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The Current State of Title IX Litigation

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Hope Murphy Tyehimba, Jeffrey P. Metzler, and Jean Demchak

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I. Introduction

Title IX of the Education Amendments of 1972 ("Title IX") states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[1] The Supreme Court has held that Title IX is enforceable through an implied private right of action,[2] which has given rise to litigation by both students who accuse others of sexual misconduct ("Complainants") and students who are accused of sexual misconduct ("Respondents") (collectively "Title IX Litigation").

Pendulum swings in Title IX guidance and regulations have had a profound impact on Title IX litigation. Following the issuance of the 2011 Dear Colleague Letter Regarding Sexual Violence[3] ("2011 DCL") by the U.S. Department of Education Office for Civil Rights ("OCR") – which called on colleges and universities to do more to protect students from sexual misconduct – litigation filed by Respondents dramatically increased.[4] However, many changes have occurred in the Title IX landscape since the 2011 DCL was issued, most notably, the amendment of the Title IX regulations in 2020, which included additional procedural protections for Respondents, among other things. Many observers believe that the 2020 Title IX regulations went too far in rolling back protections for survivors, while advocates of accused individuals welcomed the additional procedural safeguards and viewed them as consistent with constitutional protections. New

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1 20 U.S.C. §1681(a).

2 *See Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274, 281 (1998) (holding Title IX enforceable through an implied right of action in which monetary damages are available); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979) (same).

3 *Dear Colleague Letter Regarding Sexual Violence*, RESCINDED, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (last visited Apr. 14, 2023).

4 Glenn Altschuler and David Wippman (2022). *Getting Off the Title IX Roller Coaster*. The Hill, July 10, 2022. https://thehill.com/opinion/education/3551262-getting-off-the-title-ix-roller-coaster/ (last visited Apr. 15, 2023).

regulations proposed in 2022 align more closely with the 2011 DCL and sub-regulatory guidance that followed, but also retain some of the procedural safeguards included in the 2020 amendments.

This manuscript provides an overview of the evolution of Title IX Litigation from the 2011 DCL to the present, the types of claims typically filed by Complainants and Respondents, challenges encountered by Complainants and Respondents who pursue judicial resolution of their claims, and summaries of recent decisions, including the Supreme Court's recent decision in *Cummings v. Premier Rehab Keller PLLC*, which held that emotional distress damages are not available for claims brought pursuant to statutes enacted pursuant to the Spending Clause, like Title IX.[5] This manuscript also includes a collection of NACUA resources related to Title IX litigation at Appendix A.

II. Title IX – From the 2011 DCL to Present

OCR's position regarding Title IX appears to be dictated by the political party of the current President of the United States. As illustrated in the below timeline, OCR's position regarding the requirements of Title IX was different under President Obama, than under President Trump, which is different than OCR's position under President Biden. These pendulum swings have caused schools to develop new policies and procedures every four to eight years in order to comply with either sub-regulatory guidance issued by OCR or new Title IX regulations. As of the date of the submission of this manuscript, we are, once again, awaiting the issuance of new Title IX regulations by OCR.

It does not appear that the Title IX pendulum swing is going to stop in the foreseeable future. For legal practitioners who practice in this area, remaining familiar with the Title IX regulations, sub-regulatory guidance and both Respondent and Complainant litigation is critical to an effective Title IX practice.

Set forth below is a timeline regarding the changes made to Title IX in sub-regulatory guidance[6] and the Title IX regulations by OCR from 2011 to the present.

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[5] *See Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S.Ct. 1562, 1576 (2022).

[6] The timeline includes information regarding sub-regulatory guidance issued by OCR that concerns sexual assault and sexual violence and does not address sub-regulatory guidance and proposed amendments to the Title IX regulations concerning transgender students.

DATE	SUB-REGULATORY GUIDANCE/ REGULATION	PURPOSE/ACTION
April 4, 2011	*Dear Colleague Letter on Sexual Violence*	OCR established specific requirements that schools must meet to address student-on-student sexual violence and sexual harassment occurring within an educational program or activity; supplemented *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* ("2001 Guidance")[7] issued by OCR in 2001.
April 29, 2014	*Questions and Answers about Title IX and Sexual Violence* (2014 Q&As) [8]	OCR provided clarification to schools regarding the legal requirements and guidance included in the 2001 Guidance and the 2011 DCL with respect to a school's obligations to address student-on-student sexual violence, including information about procedural requirements, reporting by responsible employees and investigations.
April 24, 2015	*Guidance on Obligation of Schools to Designate a Title IX Coordinator*[9]	OCR highlighted the requirement for all schools to designate a Title IX coordinator to comply with their responsibilities under Title IX, including training Title IX coordinators and a review of responsibilities for Title IX coordinators.
September 22, 2017	*Dear Colleague Letter*[10] *and Questions and Answers on Campus Sexual Misconduct* (2017 Q&As)[11]	In the *Dear Colleague Letter,* OCR withdrew the 2011 DCL and the 2014 Q&As and stated that it would be developing a new policy regarding schools' Title IX responsibilities concerning student sexual misconduct via the rulemaking process. In the *Questions and Answers on Campus*

7 *Revised Sexual Harassment Guidance*, RESCINDED, https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (last visited Apr. 18, 2023).

8 *Questions and Answers on Title IX and Sexual Violence*, RESCINDED, https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (last visited Apr. 18, 2023).

9 *Guidance on Obligation of Schools to Designate a Title IX Coordinator*, RESCINDED, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf (last visited Apr. 18, 2023).

10 *Dear Colleague Letter on Campus Sexual Violence*, RESCINDED, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf (last visited Apr. 18, 2023).

11 *Questions and Answers on Campus Sexual Misconduct*, RESCINDED, https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf (last visited Apr. 18, 2023).

DATE	SUB-REGULATORY GUIDANCE/ REGULATION	PURPOSE/ACTION
		Sexual Misconduct, OCR clarified its position regarding schools' overall Title IX responsibilities following the withdrawn guidance in a number of key areas, including the provision of interim measures, grievance procedures and investigations and notice of outcome and appeals.
November 29, 2018	*Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* (Notice of Proposed Rulemaking – official version)[12]	OCR proposed significant changes to the Title IX regulations and to the manner in which schools must meet their Title IX obligations, further discussed in the below entry.
May 6, 2020	*Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* (Final Rule)[13]	OCR made significant changes to the final Title IX regulations including, but not limited to, changing the standard for what constitutes sexual harassment, the creation of new definitions (*i.e.*, actual knowledge, formal complaint, sexual harassment, and others), limiting the jurisdiction for when schools are required to take action under Title IX to alleged sexual harassment occurring within the United States or a school's education program or activity, requirement to include certain information in a school's grievance procedures, live hearing requirement for postsecondary schools for resolution of complaints of sexual harassment and requirement to use the Title IX grievance procedures for resolution of alleged sexual harassment involving employees.

[12] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 FR 61462 (Nov. 29, 2018), https://www.regulations.gov/document/ED-2018-OCR-0064-0001. (last visited April 18, 2023).

[13] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Title 34 C.F.R. Part 106, 20 U.S.C. §1681, et seq., https://www.ecfr.gov/current/title-34/subtitle-B/chapter-I/part-106?toc=1 (last visited Apr. 18, 2023).

DATE	SUB-REGULATORY GUIDANCE/ REGULATION	PURPOSE/ACTION
July 21, 2021	*Questions and Answers on the Title IX Regulations on Sexual Harassment*[14]	OCR issued the *Questions and Answers on the Title IX Regulations on Sexual Harassment* to clarify its position regarding the 2020 amendments to the Title IX regulations regarding a number of topics. OCR also stated that it would undertake a comprehensive review of the 2020 amendments to the Title IX regulations.
June 22, 2022[15]	*Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* (Notice of Proposed Rulemaking-unofficial version)[16]	OCR proposed changes to the 2020 amendments to the Title IX regulations which if published, would revise many of the most recent changes to the regulations including, the definition of the type of conduct that would trigger an institutional response, the definition of a hostile environment, a school's ability to address conduct occurring outside of the United States or a school's education program or activity, reporting and training requirements for all employees, permissive use of oral complaints, and single investigator and live hearings (for postsecondary schools). The final regulations are expected to be published in May 2023.

III. Non-Contractual Damages

In accordance with the Supreme Court's recent decision in *Cummings v. Premier Rehab Keller, P.L.L.C.*,[17] Plaintiffs may not recover non-contractual damages – such as emotional distress or reputational harm – for violations of Title IX.[18]

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[14] *Questions and Answers on the Title IX Regulations on Sexual Harassment*, https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf (last visited Apr. 18, 2023).

[15] The official version of the NPRM was published on July 12, 2022. (*See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 FR 41390 (July 12, 2022), https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal (last visited May 15, 2023).

[16] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm.pdf (last visited Apr.19, 2023).

[17] 142 S.Ct. 1562 (2022).

[18] *See, e.g.*, *Doe v. Purdue Univ.*, No. 2:17-cv-33-JPK, 2022 WL 3279234, at *13 (N.D. Ind. Aug. 11, 2022) ("The Supreme Court's decision [in *Cummings*] forecloses [Plaintiff's Title IX] claim for 'emotional and psychological

The specific holding of *Cummings* was that emotional distress damages are not available under the Rehabilitation Act and the Affordable Care Act, two antidiscrimination statutes enacted pursuant to the Spending Clause of the U.S. Constitution.[19] The Court explained that "Spending Clause legislation operates based on consent: In return for federal funds, the recipients agree to comply with federally imposed conditions."[20] As a result, the Court analogized the claims under the Spending Clause statutes at issue to contract claims: Defendants violate the terms of their contracts with the federal government where they receive funds but do not comply with those federally imposed conditions.

Accordingly, damages for violations of Spending Clause antidiscrimination statutes are limited to those damages that would be available in a contract claim. Because "it is hornbook law that emotional distress is generally not compensable in contract," the Court concluded that the prospective funding recipient, relying on that precedent, would not have been aware it would face such liability.[21]

While the holding in *Cummings* does not explicitly apply to claims brought under Title IX, in the short time since the decision, trial courts have uniformly held that it applies to Title IX claims specifically and bars recovery for non-contractual damages, such as emotional distress or reputational harm.[22] As such, the *Cummings* decision impacts both Respondent and Complainant litigation.

IV. Respondent Title IX Litigation

It has become commonplace for a Respondent sanctioned by a college or university to challenge the postsecondary institution's investigation and/or decision in court on a variety of theories, including discrimination or breach of contract. Particularly in cases involving sexual misconduct, Respondents frequently allege that the postsecondary institutions violated Title IX. This section provides an overview of the current framework federal courts use to evaluate such Title IX claims by Respondents ("Respondent Litigation") and highlights some of the current issues courts are grappling with as this area of law continues to evolve.

A. Framework for Analyzing Respondent Title IX Litigation

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damages."); *Unknown Party v. Arizona Board of Regents, et al.*, No. cv-18-01623-PHX-DWL, 2022 WL 17459745, at *4-5 (D. Ariz. Dec. 6, 2022) ("[I]n light of *Cummings*, Doe's claims for non-contractual damages (including emotional distress and reputational harm damages) are no longer valid."); *see also Doe v. Board of Regents of the Univ. of Nebraska*, 4:20-cv-3036, 2022 WL 3566990, at *4 (D. Neb. Aug. 18, 2022); *Bonnewitz v. Baylor Univ.*, No. 6:21-cv-00491-ADA-DTG, 2022 WL 2688399, at *4 (W.D. Tex. July 12, 2022); *Doe v. Ohio University*, 2:21-cv-00858, 2023 WL 2652482, at *5 (S.D. Ohio Mar. 27, 2023).

[19] *Cummings*, 142 S. Ct. at 1576.

[20] *Cummings*, 142 S. Ct. at 1570.

[21] *Id*. at 1571 (citations and quotation marks omitted). For the same reason, punitive damages are not available as a remedy for violations of Spending Clause antidiscrimination statutes, including Title IX. *Barnes v. Gorman*, 536 U.S. 181 (2002).

[22] *See* cases cited *supra* note 18.

In *Yusuf v. Vassar Coll.*, the Second Circuit held that "Title IX bars the imposition of university discipline where gender is a motivating factor in the decision to discipline. … Plaintiffs attacking a university disciplinary proceeding on grounds of gender bias can be expected to fall generally within two categories," which have been labeled "erroneous outcome" and "selective enforcement." Under an erroneous outcome theory, the plaintiff must show that he "was innocent and wrongly found to have committed the offense." Under a selective enforcement theory, plaintiff must show that "regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender." [23]

For many years, courts in the Second Circuit and elsewhere used these categories as a doctrinal framework for analyzing Respondent litigation.[24] In 2018, the Sixth Circuit labeled two additional categories of Respondent litigation in *Doe v. Miami Univ.*, "deliberate indifference" and "archaic assumptions."[25]

More recently, however, the analysis in *Yusuf* and *Miami Univ.* has been called into question, beginning with *Doe v. Purdue Univ.* which found no need to superimpose doctrinal tests on the statute. All of these categories simply describe ways in which a plaintiff might show that sex was a motivating factor in a university's decision to discipline a student. We prefer to ask the question more directly: do the alleged facts, if true, raise a plausible inference that the university discriminated against [plaintiff] "on the basis of sex"?[26]

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[23] *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994).

[24] *See e.g. Haidak v Univ. of Massachusetts-Amherst*, 933 F3d 56, 74 [1st Cir 2019] (applying *Yusuf* framework); *Doe v. Valencia Coll.*, 903 F.3d 1220, 1236 (11th Cir. 2018) ("[W]e will assume for present purposes that a student can show a violation of Title IX by satisfying the 'erroneous outcome' test applied by the Second Circuit in *Yusuf*."); *Plummer v. Univ. of Hous.*, 860 F.3d 767, 777–78 (5th Cir. 2017) (resolving the case by reference to the *Yusuf* framework).

[25] *Doe v. Miami Univ.*, 882 F.3d 579, 589 (6th Cir. 2018).

[26] *Doe v. Purdue Univ.*, 928 F3d 652, 667-68 (7th Cir. 2019).

Other Circuits have since adopted the Seventh Circuit's analysis with some modifications.[27] While the Seventh Circuit framed the decision in *Purdue* as a departure from *Yusuf*, other courts have found the approaches reconcilable.[28]

In sum, notwithstanding the introduction and application of various doctrinal tests in Respondent litigation over the years, the basic test for liability under Title IX seems to have boiled down to the language of the statute itself: did the University discriminate against the Respondent on the basis of sex?

B. Common Allegations by Respondents

While each Respondent Title IX case presents a unique set of facts, certain allegations tend to recur frequently, including procedural irregularities in the investigation and/or disciplinary proceeding, a pattern of gender bias, external pressure on the university, and lack of evidence to support the disciplinary outcome and/or sanctions. The sections below describe how Court of Appeals decisions have addressed these allegations.

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[27] **First Circuit** (*Doe v. Stonehill Coll., Inc.*, 55 F.4th 302, 332 n.44 (1st Cir. 2022) (acknowledging different frameworks and analyzing under the "erroneous outcome" and "selective enforcement" frameworks which were "most applicable to Doe's specific contentions that also were discussed by the district court and the parties.")); **Third Circuit** (*Doe v. Univ. of Sciences*, 961 F.3d 203, 209 (3d Cir. 2020) ("[T]o state a claim under Title IX, the alleged facts, if true, must support a plausible inference that a federally-funded college or university discriminated against a person on the basis of sex. Although parties are free to characterize their claims however they wish, this standard hews most closely to the text of Title IX.")); **Fourth Circuit** (*Sheppard v Visitors of Virginia State Univ.*, 993 F3d 230, 236 (4th Cir 2021) ("We agree with the Seventh's Circuit's approach and see no need to deviate from the text of Title IX")); **Eighth Circuit** (*Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 864 (8th Cir. 2020) ("To state a claim, therefore, [plaintiff] must allege adequately that the University disciplined him on the basis of sex—that is, because he is male.")); **Ninth Circuit** (*Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 947 (9th Cir. 2020) ("We adopt [the Seventh Circuit's] far simpler standard for Title IX claims")); **Tenth Circuit** (*Doe v. Univ. of Denver,* 1 F.4th 822, 830 (10th Cir. 2021) (adapting Seventh Circuit's approach to summary judgment context)); **Eleventh Circuit** (*Doe v Samford Univ.*, 29 F.4th 675, 687 (11th Cir. 2022) (quoting *Iqbal*, 556 U.S. at 678) (adopting Seventh Circuit's approach with "modification" of "asking whether the alleged facts, if true, permit a reasonable inference that the university discriminated against Doe on the basis of sex" rather than a "plausible inference" because "facial plausibility is determined by asking whether the facts alleged 'allow[ ] the court to draw the *reasonable* inference that the defendant is liable.'")).

[28] **Second Circuit** (*Doe v. Columbia*, 831 F.3d at 57 (requiring that plaintiff show "bias on account of sex."); *Doe v. Haas*, No. 19-CV-0014 (DRH)(AKT), 2019 WL 6699910, at *13 (E.D.N.Y. Dec. 9, 2019) (quoting *Yusuf*, 35 F.3d at 715) ("Most importantly, under either theory '[a] plaintiff must … allege particular circumstances suggesting that gender bias was a motivating factor....'")); **Fourth Circuit** (*Sheppard*, 993 F.3d at 236 (adopting Seventh Circuit framework and finding "no inherent problems with the erroneous outcome and selective enforcement theories identified in *Yusuf*. In fact, either theory, with sufficient facts, may suffice to state a plausible claim.")); **Tenth Circuit** (*Doe v. Univ. of Denver*, 1 F.4th at 830 ("We recognize that evidence of an erroneous outcome or selective enforcement are means by which a plaintiff might show that sex was a motivating factor in a university's disciplinary decision.")); **Eleventh Circuit** (*Doe v Samford Univ.*, 29 F4th 675, 687) (11th Cir 2022) (quoting *Yusuf*, 35 F.3d at 713) ("Indeed, even though some circuits have treated *Yusuf* as having established formal doctrinal tests, *Yusuf* itself acknowledges that, '[i]n order to survive a motion to dismiss, the plaintiff must specifically allege the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference of ... discriminatory intent.'").

1. Procedural Irregularities

Many Respondents claim that the college or university failed to follow proper procedures for investigating and adjudicating sexual misconduct claims by, for example, failing to interview witnesses suggested by the Respondent or to ask certain questions of the Complainant. As the First Circuit recently explained, it is well-established that procedural irregularities are relevant in identifying sex discrimination.[29] However, "procedural errors are not inevitably a sign of sex bias."[30] As described by the First Circuit in *Stonehill*, "The challenge is to distinguish between proceedings plausibly affected by sex bias in violation of Title IX and proceedings whose alleged flaws are not attributable to sex bias. For example, other plausible reasons for procedural irregularities may include "ineptitude, inexperience, and sex-neutral pro-complainant bias."[31]

In *Stonehill*, the First Circuit found that "although we have identified potentially serious flaws in Doe's disciplinary proceedings, Doe has failed to plead sufficient facts to support a plausible inference that the irregularities are attributable to sex bias… Importantly, even with the serious alleged flaws we have identified, the disciplinary process in this case was not as *inexplicably and egregiously one-sided* as in cases where courts have concluded that the allegations supported a plausible inference of sex bias."[32] Similarly, in *Rossley v. Drake Univ.*[33] the court affirmed summary judgment for the university, noting that "whatever the deficiencies in [the] investigation, they did not result i*n findings so devoid of substantive content as to be unworthy of credence*. … Likewise, the alleged deficiencies did not rise to the level of the "clear procedural irregularities" that occurred in *Menaker v. Hofstra Univ.*, 935 F.3d 20, 35 (2d Cir. 2019)."[34]

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[29] *Doe v Stonehill Coll., Inc.*, 55 F4th 302, 334 (1st Cir 2022) (citations omitted).

[30] *Id.*; *see Doe v Samford Univ.*, 29 F4th 675, 688 (11th Cir 2022) ("A deviation from a Title IX policy is not, in and of itself, a violation of Title IX."); *Yusuf v. Vassar Coll.,* 35 F.3d 709, 715 (2d Cir. 1994) ("[A]llegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss."); *see also Doe v Samford Univ.*, 29 F4th 675, 697 (11th Cir 2022) ("In most cases, procedural irregularities in a university's investigation of a sexual assault claim and an alleged erroneous outcome in a subsequent disciplinary proceeding will not, by themselves, make out a plausible Title IX claim of sex discrimination. But as the number of irregularities increases, or the irregularities become more serious (for example, a failure to interview the accused's witnesses), or the erroneous outcome becomes more glaring, the needle starts moving toward plausibility." (citations omitted))

[31] *Stonehill*, 55 F.4th at 334 (citing *Doe v. Univ. of So. Ind.*, 43 F.4th 784, 797 (7th Cir. 2022); *Doe v. Samford Univ.,* 29 F.4th 675, 692 (11th Cir. 2022)).

[32] *Stonehill*, 55 F4th at 334-35 (emphasis added) (citing *Doe v. Columbia*, 831 F.3d 46, 57 (2d Cir. 2016); *Doe v. Purdue Univ.*, 928 F.3d 652, 657-658, 669 (7th Cir. 2019)). The alleged procedural irregularities in *Stonehill* included the school's (i) failure to allow respondent the opportunity to review all of the relevant facts gleaned during the investigation; (ii) failure to give respondent notice of witness interviews; (iii) questioning of the complainant about the nature of the alleged sexual encounter; (iv) treatment of the complainant's claim of intoxication; (v) treatment of mutual sexual history; (vi) treatment of respondent's Snapchat messages; and (vii) failure to make a determination of responsibility independent of the investigation. *Id.* at 317-329.

[33] *Rossley v. Drake Univ.*, 979 F.3d 1184, 1193 (8th Cir. 2020).

[34] *Id.* (emphasis added). The alleged procedural irregularities in *Rossley* included the investigator's decision not to interview certain witnesses, her reliance on hearsay, and her finding that respondent's roommate lacked credibility. *Id.*

By contrast, the Tenth Circuit in *Doe v. Univ. of Denver*[35] reversed a District Court's summary judgment order based in part on alleged procedural irregularities without discussion of whether they were "inexplicably and egregiously one-sided,"[36] or result in findings "so devoid of substantive content as to be unworthy of credence."[37]

2. Pattern of Bias

Many Respondents also allege a pattern of bias to support their Title IX claim, often based on disparities in the number of male students versus female students subject to discipline for sexual misconduct.

In *Stonehill*, the First Circuit found insufficient Plaintiff's allegation that "in virtually all cases of alleged sexual misconduct at Stonehill, the accused student is a male and the accusing student is a female," and that "a female student at Stonehill has never been disciplined, much less expelled, for alleged sexual misconduct."[38] "'It is unreasonable to draw … an inference of sex bias from this information rather than recognize that other non-biased reasons may support the gender makeup of the sexual misconduct cases.'"[39]

By contrast, the Ninth Circuit in *Doe v. Regents of Univ. of Cal.* reversed the dismissal of a Respondent's claim based in part on allegations of "an internal pattern of gender-based decisionmaking against male Respondents."[40] These included (i) "the Respondents in Title IX complaints that UCLA decided to pursue from July 2016 to June 2018 were overwhelmingly male (citing specific statistics for each of those years), [ii] that the Regents doesn't report by gender the percentage of Respondents found to have violated campus policy; and [iii] that the University has never suspended a female for two years based upon these same circumstances, nor [has it] used the reasoning that two years is a minimum suspension when issuing a suspension to a female ... under these types of facts...."[41] The court held, "these are precisely the type of non-conclusory, relevant factual allegations that the district court may not freely ignore."[42]

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[35] *Doe v.Univ. of Denver*, 1 F.4th 822 (10th Cir. 2021). The irregularities cited by the court were (i) investigators interviewed eleven witnesses proposed by complainant but initially refused to interview all five witnesses proffered by respondent; (ii) respondent's claim that the university ignored numerous inconsistencies in complainant's story; and (iii) investigators' refusal to gather potentially exculpatory evidence from complainant's medical exam. *Id.* at 832-34.

[36] *Stonehill*, 55 F.4th at 334-35.

[37] *Rossley*, 979 F.3d at 1193.

[38] *Stonehill,* 55 F.4th at 332.

[39] *Id.* at 332-33 (quoting *Doe v. Trustees of Boston Coll.*, 892 F.3d 67, 92 (1st Cir. 2018); *Doe v. Brown Univ.*, 43 F.4th 195, 207 (1st Cir. 2022)); *accord Rossley v. Drake Univ.*, 979 F.3d 1184, 1195 (8th Cir. 2020) (even if the school took "victim-centered approach], we do not believe that it can fairly be found to be inherently gender-biased."); *see Doe v Samford Univ.*, 29 F4th at 690 ("discrimination against Respondents is not discrimination 'on the basis of sex,' and 'does not permit a reasonable inference of an anti-male bias' 'because both men and women can be Respondents.'" (quoting *Doe v. Univ. of Denver*, 952 F.3d 1182, 1196-97 (10th Cir. 2020)).

[40] *Doe v. Regents of Univ. of Cal.*, 23 F.4th 930, 938 (9th Cir. 2022).

[41] *Id*.

[42] *Id*.

Similarly, in *Doe v. Miami Univ.*, the Sixth Circuit found that "the statistical evidence that ostensibly shows a pattern of gender-based decision-making and the external pressure on Miami University supports at the motion-to-dismiss stage a reasonable inference of gender discrimination," citing plaintiff's allegations that (i) every male student accused of sexual misconduct in 2013-14 was found responsible; (ii) 18 out of 20 students found responsible for sexual misconduct between 2011 and 2014 had male first names, (iii) the university pursued male Respondents but not females based on an attorney's observation; (iv) the university investigated Respondent, but not the complainant. [43]

The Tenth Circuit in *Doe v. Univ. of Denver* strikes a middle ground, distinguishing disparities in the gender composition of Respondents versus Complainants from gender disparities in a university's response to sexual misconduct complaints, explaining, "As a general rule, we and other courts have declined to infer anti-male bias from disparities in the gender makeup of sexual-misconduct complainants and sexual-misconduct Respondents.[44] This is so because such disparities can "readily be explained by an array of alternative nondiscriminatory possibilities," *e.g.*, that male students commit more sexual assaults, that women are likelier to be the victims of those assaults, "or that female victims are likelier than male victims to report sexual assault."[45] However, gender bias may be inferred from disparities in the rate at which the university investigates sexual misconduct complaints brought by women compared to similar complaints brought by men, and in one instance, gave a different penalty to a male student and female student found guilty of similar misconduct.[46]

3. External Pressure

There appears to be "consensus among the circuits that pressure from a federal investigation into a school's handling of sexual misconduct cases can establish background indicia of sex discrimination."[47] However, because the misconduct case in *Stonehill* did not draw attention on campus or from the press; the college and its investigators were not targets of popular criticism, the "bare invocation" of the #MeToo movement and a Department of Education inquiry that took place nearly two years prior to the investigator's final report was insufficient to carry the student's allegations "over the plausibility threshold."[48]

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[43] *Doe v. Miami Univ.*, 882 F.3d at 593.

[44] *Doe v. Univ. of Denver*, 1 F.4th at 834 (citing *Purdue*, 928 F.3d at 669).

[45] *Id.* (quoting *Doe v. Univ. of Denver*, 952 F.3d 1182, 1192–93 (10th Cir. 2020)).

[46] *Univ. of Denver,* 1 F.4th at 834-36.

[47] *Doe v. Stonehill Coll., Inc*., 55 F.4th at 337 (collecting cases).

[48] *Id.* at * 336-37 (contrasting case with the facts in *Doe v. Columbia Univ.,* 831 F.3d 46 (2d Cir. 2016) and *Doe v. Purdue Univ.,* 928 F.3d 652 (7th Cir. 2019)); *see Rossley v Drake Univ.*, 979 F3d 1184, 1196 (8th Cir. 2020). (rejecting argument that Dear Colleague Letter pressured university into gender bias and noting "that the pressure that was being put on Drake to investigate and adjudicate IX complaints by females against males does not appear to have approached that described in *Doe v. Univ. of Arkansas-Fayetteville*, 974 F.3d at 865, nor was it combined with the clearly irregular investigative and adjudicative processes that were found to support a prima facie claim of sex discrimination in *Doe v. Columbia Univ.*, 831 F.3d at 56-57, and in *Menaker*, 935 F.3d at 34-37."). *But see Doe v. Regents of Univ. of Cal.*, 23 F4th 930 (9th Cir. 2022) (holding that 2011 Dear Colleague

4. Lack of Evidence

Respondents have argued "that discrimination on the basis of sex may be inferred from the "arguably inexplicable" outcome of the hearing. Under this theory, 'the merits of the decision itself ... can support an inference of sex bias 'when the degree of doubt' in 'the accuracy of the disciplinary proceeding's outcome ... passes from articulable to grave.'"[49] However, few courts have found a violation of Title IX based on this argument alone, which concededly overlaps with an "erroneous outcome" claim.[50]

C. Right to Cross Examination

Another issue that has received significant attention in the context of Respondent Litigation is whether respondents must be given the opportunity to cross-examine their accuser or other witnesses who provide testimony during the disciplinary process.

1. Caselaw

Federal appellate courts are divided on whether the Due Process Clause of the United States Constitution requires universities to give respondents the opportunity to test a witness's credibility through cross-examination in sexual misconduct proceedings. In *Doe v. Baum*, the Sixth Circuit reversed the district court's dismissal of the plaintiff's claim that the University of Michigan had violated his due process rights when it did not permit him to cross-examine the complainant and adverse witnesses in disciplinary proceedings related to allegations against him of sexual misconduct. In concluding that the plaintiff had raised a plausible claim for relief, the court relied on its prior decision in *Doe v. Univ. of Cincinnati*, which had established that "(1) if a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as expulsion or suspension, and (2) when the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for

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Letter, 2014 OCR guidance document, NPR investigative report, and audit of university "provide a backdrop that, when combined with other circumstantial evidence of bias in a specific proceeding, give rise to a plausible claim," notwithstanding the general applicability of allegations (modifications and citations omitted)); *Does 1-2 v. Regents of the Univ. of Minnesota,* 999 F.3d 571, 578–79 (8th Cir. 2021) (reversing district court's dismissal of students' Title IX discrimination claims, stating that OCR's recent investigation of the college for potential Title IX violations, coupled with evidence of internal pressure to charge male football players with sexual misconduct are sufficient evidence of "external pressures").

[49] *Samford*, 29 F.4th at 690 (quoting *Doe v. Oberlin Coll.,* 963 F.3d 580, 588 (6th Cir. 2020)); *see also Oberlin*, 963 F.3d at 588 (drawing inference of discrimination because the hearing panel's decision, as alleged, was without an "apparent basis"); *Doe v. Univ. of Ark.,* 974 F.3d 858, 865 (8th Cir. 2020) (holding that the plaintiff stated a Title IX claim in part because "the allegations in the complaint support[ed] an inference that the hearing panel reached an outcome that was against the substantial weight of the evidence").

[50] *See Oberlin Coll.*, 963 F3d at 588 (6th Cir. 2020) ("True, the first element of an erroneous-outcome claim—whether the facts of the case cast some articulable doubt on the accuracy of the disciplinary proceeding's outcome — already takes into account the proceeding's outcome to some extent. But when the degree of doubt passes from 'articulable' to grave, the merits of the decision itself, as a matter of common sense, can support an inference of sex bias. *Cf. Doe v. Purdue Univ.*, 928 F.3d at 669 (7th Cir. 2019) (reasoning that a "perplexing" basis of decision can support an inference of sex bias)."); *Samford* 29 F.4th at 690 (holding "Doe's allegations also do not cast 'grave' doubt on 'the merits of the decision' of the university").

cross-examination.[51] The court stressed that because cross-examination is "the greatest legal engine ever invented for uncovering the truth," "if a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process.[52] The court also concluded that "written statements cannot substitute for cross-examination," though it stopped short of holding that the accused had the right to personally cross-examine their accuser and other witnesses, providing instead that the cross-examination could be conducted by the accused student's agent.[53] The Sixth Circuit has reconfirmed its analysis in *Baum* on multiple occasions.[54]

The Third Circuit extended this approach to the context of private postsecondary institutions in *Doe v. Univ. of Sciences*.[55] Holding that although USciences, a private university, was not subject to the Constitution's due process guarantees, the court nevertheless found that "USciences's contractual promises of 'fair' and 'equitable' treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers."[56] The Third Circuit declined, however, "to prescribe the exact method by which a college or university must implement these procedures."[57]

Other courts, however, have held that cross-examination by the accused or their representative is not required and, much like the inquisitorial model used in civil law jurisdictions, have allowed for the examination to be conducted by the neutral fact-finder instead. Finding that model to be "fair enough," the First Circuit held in *Haidak v. Univ. of Massachusetts-Amherst* that the constitutional requirement of due process was satisfied where the neutral Hearing Board had "examin[ed] [the complainant] in a manner reasonably calculated to expose any relevant flaws in her claims."[58] The Fifth Circuit subsequently drew upon the *Haidak* court's analysis in *Overdam v. Texas A&M Univ.*, in concluding that Texas A&M University had not violated the due process rights of a plaintiff suspended for violating its policies on sexual abuse and dating violence where the plaintiff and his attorney "were allowed to submit an unlimited number of written questions to

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[51] *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (citing *Doe v. Univ. of Cincinnati*, 872 F.3d at 401–02 (6th Cir. 2017)).

[52] *Id.* (citing *Doe v. Univ. of Cincinnati*, 872 F.3d at 401–02 (6th Cir. 2017)).

[53] *Id.* at 582–83.

[54] *See, e.g.*, *Doe v. Univ. of Kentucky*, 959 F.3d 246, 252–53 (6th Cir. 2020) (university's sexual misconduct hearing panel "reasonably determined that due process required the limited participation of [accused's] attorneys"); *Doe v. Michigan State Univ.*, 989 F.3d 418, 430–31 (6th Cir. 2021) (finding *Baum* requirements satisfied where plaintiff was permitted "extensive in person cross-examination of the claimants by his attorney" and noting that *Baum* does not entitle the accused "to unlimited questioning of the alleged victims").

[55] *Doe v. Univ. of Sciences*, 961 F.3d 203 (3d Cir. 2020).

[56] *Id.* at 215; *but see Doe v. Trustees of Bos. Coll.*, 942 F.3d 527, 533 (1st Cir. 2019) (observing that federal due process clause was inapplicable to Boston College's student sexual misconduct policy because Boston College "is not a public university or a government actor and is not subject to due process requirements").

[57] *Doe v. Univ. of Sciences*, 961 F.3d at 215.

[58] *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 68, 71 (1st Cir. 2019).

the panel for it to ask [the complainant] in both parties' presence, subject to the panel's determinations on relevancy and non-harassment."[59]

Finally, a position somewhere between *Baum* and *Haidak* was implied by the Eighth Circuit when it considered a university proceeding that required the plaintiff to submit questions to the hearing panel rather than allow him or his agent to cross-examine witnesses in *Doe v. University of Ark.-Fayetteville*. Acknowledging that "[q]uestioning by the panel could be insufficient in a given case," the court nevertheless concluded that in this particular instance the plaintiff had "identifie[d] no specific question that was refused" by the panel and accordingly affirmed the district court's dismissal of his Due Process Clause claim.[60]

2. Regulations

Successive administrations of the Department of Education have also weighed in on the question, with the current administration more inclined to a flexible procedural approach to cross-examination in sexual misconduct proceedings.

Notably, on May 19, 2020, the Secretary of Education amended Title IX regulations to require postsecondary institutions to allow cross-examination at a live hearing by each party's advisor (but not by the party personally) on "all relevant questions and follow-up questions, including those challenging credibility."[61] Noting the requirement's consistency with *Baum*, the Department of Education also asserted that, with respect to the concerns expressed in *Haidak* (which was decided after the public comment period on the proposed amendments had closed) about cross-examination conducted personally by students, the amendment required postsecondary institutions to provide parties with an advisor so that the cross-examination would be conducted by "either professionals (e.g., attorneys or experienced advocates) or at least adults capable of understanding the purpose and scope of cross-examination" rather than by the party.[62]

The 2020 amendment further provided that "[i]f a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility."[63] Shortly thereafter, however, the U.S. District Court for the District of Massachusetts vacated that prohibition in *Victim Rts. L. Ctr. v. Cardona*,[64] prompting the OCR to announce that it would "immediately cease enforcement" of that prohibition and explain that "a decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the

[59] *Overdam v. Texas A&M Univ.*, 43 F.4th 522, 525 (5th Cir. 2022).

[60] *Doe v. Univ. of Ark.*, 974 F.3d at 867–69.

[61] 34 C.F.R. § 106.45(b)(6)(i).

[62] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 328–29 (May 19, 2020).

[63] 34 C.F.R. § 106.45(b)(6)(i).

[64] *Victim Rts. L. Ctr. v. Cardona*, 552 F. Supp. 3d 104, 115 (D. Mass. 2021), *order clarified*, No. 1:20-cv-11104, 2021 WL 3516475 (D. Mass. Aug. 10, 2021).

regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process."[65]

On July 12, 2022, the Department of Education proposed new amendments to Title IX concerning the right to cross-examination. Notably, the relevant proposed amendments (34 C.F.R.§ 106.46(f) and (g)) would: (i) permit, but not require, advisor-conducted questioning at a live hearing (while allowing institutions within the Sixth Circuit to continue to require advisor-conducted questioning as dictated by *Baum*); (ii) permit other methods of live questioning, including by neutral decisionmakers in individual meetings, but prohibit grievance procedures allowing for questions and answers to be provided in writing; (iii) prohibit decisionmakers from relying on any statement by a party that supports that party's position if the party does not respond to questions related to their own credibility; and (iv) prohibit decisionmakers from drawing an inference about whether sexual misconduct occurred solely on the basis of whether the party or witness was absent from a live hearing or refused to respond to questions about their credibility.[66] The comment period for these proposals closed on September 12, 2022 and a final rule is pending.

D. Pleading Standard

Another area in which federal circuit courts have not reached consensus is on how federal pleading standards apply to Respondent Litigation and what facts a Respondent-Plaintiff must allege to survive a motion to dismiss.

The recent majority and concurring opinions in *Doe v. Samford* highlight this issue.[67] First, the Eleventh Circuit modified the Seventh Circuit's framing of a Title IX case from asking whether the allegations "raise of *plausible* inference of a Title IX violation," to "whether the alleged facts, if true, permit a *reasonable* inference that the university discriminated against Doe on the basis of sex."[68] The court based this conclusion on its reading of *Ashcroft v Iqbal*, which states that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[69] Thus, the *Samford* court held, while "the ultimate inquiry is the 'facial plausibility' of the complaint … facial plausibility is determined by asking whether the facts alleged 'allow the court to draw the *reasonable* inference that the defendant is liable.'"[70] The concurrence did not join this portion of the decision.

Additionally, the majority and concurrence in *Samford* wrestled with whether a complaint, to survive a motion to dismiss, must include allegations that are more than "merely consistent" with discrimination "on the basis of sex." Noting plaintiff's allegations of procedural

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[65] Letter re *Victim Rights Law Center et al. v. Cardona* from Suzanne B. Goldberg, Acting Assistant Secretary for Civil Rights, U.S. Department of Education, to Students, Educators, and Other Stakeholders (Aug. 24, 2021).

[66] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,505–509 (July 12, 2022).

[67] *Doe v. Samford*, 29 F.4th 675 (11th Cir. 2022).

[68] *Id.* (second emphasis added) (citing *Doe v. Purdue*, 928 F.3d at 668).

[69] *Ashcroft v Iqbal*, 556 US 662, 678 (2009).

[70] *Samford*, 29 F.4th at 687 (quoting *Iqbal*, 556 U.S. at 678).

irregularities, the majority held that "[a] deviation from a Title IX policy is not, in and of itself, a violation of Title IX. … [A]llegations that are 'merely consistent with' liability 'stop short of the line between possibility and plausibility.'"[71] The concurrence, however, noted that several other circuits "have cautioned against relying on the 'merely consistent' (i.e., 'alternative explanation') concept in Title IX cases."[72]

Federal courts also differ on whether the burden-shifting framework, established by *McDonnell Douglas Corp. v. Green*,[73] for claims under Title VII, applies to Respondent litigation. As the Second Circuit explained in *Doe v. Columbia*, under the *McDonnell Douglas* framework, a plaintiff need only allege "minimal evidence" of a discriminatory motive to establish a prima facie case. The burden then shifts to the university to come forward with a non-discriminatory justification for the adverse action. Once the school makes this showing, the burden shifts back to plaintiff to demonstrate that the proffered reason was pretextual – i.e., "not the true reason (or in any event not the sole reason) for the … decision, which merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against her."[74] The court applied this to Respondent litigation to hold, "a complaint under Title IX, alleging that the plaintiff was subjected to discrimination on account of sex in the imposition of university discipline, is sufficient with respect to the element of discriminatory intent, like a complaint under Title VII, if it pleads specific facts that support a minimal plausible inference of such discrimination."[75]

Only the Tenth Circuit appears to have embraced this analysis.[76] The Third, Sixth, and Ninth Circuits have rejected the Second Circuit's application of *McDonnell Douglas* to Respondent litigation,[77] while the First and Fifth Circuit have expressly declined to take a position.[78]

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[71] 29 F.4th at 688 (citing *Gebser,* 524 U.S. at 292, and quoting *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 557 (2007)).

[72] 29 F.4th at 696 (citing *Doe v. Columbia Univ.*, 831 F.3d 46, 57 (2d Cir. 2016); *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018); *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 948 (9th Cir. 2020); *see also* Ronald J. Allen & Alan E. Guy, *Conley as a Special Case of Twombly and Iqbal: Exploring the Intersection of Evidence and Procedure and the Nature of Rules,* 115 Penn St. L. Rev. 1, 37 (2010) ("[O]ne cannot at the same time rationally dispense with a 'probability requirement' to determine 'plausibility' yet conclude that something is not 'plausible' because there are other 'more likely explanations.' No sense can be given of 'more likely' except 'more probable.'").

[73] 411 U.S. 792 (1973).

[74] *Doe v. Columbia*, 831 F.3d 46, 54-55 (2016) (quoting *Littlejohn v. City of New York*, 795 F.3d 297, 307-08 (2d Cir. 2015)).

[75] *Id.*

[76] *See Doe v. Univ. of Denver,* 1 F.4th at 829 ("Where a Title IX plaintiff relies on indirect proof of discrimination, we apply the three-part burden-shifting framework announced in *McDonnell Douglas*." (citations omitted)).

[77] *see Doe v. Princeton Univ.*, 790 Fed.Appx. 379, 383 n.3 (3d Cir. Oct. 25, 2019); *Doe v. Miami Univ.,* 882 F.3d at 589; *Austin v. Univ. of Oregon,* 925 F.3d 1133, 1137 (9th Cir. 2019).

[78] *see Doe v. Trs. of Bos. Coll.,* 892 F.3d 67, 90 n.13 (1st Cir. 2018); *Sewell v. Monroe City Sch. Bd.,* No. 21-30696, 2022 WL 2339472, at *1 (5th Cir. June 29, 2022) ("The *McDonnell Douglas* framework's applicability to Title IX claims is unsettled in this circuit."); *see also Doe v. Stonehill Coll., Inc.,* 55 F.4th 302, 334 (1st Cir. 2022)

V. Complainant Title IX Litigation

Though litigation involving Respondents has received more recent attention, active litigation involving Complainants has also continued. It is important for legal practitioners to be familiar with the types of claims filed by Complainants, as settlement of these cases is often more costly for institutions than settlements involving Respondents. [79]

A. Common Types of Claims Brought by Complainants

Complainants, like Respondents, who are dissatisfied with the on-campus Title IX process often turn to the court system for relief. As noted earlier, Title IX is "enforceable through an implied private right of action" and "monetary damages are available in the implied private action."[80] Nevertheless, "private damages actions are available *only* where the recipients of federal funding had adequate notice that they could be liable for the conduct at issue."[81]

Title IX litigation involving Complainants includes the following types of claims:

(1) Deliberate indifference;
(2) Retaliation;
(3) Hostile environment;
(4) Heightened risk/Pre-assault;
(5) Post-report/Post-Assault; and
(6) Erroneous outcome.

A discussion of each type of claim is included below.

1. Deliberate Indifference

The most common claim asserted by Complainants in Title IX litigation is that the school acted with deliberate indifference in addressing the alleged sexual harassment. The 2020 amendments to the Title IX regulations provide that, "A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent."[82] "The Supreme Court has 'consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination."[83] When a school is found to have acted with deliberate

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(declining to delve into Second Circuit pleading standard because plaintiff failed to "explain how it would -- or should -- differ in application from our obligation to draw all plausible inferences in the plaintiff's favor and our recognition that the plaintiff's burden at the motion to dismiss stage is a relatively light one.").

79 Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER ED, Oct. 2, 2019, https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings.

80 *Gebser* at 281.

81 *Davis ex rel. v. Monroe Cnty. Bd. Of Educ.*, 526 U.S. 629, 640, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999) (emphasis supplied).

82 34 C.F.R. §106.44.

83 *Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167, 183, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2006).

indifference in response to a complaint of sexual harassment, "a school's 'deliberate indifference' to a student's claims of sexual harassment by a classmate may amount to an intentional violation of Title IX."[84]

In order to be successful in asserting a deliberate indifference claim, a Complainant must show that:

> (1) he or she was subject to "severe, pervasive, and objectively offensive" sexual harassment'; (2) 'the harassment caused the [Complainant] to be deprived of educational opportunities or benefits'; (3) the funding recipient was aware of such harassment; (4) the harassment occurred 'in [the funding recipient's] programs or activities'; and (5) the funding recipient's response, or lack thereof, to the harassment was 'clearly unreasonable.[85]

A Complainant must also show that the school exercised "substantial control over the harasser and the context in which the harassment occurred."[86]

In determining whether a Complainant has met his or her burden, each element of a deliberate indifference claim must be analyzed. Actionable harassment is, "behavior that is "severe, pervasive and objectively offensive,"[87] meaning that the sexual harassment "effectively bars the victim's access to an educational opportunity or benefit."[88] "Objectively offensive means behavior that would be offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively.[89] "Whether gender-oriented conduct rises to the level of actionable 'harassment' . . . 'depends on a constellation of surrounding circumstances, expectations, and relationships.'"[90] Moreover, the evidence asserted by the Complainant regarding the conduct must be specific.[91]

A Complainant must also show that a school had actual knowledge of the sexual harassment in a deliberate indifference claim.

> Actionable knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any

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84 *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643, 119 S.Ct. 1661, 143 L.Ed 2d 839 (1999).

85 *Doe v. Brown Univ.*, 896 F.3d 127, 130 (1st Cir. 2018).

86 *Davis* at 645.

87 *Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686, 712 (6th Cir. 2022).

88 *Davis* at 633.

89 *Doe v. Ohio Univ.*, No. 2:21-CV-00858, 2023 WL 2652482, 5 (S.D. Ohio Mar. 27, 2023).

90 *Id.* at 651 (*quoting Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)); *see also id.* at 653 ("The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity.").

91 *Dahmer v. W. Kentucky Univ.*, No. 21-5318, 2022 WL 19296342, 3 (6th Cir. Oct. 13, 2022).

> employee of an elementary or secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.[92]

As noted above, "Actual knowledge requires only that a single school administrator with authority to take corrective action had actual knowledge of the sexual harassment.[93] However, to assert a deliberate indifference claim, the Complainant must show that, a school both knew *and* consciously disregarded the known risk to the victim.[94] A school can also be held liable in instances where it had actual acknowledge of prior misconduct but allowed the danger posed to persist.[95] However, a single instance of misconduct is not sufficient.[96]

In a deliberate indifference claim, the harassment must have occurred in a school's education program or activity. An "education program or activity includes locations, events or circumstances over which the recipient exercised substantial control over both the Respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."[97] Whether a school has "disciplinary authority" over a harasser can show substantial control.[98] In addition, "Courts focus on whether the recipient owns or regulates the physical location, sponsors the event, or hosts or facilitates the program or activity. Locations on a school's campus are frequently found to be within the recipient's control."[99] Further, off-campus harassment may be within a school's control when there is "some nexus between the out-of-school conduct and the school."[100]

Finally, the Title IX regulations provide that, "A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances."[101] A school's response may be found to be clearly unreasonable when an injury to a Complainant is attributable to post-actual-knowledge further harassment, which would not have happened but for the clear unreasonableness of the school's response.[102] The standard for actionable conduct thus, according to the *Davis v. Monroe County Board of Education* ("*Davis*") court, requires a finding that a school's deliberate indifference subjected its students to harassment, meaning further actionable harassment.[103] However, the court further stated that, "The deliberate indifference

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92 34 C.F.R. §106.30(a).

93 *Stiles ex rel. D.S. v. Grainger Cty*., 819 F.3d 834, 848 (6th Cir. 2016).

94 *Kollaritsch v. Michigan State Univ. Bd. of Trustees*, 944 F.3d 613, 620 (6th Cir. 2019).

95 *Hansen v. Bd. Of Trustees of Hamilton Se. Sch. Corp*., 551 F.3d 599, 606 (7th Cir. 2008).

96 *Totten v. Benedictine Univ.*, No. 20 C 6107, 2021 WL 3290926, 6 (N.D. Ill. Aug. 2, 2021)

97 34 C.F.R. §106.44(a).

98 *Davis* at 630.

99 *Id.* at 629.

100 *Id.* at 645.

101 34 C.F.R. §106.44(a).

102 *Davis* at 644.

103 *Id*.

must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it."[104]

The school's response must be clearly unreasonable *and* lead to further harassment."[105] Whether a school's response was clearly unreasonable does not differ between peer-on-peer and employee-on-student harassment.[106] However, "An educational institution's response has been deemed clearly unreasonable where it failed to enforce its own no contact order or take any steps to avoid a victim and her attacker being in the same classroom."[107]

2. Retaliation

A Complainant may also assert a retaliation claim. Similar to a claim of deliberate indifference, "Retaliation against individuals because they complain of sex discrimination is also intentional conduct that violates the clear terms of the [Title IX] statute."[108] In order to prevail on a Title IX retaliation claim, the Complainant must prove that a school retaliated against him or her *because* he/she complained of sex discrimination.[109]

To state a claim for retaliation under Title IX, a Complainant must establish that, (1) he or she engaged in protected activity; (2) the school knew of the protected activity; (2) the Complainant suffered an adverse school-related action; and (4) a causal connection exists between the protected activity and the adverse action."[110] "To qualify as "adverse," an educational action must be sufficiently severe to dissuade a "reasonable person" from engaging in the protected activity."[111] "Examples of "sufficiently severe" adverse educational actions include suspension, in-class punishment, placement in a different class, and denying enrollment in a desired class."[112] "When a Complainant fails to produce direct evidence, the retaliation claim is evaluated using the *McDonnell Douglas* burden-shifting framework."[113] "Under this framework, the burden is first placed on [the Complainant] to submit evidence from which a reasonable jury could conclude that [the Complainant] established a prima facie case of retaliation."[114] "The burden shifts to the University to articulate a "legitimate, non-discriminatory reason" for any adverse action(s)."[115] "Finally, the burden then shifts back to [the Complainant] to prove the University's reason is mere "pretext." [The Complainant] must do so by establishing that the University's reasons "(1) have no

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[104] *Id.* at 645.

[105] *Id.*

[106] *Williams ex rel. Hart v. Paint Valley Local Schl Dist.*, 400 F.3d 360, 367 (6th Cir. 2005).

[107] *Pogorzelska v. VanderCook Coll. of Music*, 442 F.Supp. 3d 1054, 1064 (N.D. III. 2020).

[108] *Jackson* at 183.

[109] *Id.*

[110] *Bose v. Bea*, 947 F.3d 983, 988 (6th Cir. 2020).

[111] *Gordon v. Traverse City Area Pub. Sch.,* 686 Fed. Appx. 315686 Fed. Appx. 315, 320 (6th Cir. 2017).

[112] *Id.*

[113] *Id.*

[114] *Doe v. Univ. of Kentucky*, No. 5:15-CV-296-JMH, 2022 WL 9408672, 5 (E.D. Ky Oct. 14, 2022).

[115] *Id.*

basis in fact; (2) did not actually motivate the action; or (3) were insufficient to warrant the action."[116]

3. Hostile Environment

Another claim that a Complainant may choose to file is a Title IX hostile environment claim. "A Title IX hostile education environment claim is governed by 'traditional Title VII 'hostile environment' jurisprudence."[117] In making the claim, a Complainant must show that he or she, "subjectively perceived the environment to be hostile or abusive" and, "the environment objectively was hostile or abusive, that is, that it was permeated with discriminatory intimidation, ridicule and insult sufficiently severe or pervasive to alter the conditions of [his or her] educational environment."[118] The totality of the circumstances must be examined, including, "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the victim's academic performance."[119] A Complainant who alleges discrimination on account of sex by the school may do so by pleading specific facts that support a minimal plausible inference of such discrimination.[120] Whether the accused's alleged conduct "rises to a level sufficient to create a hostile environment is a legal question that may be addressed on summary judgment."[121]

4. Heightened Risk/Pre-Assault Claim

A heightened risk claim/pre-assault claim is an alternative form of liability that a Complainant may assert against a school and is recognized by federal appellate courts in the Sixth, Ninth, Tenth and Eleventh Circuits. The legal framework that typically governs student-on-student discrimination claims involves actual notice and deliberate indifference as discussed in Paragraph V(A)(1) above. In a heightened risk/pre-assault claim, a [Complainant] contends that her own assault was the direct result of the university's deliberate indifference to prior reports of predatory sexual conduct by the same attacker."[122] A Complainant must show that the school had an official policy or custom that created a heightened risk of sexual assault on campus.[123] In these claims, the *school*, rather than the harasser, is the wrongdoer.[124] A court must "consider whether the defendant-institution's policy or custom inflicted the injury of which the plaintiffs complain."[125] As noted by one court, "If a recipient truly has an "official policy or custom" of

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[116] *Id.*

[117] *Doe v. Sarah Lawrence Coll.*, 453 F. Supp. 3d 653, 667 (S.D.N.Y. 2020).

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Klemencic v. Ohio State Univ.*, 10 F. Supp. 2d 911, 916 (S.D. Ohio 1998), *aff'd*, 263 F.3d 504 (6th Cir. 2001).

[122] *Doe v. Bd. Of Supervisors of Univ. of Louisiana Sys.*, No. CV 22-00338-BAJ-SDJ, 2023 WL 143171, 13 (M.D. La. Jan. 10, 2023).

[123] *Doe 1 on Behalf of Doe II v. Huntingdon Indep. Sch. Dist.*, No. 9:19- CV-00133-ZJH, 2020 WL 10317505 (E.D. Tex. Oct. 5, 2020).

[124] *Id.*

[125] *Doe 1 v. Baylor Univ.*, 240 F.Supp. 3d 646, 661 (W.D. Tex. 2017).

permitting sexual assault, surely the recipient can be held liable without the plaintiff having to point to ignorance by any one administrator."[126]

5. Post-Report/Post-Assault Claims

Similar to a heightened risk claim, a post-report/post-assault claim is also an alternative form of liability that a Complainant may assert against a school. When a Complainant files a post-report/post-assault claim, the Complainant alleges that the school violated Title IX by failing to adequately respond to the Complainant's report of sexual harassment; however, for a post-report/post-assault claim, the school is liable for its own lack of corrective action rather than the actions of the offending student.[127] "A school's inadequate response might lead to further contact between the victim and the assailant, or to subsequent harassment, either of which can impair the victim's educational experience."[128] In these cases, "a court looks at both whether a school's response was reasonably calculated to prevent reoccurrence of the harassment and also at the school's efforts to ensure the survivor's continued access to education in the wake of the reported abuse."[129] Where a school's response is clearly insufficient to ensure a victim can safely continue his/her education, or to ameliorate any post-assault hostile environment, it may constitute deliberate indifference.[130]

There is currently a federal circuit court split regarding the interpretation of *Davis* with respect to the way post-report/post-assault claims are analyzed. The First, Tenth and Eleventh Circuits, as well as the District of Columbia Circuit Court, have held that a Complainant/Plaintiff may successfully state a viable Title IX claim by alleging that a school's post-assault deliberate indifference made him or her liable or vulnerable to harassment. On the other hand, the Sixth, Eighth and Ninth Circuits require a Complainant/Plaintiff to show subsequent harassment to prevail on a post-report/post-assault claim. The cases discussed in Section V(A)(5), *infra*, highlight the circuit court split regarding this issue.

6. Erroneous Outcome

Erroneous outcome claims are typically claims filed by Respondents, not Complainants. However, the court in *Doe v. Board of Regents of the University of Wisconsin* refused to preclude Complainants from filing such claims, finding that, "there is nothing in the plain language of Title IX that would foreclose an alleged victim from bringing such a claim."[131] "To state a viable

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[126] *Doe I on Behalf of Doe II.* 2020 WL 10317505, at *5.

[127] *Id*.

[128] *Id.*

[129] *Goodwin v. Pennridge Sch. District*, 389 F. Supp. 3d 304, 317 (E.D. Pa. 2019).

[130] *Id.*

[131] *Doe v. Bd of Regents of Univ. of Wisconsin*, No. 20-CV-856-WMC, 2021 WL 5114371, 4 (W.D. Wis. Nov. 3, 2021).

erroneous outcome Title IX claim, plaintiff "must allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous outcome findings."[132]

B. Challenges Related to Complainant Title IX Claims

Like with any litigation that is filed, Complainants who seek redress from the courts regarding the way a school handled their Title IX complaint must prove certain elements of the claim that they are asserting. In doing so, Complainants face challenges that are unique to Title IX cases, as well as challenges that are common to all plaintiffs.

One challenge that Complainants face is the high threshold that must be met in order to show that a school's response to their Title IX complaint was deliberately indifferent. In a case involving sexual harassment by a non-affiliate, Millersville University expressed concerns regarding the court's decision (which held that a school can be held liable for acts of sexual harassment by a non-affiliate) and stated that doing so would "open the floodgates" and "subject universities to unwarranted liability under Title IX."[133] The court noted that the holding in *Davis* foreclosed the university's concern as, "There is a high bar to establish liability for deliberate indifference under Title IX." A school may avoid liability for a deliberate indifference claim if it takes "timely and reasonable measures to end the harassment."[134] "But if earlier measures have proved inadequate to prevent further harassment, a school "may be required to take further steps to avoid new liability."[135] "However, Title IX does not require educational institutions to take heroic measures, to perform flawless investigation or to craft perfect solutions."[136] "It is sufficient if a school takes "timely and reasonable" measures to address the harassment, even if those measures fall short of perfection."[137] "The fact that measures designed to stop harassment prove later to be ineffective does not establish that the steps taken were clearly unreasonable in light of the circumstances known by [a defendant] at the time."[138] "A claim that the school system could or should have done more is insufficient to establish deliberate indifference."[139]

A second challenge that Complainants encounter is the statute of limitations in place for the state in which their claim is filed. Title IX does not contain an express statute of limitations;[140] rather, the statute of limitations for a Title IX claim is based on the applicable state's statute of limitations for personal injury claims. Thus, a Complainant may unexpectedly find that his or her Title IX claims are time barred if not filed prior to the expiration of the statute of limitations in the

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[132] *Id.*

[133] *Hall v. Millersville Univ.*, 22 F.4th 397, 407 (3d Cir. 2022).

[134] *Wills v. Brown Univ.*, 184 F.3d 20, 26 (1st Cir. 1999).

[135] *Id.*

[136] *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 174 (1st Cir. 2007), *rev'd on other grounds*, 555, U.S. 246 (2009).

[137] *Wills* at 26.

[138] *Doe v. Pawtucket Sch. Dep't*, 969 F.3d 1, 9 (1st Cir. 2020).

[139] *Porto v. Town of Tewksbury*, 488 F.3d 67, 73 (1st Cir. 2007), *overruled on other grounds*, 555 U.S. 246, 129 S.Ct. 788, 172 L.Ed.2d 582 (2009).

[140] *Wilmink v. Kanawha Cnty. Bd. Of Educ.*, 214 Fed. App'x 294, 296 no.3 (4th Cir. 2007).

state wherein the lawsuit is filed. There is a wide variance between the statute of limitations for personal injury claims in place across the United States, which range from one year to six years.[141]

Lastly, one challenge related to the statute of limitations challenge is determining the accrual date of a Title IX claim. Though the applicable statute of limitations is determined by state law, Title IX determines when a Title IX claim arises. "A plaintiff's Title IX claim accrues when she has or should have "possession of the critical facts that [s]he has been hurt and who has inflicted the injury."[142] More specifically, "The clock starts only once the plaintiff knows or should have known that administrators "with authority to take corrective action knew of the conduct and failed to respond appropriately."[143] However, there are unique differences between how the accrual date is determined for heightened risk/pre-assault claims versus the accrual date for post-report/post assault claims. The *Snyder-Hill* court explained the differences in these theories of liability as follows:

> ... a pre-assault heightened-risk claim may not accrue until well after a post-assault Title IX claim. A plaintiff will typically know or have reason to know that a school mishandles their own report of an assault close to the time of the school's inadequate response. But that same plaintiff may have no reason to know of a school's deliberate indifference that gave rise to their heightened-risk claim. It would be "unreasonable to conclude ... that a plaintiff's knowledge that [their] individual complaint was mishandled would reveal that the University has a broad *de facto* policy of deliberate indifference generally." [*Karasek v. Regents of the Univ. of Cal.*, 500 F. Supp. 3d 967, 981 (N.D. Cal. 2020).] This difference distinguishes the plaintiffs' claims from [*King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 763 (5th Cir. 2015)], in which the Fifth Circuit held that the plaintiffs' post-assault claims accrued when their complaints to the school administrations went "unheeded." In short, even if a plaintiff has reason to know that a school responded improperly to their complaint, they may still lack reason to know that others had complained before them or that the school was deliberately indifferent to any prior complaints.[144]

C. Case Review of Complainant Litigation

A listing of recent cases involving Complainant Title IX litigation for each type of claim discussed in Section V(A) is included below:

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[141] Christy Bieber, J.D., *Personal Injury Statute of Limitations By State 2023*, FORBES ADVISOR, Dec. 6, 2022, https://www.forbes.com/advisor/legal/personal-injury/statute-of-limitations/#:~:text=It%20varies%20by%20state%20but,claim%20will%20be%20time%20barred..

[142] *United States v. Kubrick*, 444 U.S. 111, 122 (1979).

[143] *Snyder-Hill* at 705 (6th Cir. 2022) (*quoting Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1988).

[144] *Synder-Hill* at 703.

1. Deliberate Indifference

Sierra Rudman & Caitlyn Boyd v. State of Oklahoma, ex. rel. Board of Regents for the Regional University System of Oklahoma, & Kay Robinson, No. CIV-22-0091-F, 2023 WL 3105128 (W.D. Okla. Apr. 26, 2023)

In the summer of 2019, Sierra Rudman, a Coordinator of Student Engagement for the Division of Enrollment Management and Student Success, and a mandatory reporter and responsible employee, reported to her supervisor, Kay Robinson, that she had learned of sexual exploitation and harassment hazing that had occurred at the university's Cheer Team's "Unofficial" Big/Little Reveal event in August 2018. Though Ms. Robinson stated that she would look into the alleged violations, she did not. Sierra Redman, a new Cheer Team member, was invited to attend the Big/Little Reveal event in August 2020. During the event, which was held off campus, Ms. Rudman, and several other new Cheer Team members, were hazed, sexually harassed, and exploited by upper-class Cheer Team members. Ms. Robinson and the Cheer Team Coach, Jenni Hawkins, had been known to attend prior events where they had witnessed hazing and sexual harassment/exploitation of new Cheer Team members. They reportedly stopped attending the event because they knew that allowing the behavior could get them in trouble. They were, however, shown videos of the hazing and sexual harassment/exploitation activities, which had been moved off campus at the insistence of Ms. Robinson out of concern that the activities were unlawful. Attendance at the event was mandated by Ms. Robinson and Ms. Hawkins.

The court denied the university's motion to dismiss, concluding that the facts, as alleged, were sufficient to establish deliberate indifference. Ms. Robinson did not take any action to stop the 2020 event, despite having knowledge of sexual misconduct that had occurred at prior events for the Cheer Team and having the ability to terminate the event and enforce consequences for unlawful actions. The court concluded that a reasonable jury could conclude that the lack of response by Ms. Robinson was clearly unreasonable.

Luskin v. University of Maryland, Coll. Park, Maryland (No. 22-1910, 2023 WL 2985121 (4th Cir. Apr. 18, 2023)

Plaintiff was sexually harassed on four separate occasions by C.H., another student in her Ph.D. program at the University of Maryland at College Park ("UMD"). Plaintiff ended up filing a sexual misconduct complaint with UMD's Office of Civil Rights & Sexual Misconduct ("OCRSM"), but the office determined that the harassment against Plaintiff was not sex-based. However, despite this finding, OCRSM recommended that the Office of Student Conduct ("OSC") issue a no-contact order against C.H. which OSC did. C.H. eventually violated the no-contact order, prompting UMD to transition C.H. to all online classes for any classes he had with the Plaintiff, to place him on disciplinary probation until the end of the semester, and to bar him from entering the building where students in the program had class and laboratory space except through designated entrances and exits. Despite this, Plaintiff switched her Ph.D. program to the master's degree track because she felt like UMD did not have a safety plan in place that would keep her and C.H. apart.

Plaintiff filed suit against UMD alleging that she was denied equal access to educational opportunities at UMD in violation of Title IX. Plaintiff claimed that UMD acted with deliberate indifference to the harassment that she endured. The district court granted UMD's motion for summary judgment, which was upheld on appeal. The appeals court noted that UMD's response was *not* clearly unreasonable because it swiftly responded to each incident, contacted C.H.'s professors to determine if they had any concerns relative to C.H.'s behavior, attempted to relocate Plaintiff to a new student office away from C.H., issued a no-contact order within two days of being notified of a text message exchange between Plaintiff and C.H., transitioned C.H. to online classes after he violated the no-contact order, placed C.H. on disciplinary probation until the end of the semester, encouraged C.H. to undergo a psychiatric evaluation, and barred C.H. from entering the building where the program met except through designated entrances and exits. The appeals court determined that all the actions taken by UMD established that the university took Plaintiff's complaint seriously and that it responded in a reasonable manner. Though Plaintiff took issue with UMD placing C.H. on probation rather than being suspended or expelled, alleging that a school has failed to eliminate student-on-student harassment, or to impose the disciplinary sanctions sought by a victim is insufficient to prove deliberate indifference.

2. Retaliation

Du Bois v. Board of Regents of University of Minnesota, 439 F.Supp.3d 1128 (D.Minn., 2020)

In March 2018, the women's cross-country and track and field coach at the University of Minnesota ("UMD") was placed on leave following allegations that she had engaged in sexual harassment. Plaintiff, a member of the team, spoke favorably of the coach during the investigation. That summer, while the coach was on leave, Plaintiff sustained an injury. Shortly thereafter, in August 2018, the Athletic Director informed the team that the coach had resigned. Plaintiff, who had remained in touch with the coach, openly confronted the Athletic Director, asking him why he was lying about the coach's resignation since he had demanded that she resign. Plaintiff inquired about redshirting but was informed that was not an option, even though her teammate had been allowed to redshirt. Plaintiff later inquired about the possibility of being able to talk to other schools about joining their program. Plaintiff was told that she would need to request a release in order to do so, and that upon receiving a release, she would not be permitted to continue practicing with the team, even though another teammate had been allowed to do so. At the end of August, an interim coach was hired who, within two days of his hire, gave Plaintiff two options: remain on the team and compete or leave the team. She would not be allowed to redshirt. One week later, Plaintiff was summoned to a meeting with the Athletic Department staff where they told her they had heard she intended to transfer and that she wanted to redshirt to preserve her eligibility. Plaintiff denied that this was the case and said she had not yet made up her mind. She was then informed that until she made up her mind, she would be segregated from the team. Plaintiff left the meeting, filed a complaint with the UMD Office of Equal Opportunity and Affirmative Action and ultimately, transferred to another school where she immediately began to compete.

Plaintiff filed suit against UMD alleging that UMD violated Title IX by retaliating against her by not allowing her to redshirt because she supported the coach during the investigation, by discriminating against her and other female athletes by granting permission to male athletes to redshirt but not female athletes and for inadequately funding the women's cross-country and track-

and-field teams. With respect to the Title IX retaliation claim, the court granted UMD's motion to dismiss, finding that the Plaintiff did not plausibly plead that she engaged in a protected activity, nor did she plausibly plead a causal connection between her participation in the Title IX investigation and UMD's refusal to allow her to redshirt.

3. Hostile Environment

Dahmer v. Western Kentucky University, No. 21-5318, 2022 WL 19296342 (6th Cir. Oct. 13, 2022)

Plaintiff, an undergraduate student at Western Kentucky University ("WKU") alleged that she endured verbal, mental and emotional abuse that constituted discrimination on the basis of sex while serving as a member, and eventually president, of the Student Government Association. Plaintiff alleged that the abuse included expletive-laden, sex-based threats of violence from peers, and sexually explicit comments and inappropriate behavior from the SGA faculty advisor. Plaintiff reported the peer harassment to the advisor, who failed to act. Plaintiff also reported the harassment to the Title IX Coordinator who also failed to act. Plaintiff further alleged that she was retaliated against by WKU's president for reporting the harassment and WKU's deliberately indifferent response.

Plaintiff filed suit against WKU, in part, alleging that WKU was liable for the SGA faculty advisor's faculty-on-student harassment because it created a sexually hostile learning environment for female members of the SGA. The district court found that Plaintiff only identified two instances of the advisor's conduct that could potentially constitute sexual harassment and concluded that the alleged conduct was far less severe than other cases where courts did not find a hostile environment. The district court relied upon Supreme Court precedent holding that sporadic use of abusive language, gender related jokes or occasional episodes of harassment do not alone create a hostile environment, and concluded that though the advisor's behavior may have been inappropriate, Plaintiff failed to present evidence that it was so severe, pervasive and objectively offensive that it undermined and detracted from her educational experience, or that she was denied equal access to WKU's resources and opportunities. On review, the appeals court concluded that the district court did not err in granting summary judgment for WKU.

4. Heightened Risk/Pre-Assault

Snyder-Hill v. Ohio State University, 48 F.4th 686 (6th Cir. 2022)

Former students and contract referees sued Ohio State University ("OSU") for abuse committed by Dr. Richard Strauss, the athletic team doctor, between 1979 and 2000, but which did not become public until 2018. The Plaintiffs alleged that OSU was deliberately indifferent to their heightened risk of abuse.

Dr. Strauss began working at OSU in 1978, shortly thereafter became a team physician and also served as a physician at OSU's Student Health Center. He served in these roles until he was placed on administrative leave in 1996. Though OSU investigated his conduct and ultimately terminated his employment agreement with the Athletics Department and did not renew his

appointment with the Student Health Center, Dr. Strauss remained a tenured faculty member. After retiring from OSU in 1998, he opened up a private men's clinic near OSU, that he advertised in the OSU student newspaper, and continued to see and treat OSU students. Following an independent investigation by a law firm, Dr. Strauss was found to have committed at least 1429 sexual assaults against 177 male student patients, most of whom were student athletes.

OSU received student complaints about Dr. Strauss' abuse and more than 50 members of the Athletics Department Staff are alleged to have known about Dr. Strauss' inappropriate sexual conduct. The independent investigation confirmed that OSU received persistent, serious, and regular complaints from students, but took no meaningful action to investigate or address the concerns until January 1996 when Dr. Strauss was placed on leave; no reasons were provided regarding why Dr. Strauss was placed on leave. The investigators further found that OSU destroyed medical records and shredded files related to Dr. Strauss' abuse. The Plaintiffs had no knowledge of OSU's knowledge of Dr. Strauss' abuse until the investigative report was made publicly available in 2018.

The district court dismissed the Plaintiffs' case concluding that their claims were barred by the statute of limitations. Upon review, the appeals court concluded that the Plaintiffs' claims were plausible and not barred by the statute of limitations. The appeals court denied OSU's motion to dismiss and remanded the case back to the district court. The appeals court noted that a pre-assault heightened-risk claim may not accrue until well after a post-assault claim. Though a plaintiff may have knowledge that a school has mishandled their own report of an assault, they would have no reason to know of a school's deliberate indifference that would give rise to their heightened-risk claim. The appeals court ultimately found that the Plaintiffs' claims accrued when they knew or had reason to know that OSU was deliberately indifferent to sexual harassment of which OSU had actual knowledge that is so severe, pervasive and objectively offensive that it can be said to have deprived the Plaintiffs of access to educational opportunities or benefits provided by the school, which would not have occurred until 2018 when the investigative report was publicly released.

5. Post-Report Claims

Farmer v. Kansas State University, 918 F.3d 1094 (10th Cir. 2019)

Two students alleged that Kansas State University ("KSU") violated Title IX by being deliberately indifferent to reports it received of student-on-student sexual harassment, namely rape. More specifically, the Plaintiffs alleged that KSU was deliberately indifferent after the Plaintiffs reported to KSU that other students had raped them, which caused them to have to continue attending KSU with the student-rapists potentially emboldened by the indifference expressed by KSU, and which caused the students to withdraw from participating in educational opportunities offered by KSU and prevented them from using available KSU resources for fear of encountering the student-rapists and other students who knew of the rapes. By doing so, the Plaintiffs alleged that KSU had excluded them from participation in, denied them the benefits of, or subjected them to discrimination under its programs or activities. The district court who heard each Plaintiff's case separately ruled that each Plaintiff had sufficiently alleged an actionable Title IX claim. KSU

filed a motion to dismiss each case, claiming that neither Plaintiff alleged that any deliberate indifference by KSU had caused them harm that is actionable under Title IX.

In considering the claims, the appeals court accepted the Plaintiffs' allegations that KSU had been deliberately indifferent, and on interlocutory appeal, limited its inquiry to whether KSU's deliberate indifference caused the Plaintiffs to suffer further harassment rather than alleging that KSU's post-assault deliberate indifference made them vulnerable to harassment. KSU argued that the Plaintiffs must assert, as an element of the Title IX claim, that KSU's deliberate indifference caused them to be subjected to *actual further harassment* by a student. Plaintiffs argued that it is sufficient for them to have alleged that KSU's deliberate indifference made them *vulnerable* to harassment. The appeals court found Plaintiffs' argument persuasive, relying on the holding in *Davis* that a federal education recipient can be deliberately indifferent to reports of student-on-student sexual harassment that causes students to undergo harassment or which makes them liable or vulnerable to it.

Kollaritsch v. Michigan State University Board of Trustees, 944 F.3d 613 (6th Cir. 2019)

Four female students who were sexually assaulted by other students filed suit against Michigan State University ("MSU") alleging that MSU's response was inadequate, caused them physical and emotional harm, and denied them educational opportunities. Like *Farmer v. Kansas State University*, Plaintiffs alleged that MSU's deliberate indifference made them vulnerable to further sexual harassment. However, unlike *Farmer*, the appeals court in this case did not find that an allegation of vulnerability alone, was sufficient, to constitute an actionable Title IX claim. The court stated that *Davis* had two separate components, comprising separate-but-unrelated torts by separate-and-*un*related tortfeasors: (1) actionable harassment by a student, and (2) a deliberate-indifference intentional tort by the school. Even if actionable student-on-student harassment is established, the court stated that a plaintiff must also plead and prove four elements of a deliberate-indifference-based intentional tort: (1) knowledge, (2) an act, (3) injury, and (4) causation. The court found that the Plaintiffs did not meet their burden, holding that the Plaintiffs must plead, and ultimately prove, an incident of actionable sexual harassment, the school's actual knowledge of it, some further incident of actionable sexual harassment, that the further actionable harassment would not have happened but for the objective unreasonableness, or deliberate indifference of the school's response, and that the Title IX injury is attributable to the post-actual-knowledge further harassment. The Plaintiffs argument that post-actual-knowledge harassment isn't necessary because the vulnerability alone is its own causal connection between the act and the injury failed.

6. Erroneous Outcome

Doe v. Board of Regents of University of Wisconsin, No. 20-CV-856-WMC, 2021 WL 5114371(W.D. Wis. Nov. 3, 2021)

Plaintiff, a student at the University of Wisconsin ("UW"), asserted deliberate indifference and erroneous outcomes claims against UW. Plaintiff was sexually assaulted by a male football player. Following an investigation by UW's Title IX office, the male student was expelled. The male student was also charged with criminal sexual assault. However, when the male student was found not guilty, a public call ensued for the male student to be readmitted to UW. The male

student filed a petition for restoration of rights and UW readmitted him and reversed the underlying Title IX finding of sexual assault. The decision in the Title IX case was downgraded to sexual harassment but UW did not impose any further sanction against the male student. Plaintiff was not informed of the male student's return to campus in sufficient time to transfer to another school. Plaintiff alleged that the male student's readmission created an educational environment that was extremely hostile, causing her to miss classes, avoid areas of campus, ask friends to escort her while walking to classes or calling her parents to have them on the phone if she could not find anyone to walk with her. She also alleged that she lived in a constant state of stress that required her to work harder and longer hours to attain the same grades and to take a lower course-load, which resulted in her needing an additional semester to complete her degree.

UW argued that erroneous outcome claims are reserved for students accused of sexual misconduct. The court declined to accept that argument and found that nothing in Title IX forecloses a victim from bringing such a claim. As with any erroneous outcome claim, the Plaintiff need only allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding. Plaintiff alleged that UW was motivated by the male student's status as a football player in overturning its prior decision finding a violation of Title IX and in readmitting him to UW. The court found that Plaintiff adequately alleged that UW's actions to overturn its previous decision and readmit the male student were motivated by his role as a star member of the football team. The court's finding gave rise to a reasonable inference that the alleged harassment on the part of UW was gender-based.

VI. Conclusion

In conclusion, colleges and universities facing claims under Title IX from student Complainants or Respondents must remain mindful of not only developments in the Title IX regulations and subregulatory guidance, but also in the evolution of federal Title IX caselaw particularly in the jurisdiction in which the claims are filed.

APPENDIX A

NACUA's collection of resources related to Title IX litigation includes:

1. Title IX in the Academic Medical Context
    - Carol Ashely, Dana Lee, Sonya Sanchez
    - Spring 2023 CLE Workshop: Higher Education Discrimination Law

2. The Graduate(s): The Legal Affairs of Graduate Students
    - Barbara Lee, Anne Schira, Zahraa Zalzala
    - Winter 2023 Virtual CLE Workshop: Student Affairs

3. Sex Discrimination in Employment: Title IX, Title VII, State Law, and Practical Considerations
    - Leslie Golden, Leslie M. Gomez, Hope Murphy Tyehimba
    - Spring 2022 CLE Workshop: Higher Education Employment Law

4. Lessons Learned: Do's, Don'ts and Tips for Navigating the World of Title IX Litigation,
    - Kristen Bonatz, Allison Boyle, & Benita Jones
    - 2021 Virtual Annual Conference

5. Sexual Misconduct Arising out of Student Health, Athletic Medicine, and Academic Medical Centers
    - Sonya Sanchez, Rachel Mosowsky, Hailyn Chen, James R. Salzmann, and Hanna Noll-Wilensky
    - NACUANOTE Vol. 20, No. 10 (June 22, 2022)

6. Accommodations for Disabilities in the Title IX Grievance Process
    - Janet Elie Faulkner and Phil Catanzano
    - NACUANOTE Vol. 20, No. 1 (September 1, 2021)