Welcome to Your FINAL Free Trial Issue of the New *Campuses and the Courts Monthly Newsletter* from TNG

Last chance to receive *Campuses and the Courts Monthly Newsletters* without interruption from TNG! And, if you subscribe now, you’ll also get access to the bonus third case review in this free issue.

When we hatched the idea for *Campuses and the Courts*, we knew we were answering a common question for practitioners: how do I possibly keep up with the constant stream of litigation and court decisions? This summer has been no exception. Let’s just say that the *Campuses and the Courts* team has been busy keeping up, too!

**What does *Campuses and the Courts* provide to me?**

- Real-time understanding of the litigation landscape
- Expert synopses
- Digestible takeaways
- Practical application to the field of education
- Time saving curation of relevant content
- Regular delivery of necessary information, straight to my inbox

This month, we highlight a potentially groundbreaking case regarding the expectations imposed on private institutions, a recent Supreme Court case that has big implications for the pending Title IX regulations, and the issue of race discrimination in faculty hiring and tenure processes.

Although this August edition is the last of your free trial, we are already hard at work for September, when we will cover trauma-informed practices in investigations and adjudications, and off-campus jurisdictional limitations. Remember, you must subscribe to continue to receive *Campuses and the Courts*. 
Case #1:
Doe v. Rhodes College

New Due Process Requirements for Private Colleges? Court Grants Temporary Restraining Order to Prevent Expulsion at Rhodes College

Campuses and the Courts wouldn’t typically cover a Temporary Restraining Order (TRO) in Title IX litigation; however, this decision, even at this early stage of the litigation, is rather unique because of the analysis the court used in deciding to grant a TRO against Rhodes College.

A federal district court judge in Tennessee explicitly extended the right to due process in a Title IX case as discussed in Doe v. Baum to Rhodes College, a private institution.
Typically, due process protections as described in the *Baum* case flow from constitutional law and only apply to public institutions. This decision could ultimately have unprecedented significance for other private colleges.

**Brett's Take:**
This case is a heck of a shot across the bow for private colleges in terms of a new reading of Title IX that implies due process protections directly.

**Saunie's Take:**
Another court supporting cross-examination rights; this idea is clearly here to stay. Whether courts in other jurisdictions follow this reasoning for other private institutions will be key.

**Daniel's Take:**
Doe successfully raised the question of whether campus protests created gender bias against him. Gender bias cases are hard to prove; it will be interesting to watch this case unfold.

**Scott's Take:**
NO surprises for the responding party at the hearing. Be sure that they have access to all evidence before so that they can properly prepare. Also, the idea of having a hearing without a Claimant (at least) present is increasingly
Case #2: Kisor v. Wilkie

Supreme Court Sustains Authority of Federal Agencies to Interpret their own Rules, Including Title IX

A seemingly straightforward dispute about whether a veteran is entitled to certain federal benefits made its way to the U.S. Supreme Court and has potential implications for the significance of OCR rulings and the authority the U.S. Department of Education has over civil rights issues, especially Title IX.

One key issue affects how the Office of Civil Rights (OCR) interprets its regulations as they apply to transgender students. In 2016, OCR issued guidance that interpreted federal law as protecting a student’s right to use a restroom or locker room consistent with their gender identity. In the Gavin Grimm case, the Fourth Circuit relied on a longstanding principle whereby federal courts defer to agency interpretation in the absence of a court decision on a specific issue. This is often referred to as the “Auer doctrine” or “Auer deference.” The Trump administration has since rescinded that 2016 guidance letter.

READ MORE

Brett’s Take:
Putting Title IX regulations at the

Saunie’s Take:
The timing of Kisor against the
mercy of the political winds is obviously challenging for our field. *Kisor* continues that trend, especially for protections for transgender students.

Title IX regulatory changes is critical. There will inevitably be substantial ambiguity in the final regulations that OCR and the courts will need to thresh out.

**Daniel's Take:**
I anticipate that courts may read *Kisor* to require less deference to agency decision-making than before. If so, that will inevitably affect OCR’s interpretation of Title IX regulations and guidance.

**Scott's Take:**
It is unclear how workable the new “test” here will be. It is likely that *Kisor* will generate lots of new litigation, including under Title IX, about whether courts or OCR get to interpret OCR guidance.

**Bonus Case # 3:**
**Mawakana v. Bd. of Trustees of the Univ. of the District of Columbia**

**Tenure Denied: Academic Freedom or Race Discrimination? Court Finds Against Law School at the University of the District of Columbia**

Historically, First Amendment principles that are the foundation of academic freedom provide a degree of deference from the courts in matters concerning the academic life of
The reasoning is that freedom of scholarly inquiry is a core component of academic freedom. Courts are often loathe to step in and overturn an institutional action when academic freedom forms the basis of an academic decision, such as granting tenure. However, academic decisions are not immune from discriminatory actions, as demonstrated in the decision by the U.S. Court of Appeals for the District of Columbia Circuit.

**Brett's Take:**
Academic freedom underpins the entire enterprise of higher education, but it is not absolute. We need to honor it while ensuring our processes are discrimination-free, too.

**Saunie's Take:**
Tenure decisions are obviously academic ones, but our faculty need to be well-trained about how to apply consistent metrics fairly across all tenure applicants.

**Daniel's Take:**
Well-designed tenure review processes require a degree of autonomy from administration for

**Scott's Take:**
This case may well represent the same crack in the armor of academic deference in tenure
We Are Keeping An Eye On . . .
Class Action in Title IX?

A class action lawsuit, a first-of-its-kind in Title IX litigation, was filed in recent weeks against Michigan State University. In a class action, a group of individuals sue collectively when they have all been injured by the same defendant in the same way. Class actions first need approval from the court to proceed. The “class” of plaintiffs here are current or former MSU students who claim that they were denied due process under the MSU disciplinary policy. That policy was struck down by the Sixth Circuit in Doe v. Baum in September 2018, based on the lack of opportunity for cross-examination. The argument is, of course, that if cross-examination is an inherent requirement of the law under Baum, that all suspensions or expulsions decided without cross-examination were procedurally deficient. As you can imagine, this case could have a significant impact on our work. If this MSU lawsuit succeeds, it will lead to a Circuit-wide class action against all schools in the Sixth Circuit. We will continue to watch this case closely and will report back on future editions of Campuses and the Courts...

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