Higher Education: Title IX Litigation Update

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Disclaimers

- We are not giving you legal advice
- Many of these cases may still be in appeals – stay tuned
- Some of these cases predate the 2020 regulations
- Consult with your legal counsel regarding how best to address a specific situation
- Feel free to ask general questions and hypotheticals
- There are a variety of stakeholders listening, so please keep that in mind as you submit questions
- Watch your inbox for a link to the slides!

Agenda

- Cases brought by Student Complainants
- Cases brought by Student Respondents
- Cases brought by Employees
- Title IX Athletics
- Lawsuits Against the 2024 Regulations

Quick Reminder

- Pay the closest attention to the Supreme Court, your Circuit Court, and your District Court, as these decisions are "precedential," which means future courts are supposed to follow the same logic.
- All other decisions are "persuasive." The persuasiveness depends on how thoughtful the decision is, and how similar the facts are to your own.
  - Your District Court might prefer to look first to case law from other District Courts in your Circuit.
- We are not second-guessing parties or attorneys in these cases. Today we are focusing on how courts have construed facts and what they have said about those facts as construed, so as to help Title IX team members better implement their procedures.

Another Quick Reminder

- The information considered by the Court will depend on how far along the case is at the time of the decision
  - Motion to Dismiss – If we assume everything in the plaintiff's complaint is true, do they have a case?
  - Motion for Summary Judgment – Court can make findings of fact based on what is in the record now that depositions and other discovery has taken place
  - Appeal – Look to whether this is an appeal of a motion to dismiss, or an appeal for motion for summary judgment, and that will tell you whether we are working with established facts.

Cases Brought By Student Complainants

Doe v. Yeshiva Univ., 2023 WL 8236316 (SDNY Nov. 28, 2023)

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- Court denied the motion to dismiss denied in relevant part
- Allegations:
  - Case was dismissed from TIX to non-TIX track, with no notice of dismissal or appeal right
  - Investigators never asked for rape kit evidence or to interview SANE nurse
  - Investigators did not interview outcry witnesses
  - Complainant was required to sign NDA before she could access investigative report
- Court said the allegations, if true, may support a claim of deliberate indifference
- Also, the failure to investigate a complaint does not constitute retaliation for filing the complaint

Ware v. Univ. of Vermont & State Ag. Coll., 2024 WL 989804 (D.Ver. March 7, 2024) (slide 1 of 3)

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- Complainants—current and former students who were sexually assaulted while attending the University—alleged University was deliberately indifferent to the risk of sexual violence in violation of Title IX
- Pre-assault Title IX liability – Complainants alleged University was deliberately indifferent to a risk of sexual misconduct on campus
  - Second Circuit has not addressed pre-assault claims; Court denied MTD – agreed with 6th, 9th, and 10th Circuits "that Title IX countenances 'pre-assault' liability...for actions taken prior to an incident of discrimination"
  - Followed 9th Circuit's "official policy" pre-assault liability standard (*Karasek)* - Complainants must show University had a policy of deliberate indifference to reports of sexual misconduct that created a heightened risk of sexual harassment that was known or obvious in context subject to the school's control that resulted in Complainant suffering harassment that was so severe, pervasive, and objectively offensive that it denied Complainant access to educational opportunities or benefits

Ware v. Univ. of Vermont & State Ag. Coll., 2024 WL 989804 (D.Ver. March 7, 2024) (slide 2 of 3)

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- Complainants plausibly alleged University maintained an official policy of deliberate indifference to heightened risk of sexual assault on campus
  - University was investigated by OCR for failing to promptly and equitably investigate a complaint and agreed to review its process, but failed to publicize revised (or publicize) policies after state Task Force recommended changes
  - Third-party audit recommended found students did not fully understand University's Title IX investigation process, nearly all cases were delayed beyond 60-day target, and Title IX reports were written in complicated/legalistic manner resulting in "significant confusion"
  - Students were improperly pressured into resolving claims informally vs. formal investigation
  - While audits and campus protests regarding sexual assault occurred after the Complainants were assaulted, they "support the notion that UVM's policies were inadequate for an extended period, including prior to the assaults."
- **"When universities are on notice that their policies are inadequate to prevent sexual assault on campus, they must change those policies. Plaintiffs' allegations here – inadequate transparency, improper reliance on informal procedures, and improper delay – clear that threshold."**

Ware v. Univ. of Vermont & State Ag. Coll., 2024 WL 989804 (D.Ver. March 7, 2024) (slide 3 of 3)

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- Pre-assault claim concerning sexual assaults within fraternities
  - Complainants' allegation that **University's policy was "to suspend particularly troublesome fraternities from campus, only to allow them to continue to operate elsewhere" without oversight or enforcement could show official policy of deliberate indifference**
  - Sanction not effectively communicated to student body because list of fraternities in good standing was improperly maintained
  - Allowing fraternities to move off-campus without oversight "**simply pushes rules violations underground and enables further bad behavior**" - increasing risk of sexual misconduct on campus
  - Alleged that one off-campus fraternity party resulted in multiple date rape drug reports
  - Fraternity recognition and suspension process is subject to University's control, even if off-campus parties not

Kane v. Loyola Univ. of Chicago, 2024 WL 1157396 (N.D. Ill. March 18, 2024) (slide 1 of 3)

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- Complainants – former and current female students who attended University between 2012-2022
- Allegations
  - University was deliberately indifferent to alleged sexual assault by other male students or individuals affiliated with University
  - University failed to prevent their sexual assaults even though University knew Respondents had attached others
  - Complainants were forced to remain in physical proximity with Respondents after they reported misconduct
  - Complainants were not fully informed of their rights during Title IX investigation
  - Were forced to r**eenact or pantomime their assaults** at hearings
  - Common perception that University's Title IX investigations were ineffectual
  - Complainants' participation in Title IX investigations was traumatizing and flawed
  - University "grossly underreported the number of sexually violent incidents"

Kane v. Loyola Univ. of Chicago, 2024 WL 1157396 (N.D. Ill. March 18, 2024) (slide 2 of 3)

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- Ruling on University's motion to dismiss
- Claim based on sexual harassment that occurred outside U.S. while Complainant was participating in study abroad program dismissed – Complainant cannot recover for harassment that occurred extraterritorially
- Allegations sufficient to state pre-assault claims –
  - If allegations are true, University failed to adequately respond to sexual harassment complaints on at least ten separate occasions
  - University was aware that its *de facto* policy caused heightened risk of sexual harassment – "allegations that Loyola systemically mishandled sexual assault claims since 2011, corroborated by the 2016 news article, the university's reporting, and the plaintiffs' individual allegations are sufficient to plausibly allege pre-assault claims based on a *de facto* policy of deliberate indifference"

Kane v. Loyola Univ. of Chicago, 2024 WL 1157396 (N.D. Ill. March 18, 2024) (slide 3 of 3)

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- Post-assault claims based on University's failure to respond to harassment allegations
  - Post-assault claims surviving MTD
    - Complainant MK's allegations that University allowed her assailant to skip interviews and told her she could not obtain an attorney during the investigation – University's actions reflect deliberate violations of its own policies
    - Complainant MS alleged she was sexually assaulted twice in on-campus dorm buildings – she reported first assault but chose not to report second incident due to University's failure to enforce no-contact directive issued against her assailant
  - Complaint Doe E alleged that when she returned to campus following the study-abroad program, she learned her assailant was assigned to her freshman dorm, causing her "great concern" - **dismissed** – generalized knowledge that victim's assailant remained on campus not sufficient to support claim under Title IX, and she did not allege she was subjected to further harassment or made vulnerable to it

Doe v. St. Lawrence Univ., 2024 WL 1116454 (N.D.N.Y. March 14, 2024)

- Complainant professor alleged she was drugged and sexually assaulted by another professor while meeting with him at his home
  - Title VII claim – As alleged, University's response was negligent – Respondent professor was allowed to remain on campus and teach classes; he violated no contact order; he was not placed on administrative leave until nearly 3 months later, and then was permitted to return to campus; at time of filing complaint nearly two years later, University had not issued any findings; and Complainant was still required to obtain Respondent's approval for some courses

Thomas v. Regents of the Univ. of Calif., 97 Cal.App.5th 587 (Cal. App. Nov. 29, 2023)

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- Women's soccer players alleged coach was hostile and engaged in "psychological abuse," including:
  - Making inappropriate comments about their bodies
  - Inquiring into their sex lives
  - Confronting a player about a hickey on her neck
  - Creating a culture of "fear and intimidation"
- Court held that this was sufficient to pursue a claim for hostile environment sexual harassment - "There is no legal requirement that hostile ats be overtly sex- or gender-specific in content … Even with no express reference to sex or gender, harassment creating a hostile environment may constitute sexual harassment if the plaintiff can prove she would not have been treated in the same manner if she were a man"
- Allegation that the athletic director knew and did nothing was sufficient for potential employer liability, but not against the AD personally

Cases Brought By Student Respondents

Rasheed v. Mt. San Antonio Coll., 2023 WL 8594396 (9th Cir. Dec. 12, 2023)

- Plaintiff was expelled in 2019 and raised a Title IX retaliation claim in response (pre-2020 regs)
- Plaintiff failed to show she engaged in a protected activity by reporting conduct where she was expelled for continuing to accuse administrator of "sexual assault" after internal Title IX investigation found evidence that indicated did not engage in alleged conduct and Plaintiff was aware of findings and did not appeal them
- Takeaway: At least in 9th Circuit, continued accusations after finding of no violation could be reasonable basis for discipline of accuser (proceed with caution – very fact-based).

Van Overdam v. Texas A&M Univ., 2024 WL 115229 (S.D.Tx. Jan. 10, 2024)

- Pre-2020 live disciplinary hearing resulted in suspension for sexual assault
- Respondent sued, alleging selective enforcement
- Court ruled in favor of University's Motion for Summary Judgment
- Respondent's evidence of pretext was statistics from an expert witness: "Of the students that were charged and found responsible for sexual misconduct, no females were suspended or expelled from Texas A&M while 55% of males were suspended or expelled."
- Court noted that "sexual misconduct" included sexual abuse, sexual contact, and sexual harassment, which was a "critical flaw." These differ greatly in facts and severity.

Doe v. Sacks, 2024 WL 402945 (S.D.N.Y. Feb. 2, 2024)

- Motion to Dismiss was granted
- An anonymous Google doc (the "Blacklist") accused Respondent and others on campus of sexual misconduct. Posters with QR codes linking to the document were put up around campus.
- Court found that there was no allegation that NYU knew who posted the allegations, whether the allegations were true or false, whether the document was created using NYU resources, or that NYU could access any control over the document.
- Note the steps taken by the University in support of Plaintiff in this case!

Roe v. St. John's Univ., 117 Fed.R. Serv.3d 1713 (2nd Cir. Jan. 31, 2024)

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- Two Complainants alleged sexual assault against Plaintiff-Respondent in two different countries (France and US) in 2018 (pre 2020 regs)
- The Court affirmed failure to state a claim under Title IX (erroneous outcome, selective enforcement – and also examined sexually hostile environment) where Plaintiff alleged a different account of events but did not allege facts for either claim – noted that Plaintiff's allegation that the University treated him differently than Claimant was not sufficient to meet an inference of sex discrimination and the two were not similarly situated
- Alleged came to an erroneous outcome, but did not sufficiently allege due to gender bias
- Determined that procedural irregularities were not serious enough to support a claim of sex-based discrimination where alleged University attorney improperly sat on hearing panel as chair but policy reserved the right to have attorney as part of the process; the panel privately deliberated with the Title IX investigator but policy provided for separate questioning of Title IX investigator, and Appeals Board misstated the type of sexual contact at issue (penetrative vs. Non-penetrative)
- Takeaways: Continue to oversee adherence to your policies and procedures throughout the process

Doe v. Univ. Of Southern Calif., 2024 WL 1854190 (Cal. App. April 29, 2024)

- Plaintiff was charged with, in pertinent part, violation of a no contact order
- Due to court filings, the matter was delayed in resolution until after Plaintiff graduated, but found in violation and sanctioned "permanent exclusion from USC property and re-enrollment; recission of USC email and alumni status; transcript on hold for three years.
- Court agreed on appeal that USC violated its policy where Hearing Officer considered evidence not in the record - the no contact order
- Takeaway: Follow your policies and procedures and ensure hearing officers are not considering evidence not in the record.

*Univ. of Denver v. Doe**, 2024 WL 1979412 (Col. Sup. Ct. May 6, 2024)

- Student expelled for sexual misconduct for 2016 incident that was reported and processed at that time (pre 2020 regs) (has been up and down in the courts) - here, at issue was whether University followed its own procedures and promise the investigation would be "thorough, impartial and fair"
- In reviewing the record, the Court disagreed with lower court's determination that the record that Respondent's claims were false or they were irrelevant where investigator initially failed to interview any of Respondent's witnesses, only interviewed a few of them and all of Complainant's for likely duplicative information, considered only portions of SANE reported selected by Complainant, and failure to consider Complainant's improper motivation for reporting – court did a "double take" on investigation process
- Takeaway: Ensure application of procedures equally applied for opportunity of parties to provide evidence, witnesses, and document why if not equally applied

Cases Brought By Employees

Grevlos v. Augustana Univ., 2023 WL 8880321 (D.S.Dak. Dec. 22, 2023)

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- Court denied Motion to Dismiss with regard to professor's removal as department chair and reduced salary, which allegedly were due to sex discrimination
- Allegations included:
  - Male professors excluded her from important conversations so they could engage in "real talk" and because including her could make meetings "emotional"
  - Removal from position and reduction in salary occurred shortly after these comments were made
- The Court granted MTD with regard to her removal from a separate position and eventual termination, as those happened years after the above exclusionary conversation

Balakrishnan v. Regents of Univ. Of Calif., 99 Cal. App. 5th 513 (Cal. App. March 1, 2024)

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- As a result of an anonymous complaint online against a Professor and public response of Professor, the University publicly invited individuals with relevant information to contact Title IX Office and engaged external investigator (2017-2018, so post 2011 CDL, but pre-2020 Regs)
- Investigator found preponderance of the evidence to support alleged misconduct
- Faculty Tenure Committee held an administrative hearing and found (unanimously) Professor violated Faculty Code of Conduct, recommended dismissal and denial of emeritus status and adopted all the way up to Regents
- Professor argued no jurisdiction for conduct that occurred off campus and against a non-student or community member – Court rejected because policy contemplated off-campus conduct and non-students and community member
- Takeaway: Keep following your policies!

Manco v. St. Joseph's Univ., 2024 WL 299265 (E.D.Pa. Jan. 25, 2024)

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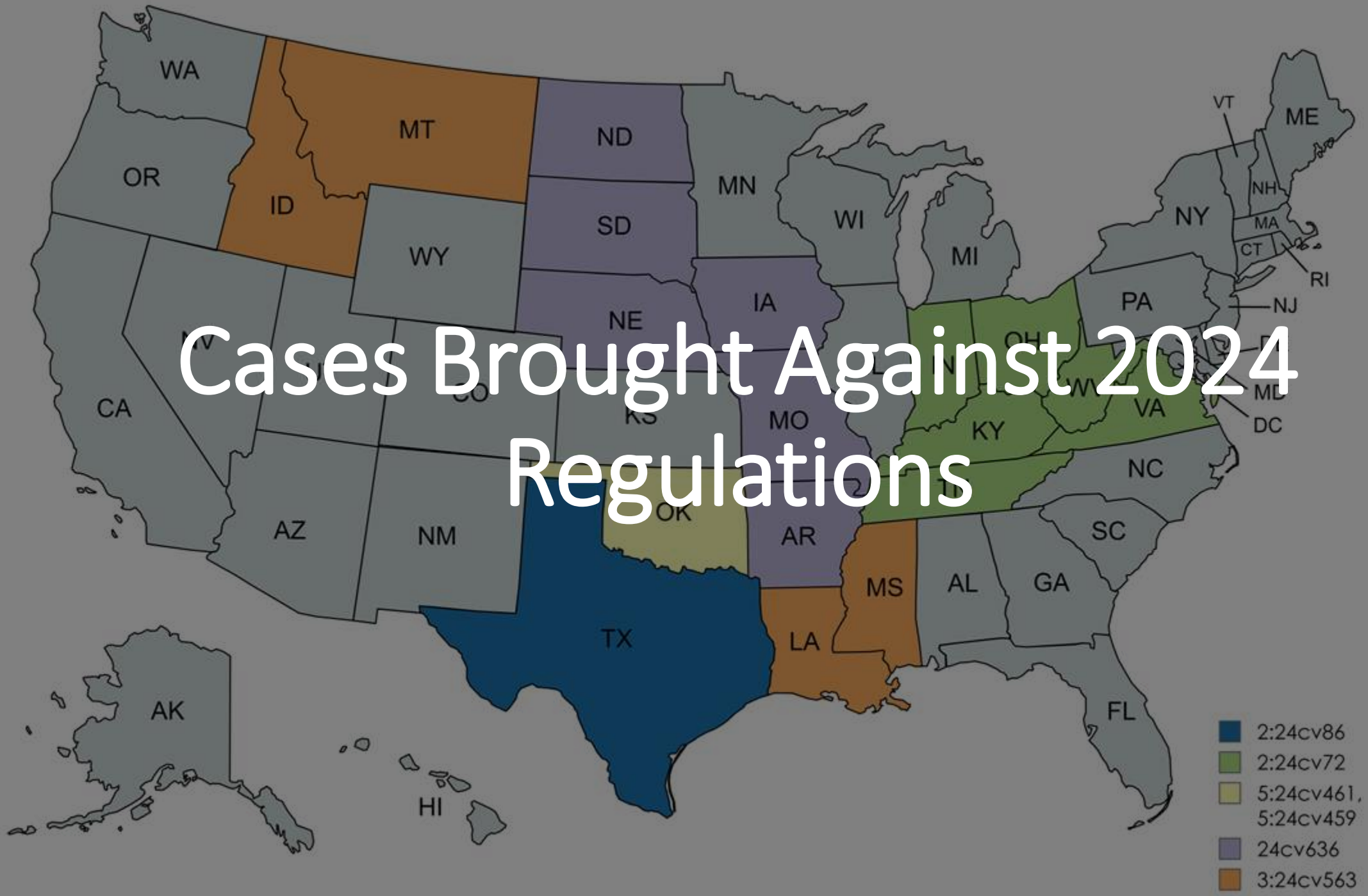
- Professor who was removed from school filed allegations under multiple bases for discrimination, as well as, in part, conspiracy against the Title IX Coordinator (2021, so post 2020 Regs)
- Professor alleged that, because Title IX Coordinator had an intake meeting with Complainant (Co-Defendant of TIXC here) during Title IX process, that Title IX Coordinator conspired with Complainant to strengthen Complainant's formal complaint against Professor – ultimate determination not enough evidence to substantiate
- Court dismissed claim against Title IX Coordinator for not meeting basic pleading standards (bald assertions)
- Takeaway: You are not alone in being a target for doing your job (sorry)!

Cases Brought Involving Athletics

McGowan v. Southern Methodist Univ., 2024 WL 455340 (N.D. Tex. Feb. 5, 2024)

- Former members of the women's rowing team sued SMU for damages suffered from hip injuries, claiming, in part, that SMU violated Title IX
- Alleged violated Title IX by discriminating against the women's rowing team by providing "inferior resources to its female rowers, including incompetent coaching, substandard medical treatment, and limited access to qualified training personnel"
- Court dismissed emotional damages because not available under Title IX
- Court did allow to proceed to trial claims under Title IX for damages for medical expenses (past and future) and loss of educational opportunities
- Takeaway: work with athletic department to make sure parity of resources between teams on the basis of sex

Cases Brought Against 2024 Regulations



Common Themes

- **Original intent** of Title IX = biological sex, not gender identity or sexual orientation.
  - *Expanding the definition exceeds statutory authority.*
- Constitutional **overreach**, particularly regarding the 10th Amendment.
- **Privacy** and practicality.
  - *All mention sports and educational facilities and emphasize the impact on competitive fairness. Some mention bathroom and traditional single-sex spaces.*
- Administrative Procedure Act (**APA**) violations.
  - *Notice-and-comment rulemaking obligations were not met.*

Motion for Preliminary Injunction (24-cv-00072)

- Primary objective is to prevent the implementation of the new Title IX regulations until the court can fully adjudicate on the legality of these changes.
- Irreparable Harm
  - *disruptions to administrative processes, financial burdens due to compliance costs, and infringements on privacy and safety in educational settings*
- Likelihood of Success
  - *new regulations exceed the statutory authority of Title IX, were not properly adopted through the required administrative procedures, and potentially violate constitutional rights*
- Balance of Equities
- Public Interest

Bostock looms

- Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of ... sex," also covers discrimination based on sexual orientation and gender identity.
- "Sex" under Title VII = "Sex" under Title IX? Not automatically, according to the states.
- Court explicitly stated in *Bostock* that the decision was limited to employment scenarios.

Upcoming Webinars – BrickerGraydon.com/Events

- May 15th, 3:00 ET – New Title IX Regulations: An Overview for College and University Governing Board Members (free)
- May 30th – **Ohio** Higher Education Institutions Only – ODHE Title IX Policy Drafting Bootcamp (free)
- June 20th – **Ohio** Higher Education Institutions Only – ODHE Title IX Policy Drafting Bootcamp (free)
- August 29th, 1:00 ET – Trauma-Informed Resolution Process (free)

We are currently preparing to launch virtual Policy Bootcamps, as well as several on-site bootcamps. Subscribe to our Higher Education Insights newsletter to get more information: www.brickergraydon.com/subscribe

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