student, Mao Xue. Xue is a Chinese national who graduated in 2013 and, during her time as a student, served as a Research Assistant to Throupe and took much of her coursework from him. Outside of school, Xue worked for Throupe's private real estate consulting business, spent extensive time with his family, traveled with him for conferences, and was on his family's cell phone plan. When advised by an administrator that Throupe needed to pay for Xue's ticket to the gala, which was customarily free for faculty/staff and their significant others, Throupe responded that Xue was his significant other. Thereafter, faculty and students expressed concerns to Jackson about an inappropriate relationship between Throupe and Xue.

Xue returned to DU as a graduate student in fall 2014. In spring 2015, she served as a graduate assistant to Throupe and took all her coursework with him.

During that quarter, Xue stopped attending classes for several weeks and failed to report for her work as a Research Assistant. Throupe couldn't locate her and contacted the Director of International Student Services and the Director of Graduate Student Services to express concerns about Xue's immigration status given her poor attendance.

Based on Throupe's description of his close, personal relationship with Xue (including that he financially supported her and asked her to refer to him as "stepdad"), each Director contacted DU's Title IX office to express concerns. After meeting with the Title IX office, Throupe submitted an internal complaint reporting a hostile work environment due to rumors circulating in the department about his relationship with Xue.

Jackson, along with the department's Associate Dean, issued Throupe a written warning against continuing his relationship with Xue given her status as a student. Throupe maintains Jackson continued to further harass him by assigning him unfavorable course schedules.

## DISMISSAL OF SEX DISCRIMINATION LAWSUIT AFFIRMED

Throupe filed a sex discrimination lawsuit under Title IX against DU and individual administrators. The district court granted DU's motion for summary judgment, determining Throupe failed to establish a *prima facie* case of sex discrimination based on disparate treatment or a hostile environment.

Title IX employment discrimination claims are generally assessed under the same burden-shifting framework as Title VII claims.

Rejecting Throupe's contention that he was reported for a Title IX violation *because* he is a male faculty member, the Tenth Circuit recognized that the mere fact Jackson viewed Throupe's conduct as reportable doesn't support an inference that she discriminated against him based on his sex.

In fact, Plaintiff's own counsel acknowledged during oral argument that it was appropriate to report Throupe initially for a Title IX investigation based on the way he described his relationship with Xue. Similarly, although some of the department-wide rumors circulating about his relationship with a female student involved speculation that they were having an affair, Plaintiff couldn't provide evidence supporting the inference that the rumors were motivated by his sex.

Additionally, the conduct at issue wasn't severe or pervasive. The court went on to quickly dispatch Plaintiff's disparate treatment claim since he failed to raise any inference of discrimination or provide evidence that a similarly situated female professor would have been treated differently.

### THE BOTTOM LINE



Without more, rumors of an inappropriate professor-student relationship aren't based on gender. Similarly, the reporting of concerns regarding such a relationship to a university's Title IX office doesn't raise an inference that a male employee was treated a certain way because he is a man. The warning provided to the professor about his behavior stemmed from concerns of inappropriate professor-student interactions. Universities should ensure that regardless of the gender of the subject of a complaint, policies are followed and applied consistently.

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*Throupe v. Univ. of Denver, et al.*, 988 F.3d 1243 (10th Cir. Feb. 26, 2021).

## Pay Discrimination: Paycheck Accrual Rule Applicable to Claims Under the Equal Pay Act

*Congress passed the Lilly Ledbetter Fair Pay Act in 2009, codifying the so-called “paycheck accrual rule,” which holds that the statute of limitations resets every time an employee receives a paycheck tainted by past discrimination, even if the discriminatory acts began years before. While the Act targeted Title VII, the Seventh Circuit extends the paycheck accrual principle to claims under the Equal Pay Act.*

### LONG-TERM EMPLOYEE COMPLAINS OF BEING PAID LESS THAN MALE COLLEAGUES

The Indiana Academy for Science, Mathematics and Humanities is a residential high school on Ball State University’s campus. In 2006, the academy hired Cheryl Kellogg as a life science teacher with a starting salary of \$32,000. Kellogg negotiated this salary with the academy’s Executive Co-Director, Dr. David Williams.

According to Kellogg, Williams told her during these negotiations that \$32,000 was the maximum salary the academy was willing to pay because otherwise she would earn as much as instructors with a Ph.D. He also remarked offhandedly that she “didn’t need any more money” because her husband worked at Ball State, so they “would have a fine salary.”

Over a decade later, in 2017, Kellogg complained to the Dean of Ball State’s Teacher’s College, which oversees the academy, that she received less pay than her similarly situated male colleagues.

The Dean responded to Plaintiff’s complaint by noting that the issue was “salary compression,” meaning that those hired after Kellogg began at a higher salary. The Dean observed that her salary increased by over 36% during her employment at the academy while her colleagues’ salaries had increased by a smaller percentage. Dissatisfied with this response, Kellogg sued the academy in 2018 for violating Title VII and the Equal Pay Act by engaging in sex-based pay discrimination.

The district court ruled in the academy’s favor on summary judgment. Kellogg appealed.

### PAY DISCRIMINATION CLAIM CAN RELY ON EVIDENCE OUTSIDE THE LIMITATIONS PERIOD

With respect to her Title VII claim, Kellogg argued on appeal that she had presented evidence that the academy’s offered nondiscriminatory explanations for her salary were pretextual, thereby creating a triable issue of fact.

Kellogg pointed to Dr. Williams’ 2006 statement about paying her less because of her husband’s employment as being sufficient evidence, and the Seventh Circuit agreed. The academy argued the court shouldn’t consider Williams’ statement because it was a “stray remark” with no real link to her pay, and because it occurred outside the statute of limitations period and therefore couldn’t be used to establish liability.

The Seventh Circuit disagreed, noting that while isolated comments are insufficient to establish that a particular decision was made based on discriminatory animus, the statement Williams made wasn’t “water-cooler talk.” Rather, the court found it to be a straightforward explanation by the academy’s director, who had control over setting salaries, during salary negotiations, that Kellogg didn’t need more money “because” her husband worked at the university.

The court also rejected the academy’s statute of limitations defenses for several reasons. To start, under the paycheck accrual rule, as codified by the Lilly Ledbetter Fair Pay Act of 2009, the court noted that Williams’ statement could give rise to potential liability for pay discrimination.

Under the Act, a new cause of action for pay discrimination arises every time a plaintiff receives a paycheck resulting from an earlier discriminatory compensation practice, even one occurring outside the statute of limitations.

Because each of Kellogg’s paychecks was tied at least in part to the decision regarding her starting salary, each paycheck gave rise to a new cause of action for pay discrimination. Consequently, the court concluded she could rely on Williams’ discriminatory statement even though it occurred outside the statute of limitations, to seek damages from any paychecks she received within the statute of limitations window.

Moreover, even apart from the paycheck accrual rule, the court held that Kellogg could rely on Williams' statement to show the academy's proffered explanations were pretextual, because time-barred acts can support a timely claim.

Although the framework for Equal Pay Act claims differs somewhat from Title VII, the court reached the same result in this case. Under the Equal Pay Act, if the plaintiff establishes a *prima facie* case of pay discrimination, the burden shifts to the defendant to establish one of four statutory defenses.

Relevant to this case was the catchall defense that a pay discrepancy may be based on any factor other than sex. As with Plaintiff's Title VII claim, the court found the paycheck accrual rule applied to her EPA claim and, further, that irrespective of the paycheck accrual rule, Kellogg could use Williams' statement to raise a factual question regarding the sincerity of the academy's proffered nondiscriminatory explanations in dispute. Accordingly, the Seventh Circuit

reversed the district court's decision and remanded the case for further proceedings.

## THE BOTTOM LINE



The Seventh Circuit clarifies in its opinion that the applicability of the pay accrual rule isn't merely limited to Title VII pay discrimination claims, but also applies to similar allegations raised under the Equal Pay Act and 42 U.S.C. 1983. As employers, colleges and universities can be found liable for discriminatory compensation decisions made well outside the applicable statute of limitations if an employee's compensation remains impacted by that decision for paychecks issued during the limitations period.

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*Kellogg v. Ball State Univ. d/b/a Indiana Acad. for Sci., Mathematics & Humanities*, 984 F.3d 525 (7th Cir. Jan. 5, 2021), petition for reh'g denied, Jan. 28, 2021.

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U.S. Court of Appeals for the Third Circuit

## No Duty Owed by School in Suicide Case

*In a non-precedential decision, the Third Circuit affirmed the district court's granting of summary judgment to the school, rejecting claims of negligence on the basis of in loco parentis, duty and violations of the Fair Housing Act, where the student was no longer in the school's physical custody.*

### SCHOOL'S IN LOCO PARENTIS DUTY ENDS ONCE A STUDENT LEAVES

The Milton Hershey School is a private, nonprofit boarding school for disadvantaged children, offered free to students. When the school realized one of its students was struggling with suicidal thoughts, and determined its resources weren't enough to support her needs, it assisted her mother with checking her into an inpatient hospital.

The student returned to school after receiving treatment, but her condition quickly worsened. Again, the school had the student check into the inpatient hospital and, again, she returned to school after discharge. After it became clear to the school that she remained at a high risk of suicide, the school, which isn't an licensed mental health or treatment center, helped the mother check her into a psychiatric institute.

While the student was at the institute, the school advised her mother that she might not be able to return to school after her discharge, as the school didn't have the services she likely needed to support her. In the meantime, she wasn't permitted to attend her eighth-grade graduation or the after-party.

The psychiatric institute discharged the student to her parents' care without telling the school. She took her own life at home.

The lawsuit alleged the school was negligent by dismissing the student from its care and barring her from graduation and the after-party, which resulted in her death. Her parents claimed the school owed her a duty because it stood *in loco parentis* (in the place of a parent).

The court agreed that, given her age, the duty *in loco parentis* existed while she was at school, but noted that when a student returns to her parents, the parents — and not the school — typically are responsible for the student. Thus, once her mother checked her into the institute, the school's duty ended.

Because she was discharged to her mother and, moreover, because the duty couldn't extend over the summer break when she was back with her parents full-time, the court held, as a matter of law, that the school's duty ended once she left be-

cause she was out of its physical custody and control. Without a duty of care, the negligence claim failed.

For the first time at summary judgment, the parents raised the argument that the school owed her a “continuing duty” of care even after releasing her to the institute. The Third Circuit agreed that the district court properly refused to consider the argument because it wasn’t raised in the complaint. The court also concluded that because the other state-law claims failed, there was no cause of action under Pennsylvania’s Wrongful Death and Survival Act, because the Act doesn’t create a standalone cause of action.

### **FAIR HOUSING ACT NOT APPLICABLE WHERE THERE IS NO RENTER**

The parents also contended the school violated the Fair Housing Act by prohibiting the student from attending her graduation and after-party, because those events were held at her on-campus residence. In affirming the district court’s dismissal of the Fair Housing Act claim, the Third Circuit held that because she

was provided free room and board and wasn’t a “buyer or renter” under the terms of the Act, the statute didn’t apply.

The court wasn’t persuaded by the argument that the student was a renter because she was required to do chores while attending the school; rather, the court found the promise to perform chores was gratuitous and not offered as consideration for living at the school.

### **THE BOTTOM LINE**



The facts of this case are tragic, but not every tragic case leads to legal liability. More specifically, though the doctrine of *in loco parentis* remains in the case of minor students, it isn’t unlimited and doesn’t extend to situations where the school has relinquished control of a student, with the parents’ consent, to the parents or another institution.

*Wartluft v. Milton Hershey Sch. and Sch. Trust, Case No. 20-1753, 2021 U.S. App. LEXIS 2672 (3d Cir. Feb. 1, 2021).*

### **RELATED UE RESOURCES**

- [Provide Suicide Prevention Training at K-12 Schools](#)

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

## **Due Process in Student Misconduct Hearings Doesn’t Mean Unlimited Cross Examination**

*In the Winter 2020 issue of UE on Appeal, we reported the district court’s ruling on the university’s Motion to Dismiss, with a focus on the Title IX claim. Plaintiff appealed that ruling as to the rejection of his equal protection claim and denial of his motion to amend the complaint. Affirming the district court, the Sixth Circuit further clarifies its prior ruling in Doe v. Baum with respect to the balancing test required for the live hearing with cross-examination in a student disciplinary process.*

### **STUDENT APPEALS DISMISSAL OF LAWSUIT CHALLENGING HIS EXPULSION AFTER HEARING**

John Doe was expelled from the Michigan State University (MSU) of Human Medicine after being found responsible for sexually assaulting two women, Jane Roe 1 and Jane Roe 2, during and after a “Med Ball” party. The lengthy investigation

an outside investigator conducted resulted in a finding that Doe violated the university’s sexual misconduct policy.

Doe was placed on an interim suspension. The university held a hearing, which upheld the suspension. Doe appealed the findings and sanction.

During these initial proceedings, the Sixth Circuit issued its decision in *Doe v. Baum*, holding that when the determination of a university disciplinary proceeding depends on credibility, the accused has a constitutional right to cross-examination at an in-person hearing. The university began to revise its sexual misconduct policy, which didn’t then require an in-person hearing with the opportunity for cross-examination, and determined Doe was due a hearing in accordance with the ruling in *Baum*.

Before the live hearing occurred, Doe brought a lawsuit against MSU alleging the university's proceedings violated the Due Process Clause, the Equal Protection Clause, and Title IX. Meanwhile, the parties moved forward with the *Baum* hearing, involving three days of in-person testimony and cross-examination. During the hearing, the hearing officer allowed Roe 1 to refuse to answer certain questions Doe asked on cross-examination. Ultimately, the hearing officer found Doe violated the university's sexual misconduct policy and recommended expulsion.

Upon completion of the *Baum* hearing, Doe amended his complaint to include facts and allegations arising from the hearing, including that the hearing officer permitted Roe 1 to refuse to answer questions on cross-examination. The university moved to dismiss for failure to state a claim, and in response Doe sought to amend his complaint for a second time. The district court denied Doe's motion to amend his complaint a second time and granted the university's motion to dismiss.

Doe appealed to the Sixth Circuit, asserting the district court erred in denying his motion to amend a second time.

The second amended complaint was to include additional facts relating to specific categories of questions that Roe 1 refused to answer, along with assertions that the university refused to provide Doe with copy of the hearing transcript. The district court held that Doe's proposed amendment was untimely because he failed to argue the additional facts were newly discovered or provide an explanation as to why the delay was warranted.

On appeal, Doe didn't address the lower court's holding that his amendments were untimely until filing his reply brief. As a threshold matter, the court therefore held that Doe waived this issue on appeal. Regardless, it goes on to affirm on the decision's merits. The court reviewed the denial of the motion under an abuse of discretion standard and determined the additional facts wouldn't withstand a motion to dismiss for failure to state a claim.

### **BALANCING TEST: DOE RECEIVED AMPLE DUE PROCESS THROUGHOUT HIS HEARING**

Doe also contended on appeal that the district court erred in dismissing his due process claims. He didn't appeal the district court's dismissal of his Title IX and Equal Protection claims. Doe argued the district court erred in granting the motion to dismiss because his hearing violated his due

process rights as laid out in the Sixth Circuit's prior, recent decisions in *Baum* and *Doe v. University of Cincinnati*.

In considering Doe's argument, the court reviewed its decisions in *Baum* and *Doe v. University of Cincinnati*, along with its 2016 decision in *Doe v. Cummins*. In the context of campus sexual assault proceedings, the Sixth Circuit has consistently applied longstanding Supreme Court case *Mathews v. Eldridge*, which provides the balancing test for courts to determine what procedures are required when a plaintiff has an interest at stake.

Under *Mathews*, the level of process required under the Fourteenth Amendment is determined by balancing three factors:

1. The nature of the private interest affected by the deprivation
2. The risk of an erroneous deprivation in the current procedures used, and any probative value of additional or alternative procedures
3. The government interest involved and the burden that additional procedures would entail

The court decided *Doe v. Cummins* in the context of campus sexual assault proceedings where a hearing panel refused to ask all the written questions the respondent submitted. There, the court applied the *Mathews* balancing test and held that due process may require a limited ability to cross-examine witnesses in school disciplinary hearings.

In 2017, the court decided *Doe v. University of Cincinnati*, which built on *Cummins*. In *University of Cincinnati*, the complainant wasn't present at the student misconduct hearing, thereby depriving the accused student, who was ultimately suspended, from any right to cross-examination.

Applying the *Mathews* test, the court weighed Doe's interest with the university's burden of additional procedural safeguards and the risk of erroneous deprivations of Doe's interest without the additional safeguards. The court held that when the deprivation is severe, as is the case in a suspension, and the credibility of the accuser is at issue, a denial of cross-examination is a denial of due process. The court acknowledged the potential harm that unfettered cross-examination could pose on victims of sexual assault.

A year later, in *Baum*, the issue of cross-examination was before the Sixth Circuit again. In *Baum*, the court held that when a university's decision requires a credibility determi-



nation, there must be some form of cross-examination to satisfy due process. In reaching this determination the court weighed the significance of the accused's interests, the minimal burden on the university, and the university's interest in protecting victims. In *Baum*, the court didn't detail exactly what form of cross-examination is required, beyond being in-person and in front of the factfinder.

Now, in this case, the Sixth Circuit has further clarified that the form of cross-examination required must allow for the accused to probe the complainant's credibility and for the factfinder to observe the witness' demeanor under questioning.

In this instance, the court concluded the university wasn't required to make Roe 1 answer every question. Forcing the claimants to answer two additional categories of questions didn't significantly add to the factfinder's ability to test their credibility.

Because of the lengthy hearing, which included in-person cross-examination where the hearing officers had ample opportunity to judge credibility, the probative value of forcing them to answer every question was outweighed by the university's interest in protecting victims, and the court affirmed the district court's granting of the university's motion to dismiss.

## THE BOTTOM LINE



The Sixth Circuit's holding in *Doe v. Mich. State Univ.* further clarifies the cross-examination requirements previously articulated in *Doe v. Baum*. It relies again on the Mathews balancing test in evaluating appropriate due process in student misconduct hearings. Colleges and universities within the Sixth Circuit (Michigan, Ohio, Kentucky, and Tennessee) should ensure their sexual misconduct policies and hearing processes are consistent with this line of decisions.

*Doe v. Mich. State Univ., et al.*, 989 F.3d 418 (6th Cir. Feb. 25, 2021).

## RELATED UE RESOURCES

- [Lawsuits Brought by Students Accused of Sexual Assault](#)
- [Review of Student-Perpetrator Sexual Assault Claims with Losses](#)
- [Checklist: Title IX Compliant Sexual Harassment Grievance Procedures in Higher Education](#)

## SUPREME COURT UPDATE

United Educators reported on the Eighth Circuit's decision in *Rossley v. Drake University* in the Winter 2021 issue of *UE on Appeal*. Rossley subsequently filed a petition for a writ of certiorari at the U.S. Supreme Court raising two issues — first, whether the split in circuits regarding Title IX discrim-

ination presents a federal question that should be considered by the Court and whether the university's "constructive notice" of the student's disabilities was sufficient to provide accommodations in a disciplinary hearing. The Supreme Court denied Rossley's petition on March 22, 2021.



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