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

*Campuses and the Courts* works hard to track the many court trends that affect colleges and universities. Title IX litigation is obviously a big part of that mission, but we also monitor a broad range of issues beyond Title IX: free speech, disability law issues, employment law, and more.

The *Campuses and the Courts* team has continued to track new cases this month, including analyzing and interpreting recent decisions to make it easy for you to incorporate new ideas into your work.

This month, we analyze two courts’ decisions that share a common link: the degree of judicial deference to institutional decision-making. Generally speaking, courts will avoid second-guessing our judgments if our processes are inherently fair, consistent with due process, and followed carefully. This month’s pair of cases, one regarding student conduct and disability law, and the second reviewing a Title IX process, provide contrasting approaches to judicial scrutiny. Each court’s degree of deference was informed in some measure by whether the institution followed its own policies.

We also highlight a PreK-12 Title IX case that provides helpful guidance to higher education. Remember, many of our seminal Title IX cases, such as *Gebser* and *Davis*, arise from PreK-12 settings. The case will be helpful for administrators who are grappling with the impact of cell-phone culture on our Title IX systems, and the degree to which we are expected to address systemic problems that we see with our students’ use of technology.

Recall that this is the second of three free trial issues of *Campuses and the Courts*. The trial subscription will extend from now until August, and then you will have the option to subscribe to continue receiving our newsletter each month. Of course, if you subscribe now, you’ll also get access to the bonus third case review in this free issue.
Case #1:
T.C. v. Metropolitan Government of Nashville

Inadequate Response to Distribution of Videos of Sexual Activity Constitutes “Deliberate Indifference”

Cell phones are an often-used communication pathway that create challenges in the Title IX world. It’s becoming increasingly common for students to capture and share videos and photos of sexual activity, often without consent. A recent PreK-12 case posed a challenge to school administrators in this arena. In what could be a sweeping new duty under Title IX if upheld on appeal, a federal district court held against the school district, not only for how it responded to individual reported incidents, but for failure to address and remedy what it knew was a growing problem districtwide.

This case is noteworthy for administrators in both PreK-12 and higher education for several reasons. First, it is difficult to respond to the emerging challenges that technology presents for Title IX teams. Second, this decision imposes a fairly substantial obligation on the school district based on a “before” theory, which evaluates a recipient’s responsibilities to “prevent” sexual harassment in response to known harms before an incident, rather than evaluating a response to a report of actual misconduct (Title IX’s more common “after” theory). It is unclear whether this potentially groundbreaking case will ultimately withstand appeal, which makes it an important case to watch closely. Its eventual outcome may signal important lessons for the field or set up a Supreme Court showdown.
**Brett's Take:**
It will be interesting to see if the Sixth Circuit upholds this decision on appeal, because it arguably places a new and substantial Title IX-based duty to prevent on schools before any specific incident occurs.

**Saunie's Take:**
This case underscores the need for training for investigators, and that there be an effective Title IX staffing structure with clear roles.

**Daniel's Take:**
We watch PreK-12 cases closely because they also present so many lessons for higher education – especially with emerging technology and cyberbullying.

**Scott's Take:**
The judge’s analysis distinguishing sexual history of a party versus sexual pattern between two people (and its admissibility) is consistent with ATIXA’s training and worth a look.

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**Case #2:**
Castelino v. Rose-Hulman
The facts of this case present a common dilemma for higher education at the intersection of student misconduct, student mental health concerns, behavioral outbursts, and readmission decisions. Rose-Hulman Institute of Technology has been embroiled in a prolonged and contentious lawsuit that exposes all of these tensions.

This case is worthy of our attention for several reasons. First, it demonstrates an institution’s effectiveness in following its published procedures for addressing misconduct and the standard protocol for readmission following suspension of a student, even when the student had disability accommodations that were at the crux of the underlying conduct process. Second, this case highlights that minor deviations in processes are not typically enough to be considered discriminatory. Instead, a plaintiff needs to demonstrate that the alleged discrimination is based on the disability (a “but for” standard). Why cover this case in *Campuses and the Courts*? Sure, there are plenty of cases that uphold college discipline because the institution followed its policies and procedures, but it is fairly rare for a case involving disability and direct threat to make it to trial, and your Editors think the judge’s discussion of why the direct threat defense wasn’t applicable here is important to understand.
apply to private institutions, here the Institute provided the student with extensive opportunities to respond.

student’s “threat” to the campus community, based on past conduct and/or prospective concerns.

Daniel's Take:
It is refreshing to see the court’s acknowledgement that the Institute followed its regular processes, even in reaching a difficult outcome for this student.

Scott's Take:
This case is a reminder that there is not necessarily a reasonable accommodation that allows for unaddressed aggressive behaviors and/or academic misconduct. Schools will not run afoul of the law when they address the behaviors, as opposed to the disability.

Bonus Case # 3: Doe v. Westmont College

Shuttle Diplomacy Model Shot
Down by California Appeals Court

As we covered last month in Campuses in the Courts, California state courts are utilizing the “writ of administrative mandate” frequently now to grant relief to students who claim that Title IX processes are unfair. As we see in this case, private institutions are not immune from this scrutiny – at least in California – where the state administrative code applies both to public and private institutions. Furthermore, this case is another key example of the
demise of the “single-investigator model.” Courts continue to emphasize that “fundamental fairness,” at least in California, absolutely prohibits a single person from serving as both the investigator and decision-maker in a case.

Jane Roe attended the same party as John Doe. Roe reports that when they stepped away from the party to smoke marijuana Doe sexually assaulted her. Roe reported the alleged assault to the Title IX Coordinator and an investigation was initiated. Doe, in contrast, flatly denied the allegations. He claimed that he never had sex with her, and that they were never even alone together. Roe and Doe had friends at the party who provided varying accounts of the evening. Some of Doe’s friends indicated they were with him or near him throughout the evening. Some of Roe’s friends felt that she was lying to gain attention.

**Brett’s Take:**
California courts continue to closely scrutinize processes and are increasingly wary of “dual roles” for investigators. The “single-investigator model” era is over.

**Saunie’s Take:**
Even though California courts are requiring hearings for credibility assessments, there is room under this decision for questioning to be indirect or by video conference.
Daniel's Take:
Although our policies and procedures need to have some degree of flexibility, be careful of deviating from your policies regarding inherent due process issues.

Scott's Take:
There should not be any surprises for any party at a hearing. Ensure that they both receive a full copy of the investigation report and all relevant evidence that will be considered. Also, any model that has one person as judge, jury, and sanctioning body with no other oversight is inherently flawed.

We Are Keeping An Eye On . . .
The Path to Litigation

A key issue in Title IX litigation is the standard a court will apply at the first stage in civil litigation, to determine if a complaint can survive a motion to dismiss. Conceptually, this is a court’s “first pass” at evaluating the merits of a case, allowing a court to rule on a lawsuit before discovery begins by assuming all facts in the complaint are true. Some courts use a reduced pleading standard to evaluate a motion to dismiss, and some use a heightened standard, making it harder to get to trial. Recently, the Ninth Circuit declined to adopt the Second Circuit’s reduced pleading standard, which only requires “facts that support a minimal plausible inference of discrimination.” Instead, in Austin v. Univ. of Oregon, the Ninth Circuit instead adopted the Sixth Circuit’s analysis, requiring enough facts to plausibly add up to a viable Title IX claim on its face. This standard would be applied whether the theory of the case is based on deliberate indifference, erroneous outcome, or selective enforcement. Austin further sets up a “circuit split,” making the issue ripe for possible Supreme Court review in the future. This issue will have a significant impact on future Title IX lawsuits. We will follow further developments closely for readers of Campuses and the Courts.

Sign up now for a free trial of the first three issues!