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Welcome to Your First of Three Free Trial Issues of the New *Campuses and the Courts* Monthly Newsletter from TNG



We can all agree that the courts have become more directive to college and university administrators, and that litigation is driving our practices, at a level exceeding any other time in history. How do we keep up? How can we interpret the cases and implement their lessons? How do we stay on top of what seems like a weekly deluge of new cases? TNG is here to help.

Perhaps more than any other function we provide, higher education has come to trust TNG for our ability to teach and operationalize the case law for lawyer and non-lawyer administrators alike. We break the cases down, grasp their essence, and teach key takeaways that should influence your decision-making, policies, procedures, and practices.

This approach has guided TNG for over 20 years and has allowed us to guide you and the field on evolving practices, often getting you out ahead of key rulings, preparing you before new legal standards take effect, and helping you avoid the liability that has impacted peer institutions.

Without a collected, centralized source for interpretation of litigation, you have had to find your information – and the time to review multiple lengthy court decisions each week – piecemeal. Now, TNG has a one-stop resource for case law impacting on your role. Everything you need. In one place. From one trusted source: the TNG *Campuses and the Courts* monthly newsletter.

TNG will find and digest the cases for you, interpret them, and offer summaries to you in an easily understood format. You'll stay up-to-date, have the information you need at your fingertips, and have a single, reliable, succinct source for the content that informs your practices.

Subscribers will receive a monthly newsletter featuring synopses of the most current and pressing campus case law. You'll receive three free trial issues from now until August, and then you'll 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 each free issue.

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Case #1: Farmer v. Kansas State University

Tenth Circuit Considers Kansas State's Failure to Remedy Discriminatory Effects of Off-Campus Conduct



Two undergraduate students sued Kansas State under Title IX claiming that the university was “deliberately indifferent” to their reports that they had been raped by other students.

This case is worthy of your attention for several reasons. First, you know there is a high bar for students who sue schools under Title IX. This is one of the rare cases with the facts to meet that bar. Second, it’s a decision from an appeals court in the federal system, which carries greater weight and precedential value than a district court decision. Third, the case involves off-campus misconduct, and shows the continued willingness of the Tenth Circuit to find college liability for off-campus incidents.

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Brett's Take:



Saunie's Take:

This is one of the few victim-side Title IX cases to prevail and it's a federal appellate case. It may carry more persuasive weight with other courts moving forward.

It's not as simple as whether the conduct occurred on- or off-campus. You must always assess whether there is some aspect of institutional control even for off-campus conduct.



Daniel's Take:

This case reminds us that even if you do not have disciplinary jurisdiction over a particular incident, you should always offer supportive resources and take necessary measures to help ensure health and safety.



Scott's Take:

If schools decide not to assert off campus jurisdiction for sexual misconduct, they should be prepared to explain why they do in other areas (e.g., alcohol and drugs). It is a safety and downstream effect analysis.

Case #2: Doe v. University of Southern California

CA Appeals Court Overturns Student Expulsion: Incomplete Investigation Denies Responding Party "Fundamental Principles of Fairness"

In the last twelve months, nine lawsuits have reversed student discipline in sexual misconduct cases in California on due process grounds. Those cases and likely those to come will be chronicled in Campuses and the Courts. Like the state universities in New York, California's Administrative Procedures



Act (APA) permits what amounts to a final level of appeal of college discipline to the state courts. Unlike New York, this “appeal” is afforded to students at private colleges as well as public universities. Also unlike New York, the mechanism for seeking relief is called the Writ of Administrative Mandate (also known as a Mandamus Action), alleging that the discipline is not supported by substantial evidence or procedural fairness. While these cases only apply to California colleges, Campuses and the Courts will highlight those we think have broader implications, either because they likely foreshadow coming protections within the Title IX Regulations, because they mirror the trend of judicial activism on due process in other jurisdictions, or because their principles are likely to be followed by courts in other jurisdictions. This is one such case...

University of Southern California (USC) students Jane Roe and John Doe both attended a “paint” party, which involved attendees throwing paint at each other. Although the extent of their intoxication is disputed, both Roe and Doe had consumed alcohol prior to and during the party. After the party, Doe accompanied Roe back to her apartment. According to Roe, Doe then sexually assaulted her, both vaginally and anally. Following an investigation, USC expelled Doe. Doe brought a lawsuit in California state courts to overturn his expulsion.

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Brett's Take:

California courts are deciding due process cases at a rapid-fire pace right now. Practitioners everywhere can learn a lot about where the field is heading with these cases.



Saunie's Take:

The Sixth Circuit is not alone in focusing on credibility analyses. We can anticipate continued scrutiny on this in other jurisdictions, too.



Daniel's Take:

We can expect that other state courts will wade into these due process issues, especially as more states are passing state-specific legislation.



Scott's Take:

Remember that investigations must be as thorough as possible. Ensure that you follow up on any probative evidence that might inform the investigation and its outcome.

Bonus Case # 3:

Fogel v. University of the Arts

More Proof that Title IX Protects Employees, Too!

***Tenured Professor Loses His Job:
Was The Investigation Skewed by
Gender Bias?***

Tenured professor Harris Fogel was terminated from The University of the Arts (UA) after two women – professional acquaintances – alleged

that he sexually harassed them at professional conferences. Fogel claimed that the allegations were the product of collusion between the two women, and that the subsequent investigation against him was tainted by gender bias.



This case informs our approach to employee harassment issues in a couple of ways. First, it reminds us of the challenges presented by the all-too-common gender bias claims cropping up in our disciplinary processes. Second, the case examines an institution's response to claims that arose in the context of the wave of #MeToo reporting, including reports made about an employee by reporting parties who are not affiliated with the university. Yet the institution still took jurisdiction over the responding party, of course, and undertook to “stop, prevent, and remedy.”

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