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Legal Issues in Higher Education

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Supplement to the Legal Update**

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¹ This outline is an illustrative, not exhaustive, list of higher education cases of interest to this audience. It is intended to provide general information, not binding legal guidance. If you have a legal inquiry, you should consult an attorney in your state who can advise you on your specific situation.

Discrimination and Sexual Misconduct: Administrative and Legal Updates

The last year has been one of administrative change with the new Presidential administration and the appointments of Besty DeVos as Secretary of Education, and Candice Jackson as the Acting Assistant Secretary for Civil Rights for the Department of Education's Office for Civil Rights ("OCR"). The new OCR administration rescinded a number of Obama era guidance documents regarding Title IX, indicated an intention of engaging in formal public rulemaking to replace the defunct guidance on sexual misconduct, and edited the case processing manual for OCR investigations. The Department of Justice ("DOJ") similarly reversed course on prior interpretation of Title VII, holding that DOJ would not enforce an application of Title VII to include discrimination on the basis of transgender status. And of course, in the courts, these issues continued to be battled out, notwithstanding the changing winds of the administrative agencies.

I. Department of Education Office for Civil Rights and Department of Justice: Changes, Changes, Changes

A. OCR: Rescinding Prior Guidance Documents on Transgender Students

In a Dear Colleague Letter dated February 22, 2017 ("February DCL"), OCR rescinded (1) a Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education dated January 7, 2015; and (2) Dear Colleague Letter on Transgender Students jointly issued by the Civil Rights Division of the Department of Justice and the Department of Education dated May 13, 2016. Both documents took "the position that the prohibitions on discrimination 'on the basis of sex' in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq., and its implementing regulations, see, e.g., 34 C.F.R. § 106.33, require access to sex-segregated facilities based on gender identity." In explaining the reason for the rescission, OCR indicated that the two documents did not "contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process." The February DCL further cited a growing split among the federal circuit courts regarding whether the Title IX prohibition of discrimination on the basis of sex included gender identity:

This interpretation has given rise to significant litigation regarding school restrooms and locker rooms. The U.S. Court of Appeals for the Fourth Circuit concluded that the term "sex" in the regulations is ambiguous and deferred to what the court characterized as the "novel" interpretation advanced in the guidance. By contrast, a federal district court in Texas held that the term "sex" unambiguously refers to biological sex and that, in any event, the guidance was "legislative and substantive" and thus formal rulemaking should have occurred prior to the adoption of any such policy. In August of 2016, the Texas court preliminarily enjoined enforcement of the interpretation, and that nationwide injunction has not been overturned.

The February DCL indicated that OCR would "further and more completely consider the legal issues involved." The DCL ended that though OCR was rescinding the two documents:

Please note that this withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms. The Department of Education and the Department of Justice are committed to the application of Title IX and other federal laws to ensure such protection.

Then, on June 6, 2016, OCR issued a field memorandum to all Regional Directors further clarifying enforcement of Title IX with respect to transgender individuals in the wake of the February DCL withdrawal of the Obama era guidance documents. The memorandum indicates that Regional Directors should rely on Title IX, its implementing regulations, relevant decisions of federal courts, and OCR guidance documents that remain in effect when evaluating sex discrimination complaints, regardless of whether the complainant is transgender. The document provided a list of five scenarios in which OCR could assert jurisdiction over a complaint involving transgendered individuals: (1) failure of a school to promptly and equitably resolve a transgender student's complaint of sex discrimination; (2) failure to assess whether sexual or gender-based harassment, such as reports of individuals refusing to use a transgendered student's preferred pronouns or intimidation/hostility based on sex-stereotypes, creates a hostile environment; (3) failure to take steps reasonably calculated to address sexual or gender-based harassment that create a hostile environment; (4) retaliation against a transgender student for raising concerns about sex discrimination; and (5) different treatment based on sex stereotyping. The memorandum also encouraged Regional Directors to treat each complaint with care and individualized attention and to search "for a permissible jurisdictional basis for OCR to retain and pursue the complaint," noting that flexibility should apply to cases where one allegation can move forward (e.g., harassment based on sex or gender stereotypes), but the other may not (e.g., denial of access to restrooms based on gender identity).

B. Department of Justice - Title VII Does Not Protect Transgendered Employees

Of note, the Department of Justice soon followed OCR's lead and issued a memorandum on October 5, 2017, reversing prior Obama administration policy and holding that Title VII does not prohibit discrimination against transgender persons. The DOJ's interpretation is at odds with the Equal Employment Opportunity Commission ("EEOC") interpretation of the scope of Title VII, as well as a number of federal courts (as will be explained in the subsequent section on case law).

C. OCR Rescinding Prior OCR Guidance on Title IX/Sexual Misconduct

On September 22, 2017, OCR issued a Dear Colleague letter ("September DCL"), which rescinded the April 4, 2011 Dear Colleague Letter on Sexual Violence and the April 29, 2014 Question and Answers on Title IX and Sexual Violence. OCR noted that in rescinding these documents, it intends to engage in rulemaking on the topic of schools' Title IX responsibilities concerning complaints of sexual misconduct and harassment, including soliciting input from stakeholders and the public during that rulemaking process. The September DCL noted that in

the interim, OCR would continue to rely upon the 2001 Revised Sexual Harassment Guidance, along with a new document - *Q&A on Campus Sexual Misconduct* (“September Q&A”) - issued at the same time as the September DCL. Though more fulsome guidance is eventually expected, some highlights from the Q&A are worth noting:

- **Standard of proof:** The Q&A states that schools may elect to use one of two legal standard investigating/adjudicating reports of sexual misconduct - “preponderance of the evidence” or “clear and convincing.” OCR’s position here is a reversal from the 2011 DCL and 2014 Q&A, which unequivocally held that schools were expected to employ the “preponderance of the evidence” standard. However, in a footnote, the September Q&A advised that in choosing which standard to apply to sexual misconduct cases, each school should utilize the standard that is consistent with the school’s disciplinary process for other forms of student misconduct.
- **What is an “equitable” investigation:** Though not technically in contradiction with the 2011 DCL or the 2014 Q&A, the September Q&A places a fine point on the investigator’s responsibility to “synthesize all available evidence - including inculpatory and exculpatory evidence . . .”
- **Length of investigation:** Abandoning the 2011 DCL instruction that investigations be completed in 60 days, the September Q&A states that there is no set timeframe for completion of investigation. However, the 2001 Guidance requirement that investigations be “prompt” remains.
- **Interim measures:** The September Q&A states that in determining the need for interim measures, schools may not favor one party over the other and must make all measures available to all parties equally. This point is not a major change from the 2011 DCL, but does seem inconsistent with the prior recommendation that in implementing interim measures, schools should seek to minimize the burden on the complainant.
- **Use of Mediation in Informal Resolution:** The September Q&A reverses the 2011 DCL and 2014 Q&A blanket ban on the use of voluntary mediation in sexual misconduct cases. The September Q&A states that mediation, when all parties voluntarily agree, may be appropriate in some, though not all circumstances. This statement is consistent with the 2001 Guidance, which permitted mediation, but noted that in some situations, like those involving sexual assault, mediation may not be appropriate.
- **Communication about investigations:** The September Q&A states that “gag orders” or any restriction on the parties to communicate about the investigation are prohibited. The section reflects the current OCR view that any restriction on discussion of the investigation could deprive the parties from the ability to gather evidence.

- **Appeals:** Consistent with prior guidance, the September Q&A does not require an appeal process. However, the current Q&A permits schools that choose to offer an appeal process to do so for either (1) the respondent only; or (2) both parties equally.

Perhaps disappointing to some, the Q&A explicitly noted that existing resolution agreements would remain in place. The 2001 Revised Sexual Harassment Guidance is worth a review for a reminder as to what has not changed during this interim period pending issuance of new regulations. Further, the September DCL did not rescind the 2015 Dear Colleague Letter on Title IX Coordinators and Resource Guide, meaning the documents remains a reflection of OCR view, even with the rescission of other prior guidance documents.

D. Reformulating OCR Investigations

On March 5, 2018, OCR launched a new version of the Case Processing Manual, which serves as the road map for OCR handling of complaints against and compliance reviews of covered institutions. Many schools with open OCR investigations had already noticed a change in the manner in which OCR handled investigation under the Trump administration. Anecdotally, over the past year, OCR has been issuing far fewer broad requests for systemic institutional information (often requesting years of data regarding institution's handling of reports of sexual misconduct) that had typically accompanied individual complaint notices under the prior administration. The formal changes to the Case Processing Manual appear to be consistent with this evolving practice. The new manual no longer references "systemic" investigations - though Secretary of Education DeVos commented that OCR retains the authority to conduct such investigations when warranted. The changes also remove an appeal process for complainants and narrows the time for providing evidence during the OCR investigation into a complaint. The changes appear to be part of a broader effort to clear the backlog of open OCR cases by narrowing the scope of investigations and getting cases to resolution more quickly and efficiently. The current version of the manual strengthens language regarding the circumstances under which investigators must dismiss complaints. The prior version of the manual listed a number of basis upon which an investigator "should" close an investigation, but allowed for investigator discretion to continue investigation if systemic issues were suspected. The new version changes that "should" to a "will," meaning investigators must dismiss when one of the eleven basis for dismissal (e.g., information provided by complainant fails to state a violation).

II. Case Law Developments

A. Evolving and Conflicting Standards for Gender Identity Cases

On the heels of the shifts by OCR and DOJ interpretation of Title IX and Title VII, respectively, a case from the Seventh Circuit Court of Appeals suggests courts may be veering in a different direction. In *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), the Seventh Circuit upheld a transgender high school student's preliminary injunction against his school on the grounds that he demonstrated a likelihood of success that the school's restriction on which bathroom he could use violated Title IX and the U.S. Constitution's Equal Protection Clause. With respect to Title IX, the court analogized the student's claim to Title VII claims asserting sex-stereotyping under Supreme Court precedent in

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), and held that the student demonstrated a likelihood of success of establishing that the school bathroom policy was inappropriately based on sex-stereotypes. As for the Equal Protection claim, the court held that the student demonstrated a high likelihood of success because the school's bathroom policy constituted a sex-based classification and was thus subject to "heightened scrutiny."

A case from federal court in the Western District of Oklahoma signals a similar departure from federal administrative policy. In *Tudor v. Southeastern Oklahoma State University, et al.*, No. CIV-15-324-C, (W.D. Okla. Oct. 26, 2017), a professor at the university claimed that upon announcing she would be transitioning from male to female, she began to experience discrimination and harassment, which culminated in denial of tenure and termination of employment. Plaintiff filed her claims under Title VII and the university moved for summary judgment.

In denying the university's motion for summary judgment, the court rejected the university's argument that Title VII did not extend protection to those claiming discrimination on the basis of gender identity. The court, relying on prior decision, held that claims based on "gender-nonconformity" could rightly be considered as potential violations of Title VII's prohibition on gender discrimination. Further and of particular note, the court also held that evidence that the university restricted which bathroom Plaintiff could use, instructed her how to present herself, and used her non-preferred pronouns when referencing her could substantiate a hostile environment claim if found to be true. The Court also rejected the university's *Faragher/Ellereth* defense because the University's discrimination and harassment policies did not include specific protections for transgendered employees.

B. Schools on Trial for Handling of Sexual Misconduct Reports

Not surprisingly litigation over institutional handling of sexual misconduct cases - from both complainants and respondents - continued apace throughout 2017 and into the new year. The following is just a small selection of cases to note.

1. Due Process - The Role of Cross-Examination

Doe v. University of Cincinnati, et al., 872 F.3d 393 (6th Cir. 2017) -

In *Doe*, the Sixth Circuit Court of Appeals upheld a preliminary injunction on the suspension of a University of Cincinnati student - Doe - who had been found responsible for sexually assaulting a fellow student, Jane Roe. In appealing his suspension to the district court, Doe argued that the University violated his due process right to a fair hearing by denying him the right to confront Roe before finding him responsible for sexual assault. Granting a preliminary injunction with respect to Doe's suspension, the district found a strong likelihood that Doe would prevail on his constitutional claims. The Sixth Circuit agreed and the court's reasoning is instructive for public universities investigation and adjudicating sexual misconduct claims.

By way of background, Doe and Roe met on Tinder and after a couple weeks of communicating, they met in person. Doe invited Roe back to his apartment where the two had sex. Three weeks later, Roe reported to the University's Title IX office that Doe had sexually assaulted her that night. Pursuant to University procedures, the Title IX Office investigated the

report and forwarded the collected evidence to the parties and to the Administrative Review Committee (ARC) for hearing. According to University procedures, during this hearing, accused students are permitted to present evidence, explain their version of events, and engage in a limited version of cross-examination of witnesses by submitting questions to the ARC panelists who then determine whether the questions are relevant and should be posed to the witness. Crucial to the court's analysis here, University policy does not require that witnesses appear for the hearing and if a witness does not attend, the witness may instead submit a notarized statement.

Though Roe provided her account of the encounter with Doe to the Title IX investigator, she failed to appear for the hearing. Rather she provided a written closing statement. The panel read the Title IX report, as well as a summary of Roe's statement, and the statements of witnesses interviews into the record. Doe submitted to questioning from the panel, disputed various parts of Roe's statement, and orally provided his own written statement. At the close of the hearing, the ARC found Doe responsible for violating the Student Code of Conduct and recommended a suspension of two years. Upon appeal, the suspension was reduced to one year. Doe then filed suit alleging that the University had violated his rights under the United States and Ohio Constitutions and discriminated against him in violation of Title IX. Doe also filed for preliminary relief to enjoin the University from enforcing the suspension. That motion focused solely on Doe's argument that the University could not constitutionally find him responsible for sexually assaulting Roe without any opportunity to question her.

As a plethora of case law across circuits confirms, the Sixth Circuit reaffirmed the premise that state universities must afford students a minimum of due process before issuing significant disciplinary decisions. The court further reminded that the property rights and liberty interests of students in public institutions are clearly implicated by both suspension and the allegation of sexual assault (which may impugn a student's reputation and integrity). The court acknowledged that the right to cross-examine has not typically been considered an essential requirement of due process in school disciplinary proceedings. However, the court caveated that this standard is not absolute and that the more serious the misconduct at issue- and consequently, the graver the potential consequence- the more process is required. The court wrote that as in the case of Roe's report against Doe, where the panel was essentially tasked with making a credibility determination between the accounts of Roe and Doe, some form of cross examination was essential to a fair hearing. In a lengthy explanation on the history and value of the process of cross-examination, the court noted that the ability to cross-examine the individual alleging serious misconduct, like sexual assault, is critical to assessing credibility where no other corroborating evidence is presented. Because the University panel essentially made a credibility determination to affirm Roe's allegations without actually questioning her or permitting Doe to question her via the limited cross-examination process provided for in the panel procedures, the panel likely deprived Doe of a fair hearing.

The entire decision is worth a read. There are a few important limitations to the court's holding. First, Doe did not challenge the constitutional sufficiency of the University's procedure of permitting the accused to question witnesses or the complainant through questions submitted to the panel. Rather, the basis of his due process claim was that Roe did not appear and thus did subject herself to questioning and deprived Doe his procedural right to submit questions to be directed to her. The court nodded at this distinction, noting that the due process

obligations for the University with respect to cross-examination are narrow in that the University need only provide some mechanism for meaningfully evaluating credibility, not necessarily permitting the accused to physically confront the accuser. The court specifically noted that the University's process for submitting questions, if it had been followed, likely would have cleared this bar. Second, the court's holding appears to focus on what have typically been called "he said-she said," or more recently "word-on-word," cases for which no physical or other corroborative evidence exists. The court highlighted that the fact that the decision of responsibility rested solely on the determination of which version of events seems more likely rendered the need for some sort of credibility measure, like cross-examination, all the more critical. Third, in response to a secondary argument by Doe that the University panel should not have relied on hearsay evidence - that is, the Title IX report and witness statements - in determining his responsibility, the court wrote that nothing in the holding should be construed as limiting the University's ability to rely on hearsay evidence in its disciplinary proceedings. Rather the court noted that Doe's due process rights were violated because the hearsay evidence introduced issues of credibility between the parties that could only be fairly resolved through questioning Roe. And finally, the holding is limited too public institutions who are subject to the due process provisions of the U.S. Constitution.

Plummer, et al. v. Univ. of Houston, No. 15-20350 (5th Cir. Jun. 23, 2017)

In *Plummer*, the Fifth Circuit evaluated a different set of facts regarding the necessity of some form of cross-examination in public institution disciplinary proceedings and held that confrontation of the accuser was not critical to a fair hearing. But, as will be explained further, the court's holding in *Plummer* rests on specific facts, rendering it entirely consistent with the Sixth Circuit decision in *Doe v. Univ. of Cincinnati*. Plaintiffs were Plummer and McConnell, two former university students at the University of Houston - a public university - who were then dating. Plummer came to McConnell's room one night and found him naked and intoxicated with another woman. Plummer took video of the two and posted it on social media. The video purportedly showed, among other things, McConnell engaging in sexual activity on the student while she was passed out. The conduct was reported and the University held two evidentiary hearings, eventually finding McConnell responsible for sexual assault and Plummer responsible for recording the sexual activity of another. Both were expelled and then filed suit after appealing the findings and sanctions. Plaintiffs asserted that the hearing process denied them due process because (1) they did not have adequate notice of adverse evidence; (2) they were not able to confront the student who accused them; (3) cross-examination was limited to written questions; and (4) the investigator was conflicted because he also served as victim advocate. The Plaintiffs also asserted Title IX claims on the basis of differential treatment toward the accusing student and deliberate indifference to the constitutional inadequacies of the process. The University moved for summary judgment, which was granted. Plaintiffs appealed.

The court upheld the dismissal of Plaintiffs' case on summary judgment citing that the Plaintiffs had had multiple, meaningful opportunities to challenge the University's allegations, evidence and findings. Critical to the court's reasoning was that the University possessed video evidence of the alleged behavior, which was so graphic and clear, that no additional procedural safeguards would have lessened the risk of erroneous outcome. The court then addressed each of the four alleged areas of due process deprivation in turn. With respect to the claim that the University failed to give appropriate notice of the existence of adverse witnesses, the court held

that even if more notice could have been provided, this alleged failure would not have lessened the potential of erroneous outcome because the findings relied so heavily on video and photographic evidence (the authenticity of which neither Plaintiff apparently challenged). As for the confrontation and cross-examination claims, the court specifically noted that the case “does not require that we determine whether confrontation and cross-examination would ever be constitutionally required in student disciplinary proceedings.” Similar to the reasoning of the Sixth Circuit - though reaching a different result based on the facts - the court held that the lack of direct confrontation and cross-examination was not a procedural deficiency in this case because the University relied primarily on the videos and photo taken by Plummer, not the testimony of the student who later reported the conduct. Nor did either Plaintiff contend that the student’s testimony or scrutiny under questioning would somehow suggest that she consented to the behavior in which the Plaintiffs reportedly engaged. And with respect to the multiple roles of the investigator, the court held that the investigator’s service as the victim advocate alone could not establish bias without other evidence that the integrity of the proceedings had been undermined. Again, noting on the reliance of visual evidence, the court indicated that Plaintiffs adduced no evidence that a different investigator would have reached a different outcome. The court also nodded to other procedural safeguards present in the University’s process, specifically that the hearing panel was instructed that they were free to disagree with the investigator’s findings.

Finally, the court made short work of the Title IX claims. With respect to the differential treatment claim, the court disposed of it by noting that one plaintiff was male and the other female, suggesting they had been treated similarly for purposes of the University disciplinary process. And as for the deliberate indifference claim, the court noted that while the university’s process was wanting in some areas of procedural protection, in light of the facts elucidated in the due process analysis, the evidence did not support a finding of deliberate indifference.

***Interesting note here, the dissent to this case by Judge Edith Jones is worth a read for the differing viewpoint. She argues that the Fifth Circuit decision is a “canary in the coal mine” for student procedural due process rights, summarizing the court’s reasoning as “the panel implies that because they were guilty, they got enough due process.” Specifically, Judge Jones opines that the court’s holding here is in contradiction with Supreme Court precedent in *Carey v. Phipps*, 435 U.S. 247 (1978), in which that Supreme Court held that public school students who were suspended for a few weeks without hearing were deprived of due process rights, even though they did not dispute they engaged in the conduct for which they were sanctioned. In other words, the deprivation of due process was sufficiently actionable injury, even if no other actual injury was suffered. According to Judge Jones, in the present case, several process issues constituted due process violations: (1) the absence of a complaint filed by the affected student; (2) Baker’s dual and conflicting role as advocate and investigator; (3) use of the preponderance of the evidence standard (which she also argues was inaccurately explained to the hearing panel); and (4) evidence that the investigator insisted on deference to his findings and position to the hearing panel.

2. Circuit Split on Title IX Discrimination Pleading Standards

Doe v. Miami University, 882 F.3d 579 (6th Cir. 2018)

Plaintiff, John Doe, a male student at Miami University in Ohio filed suit against the university and several individuals after a disciplinary panel found him responsible for sexual misconduct. Doe filed suit alleging a number of Title IX violations and violation of constitutional rights to due process and equal protection. The University moved to dismiss, which the district court granted. Doe appealed. In a February 9, 2018 decision, the Sixth Circuit Court of Appeals reversed and reinstated some of Doe's claims. In doing so, the Sixth Circuit applied traditional pleading standard to Title IX cases, splitting from recent Second Circuit precedent in *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. 2016), officially setting a circuit split.

In the Second Circuit case, the court adopted a lower pleading standard for Title IX discrimination claims - identical to the one it adopted for Title VII employment discrimination cases - in which plaintiffs need only plead a "minimal plausible inference" of discriminatory intent to survive motion to dismiss. The Sixth Circuit in *Doe* expressly declined to apply that lower standard, noting it had also not adopted the lower pleading standard articulated by the Second Circuit for Title VII cases and would thus not do so for Title IX. The court reaffirmed that in the Sixth Circuit, plaintiff must still plead sufficient facts that the discriminatory intent of defendant is "plausible on its face," as required by *Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.

Based on this holding, the Court reinstated only one of Doe's three Title IX claims (erroneous outcome). The Court held that Doe's claim that the University's pursuit of disciplinary action against and not the female complainant based on a kiss, during which he alleged neither had capacity to consent, was sufficiently plead. The Court also reinstated Doe's Equal Protection Due Process claims, holding that Doe's allegation that his Due Process rights were violated because the hearing panel was biased was sufficiently plead to survive motion to dismiss. In particular, the court noted that the confluence of the allegations that (1) one of the hearing panel members wore multiple hats in the process as both investigator and adjudicator and (2) that same panel member had allegedly made several statements that suggested she was not impartial was enough to permit the due process claim to proceed.

3. Proving Deliberate Indifference

Ross v. University of Tulsa, 859 F.3d 1280 (10th Cir. 2017)

Plaintiff Abigail Ross reported that she was raped by a fellow student at the University of Tulsa. The University conducted a student-conduct hearing on the report, but declined to consider a prior report of rape levied against the same accused student. Plaintiff sued the University for money damages under Title IX of the Education Amendments Act of 1972, asserting two separate theories of the University's deliberate indifference. On the first theory, Plaintiff asserted that the University acted with deliberate indifference by failing to investigate a 2012 report to campus security that the same accused student raped another student, after that student requested the campus security officers take no further action; thus permitting the accused student to assault Plaintiff years later. On the second theory, Plaintiff argued that the University acted with deliberate indifference by excluding the 2012 reports from the hearing on her report. The trial court granted summary judgment in favor of the University of Tulsa, and plaintiff appealed. The Tenth Circuit concluded both theories failed as a matter of law.

With respect to the first theory, the court held that a fact-finder could have reasonably found that the campus security officers acted with deliberate indifference by not pursuing investigation of the sexual assault report, notwithstanding the request of the affected student to the contrary, because the reported rape put the officer on actual notice of a potential threat on campus. However, the court noted that the same could not be held for the University because the actual notice of the campus security officers could not be imputed to the University. Specifically, the court held that the campus security officers were not “appropriate persons” for purposes of Title IX through which the University could receive notice of the rape. The court explained that under Title IX precedent an “appropriate person” is one who is authorized by the school to take corrective action in response to a report of prohibited conduct. The court observed that under the University’s reporting procedures, campus security officers must report rapes or sexual misconduct to the Office of Student Affairs, which in turn is authorized to initiate corrective action. In the case of the 2012 reported rape, the campus security officers did not forward the report and as such, failed to put the University on notice of the incident. Plaintiff argued that because the campus security officers were required to “initiate” the corrective action process by forwarding a report to the Office of Student Affairs, they could reasonably be considered “appropriate persons” for purposes of notice to the University. The court disagreed, holding that to confirm that view would be to inappropriately extend Title IX liability beyond Supreme Court precedent and convert the deliberate indifference standard to one of vicarious liability.

As for the second theory, the court held that the University’s exclusion of the 2012 report of rape from the misconduct hearing concerning Plaintiff’s report also was insufficient to establish deliberate indifference. The court cited that the University relied on its own internal procedural rule that evidence of prior acts could not be considered unless the acts had been subject to a separate trial or conduct proceeding that resulted in a finding of responsibility. Plaintiff argued that the procedural rule was not unreasonable on its face, but that its application in her case was unreasonable because the University allegedly failed to properly investigate the 2012 report. The court disagreed, noting that the university’s procedural rule was not only reasonable and compliant with OCR Title IX guidance, but also applied appropriately in Plaintiff’s situation. Plaintiff also argued that the university should have investigated the 2012 report (as well as another report that came to light later in the proceedings) along with hers so that the reports could be adjudicated together. The court also rejected this argument, noting that the university’s decision not to investigate the 2012 report was not unreasonable, given the lapse of time and the refusal of that complainant to participate in a school investigation.