Title IX Litigation Landscape: A Guidebook for Practitioners

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Ogletree Deakins Bricker Graydon

1

Your Presenters

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Disclaimers

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- We are not giving you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
- Feel free to ask general questions and hypotheticals

3

Agenda

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- Status of Title IX Regulations
- Cases brought by Student Complainants
- Cases brought by Student Respondents
- Cases brought by Employees
- Title IX Athletics
- Other Title IX Considerations

4

Status of Title IX Regulations

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- Overview of 2020 Title IX Regulations
- Overview of 2024 Title IX Regulations
- On January 9, 2025, in *State of Tennessee v. Cardona*, Civil Action No. 2:24-cv-072-DCR, the U.S. District Court for the Eastern District of Kentucky vacated the 2024 Title IX Final Rule.
- On January 31, 2025, the U.S. Department of Education's Office for Civil Rights issued a "Dear Colleague Letter" announcing that it would enforce the 2020 Title IX Final Rule.
- Additional Updates

5

Quick Reminder

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

6

Another Quick Reminder

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

7

How a recent SCOTUS case may upend Title IX Guidance

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- Recent SCOTUS decision that eroded Chevron deference
- *Loper Bright Enterprises v. Raimondo* (U.S. June 28, 2024)
- For example, this means that the courts deference/reliance on the 1979 Interpretation that sets forth the three part test could go away
- We are already seeing this argument (more on this case later)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON
CIVIL ACTION NO. 5:19-CV-00094-KKC
Electronically filed

ELIZABETH NIBLOCK, and ALA HASSAN, Individually and on behalf of all those similarly situated — PLAINTIFFS

v.

UNIVERSITY OF KENTUCKY'S MOTION FOR RECONSIDERATION OF COURT'S PREVIOUS RULING ON APPLICABILITY OF THE THREE-PART TEST

UNIVERSITY OF KENTUCKY, MITCH BARNHART and ELI CAPILOUTO — DEFENDANTS

***** ***** *****

Given the Supreme Court's decision in *Loper Bright v. Raimondo*,[1] the University moves this Court to reconsider its previous ruling on the applicability of the "three-part test" stated in the 1979 Policy Interpretation.[2] If necessary, the University suggests allowing both parties to file supplemental briefing.

8

Cases Brought By Student Complainants

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Zavada v. East Stroudsburg Univ., 2024 WL 4311492 (M.D. PA, Sept. 26, 2024) (1/5)

Ogletree Deakins Bricker Graydon

- Motion to Dismiss Third Amended Complaint
- U.S. Dist. Court, Middle District of Pennsylvania
- Conduct occurred on Nov. 29, 2021 – so the 2020 Title IX regulations applied
- Complainant alleged
  - She was sexually harassed by a male student in Nov. 2021 and Jan. 2022
  - University Defendants had knowledge of the incidents from her attempts to report them to resident assistants, student misconduct officials, and Title IX coordinators
  - University Defendants were deliberately indifferent to the harassment as they failed to take any meaningful action following her reports, and at least one other student had an open case against the same male student prior to the Jan. 2022 incident
  - The harassment caused her to suffer mental and physical effects, caused her academic performance to decline, and led to her moving out of her dorm – thus depriving her of access to educational opportunities and benefits

10

Zavada v. East Stroudsburg Univ., 2024 WL 4311492 (M.D. PA, Sept. 26, 2024) (2/5)

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- Claims brought against University Defendants include:
  - Pre- and post-harassment Title IX deliberate indifference;
  - Failure to train;
  - Violation of equal protection; and
  - A Policy, Practice, or Custom of "One Free Title IX Violation
- Similar claims brought against a student misconduct official

11

Zavada v. East Stroudsburg Univ., 2024 WL 4311492 (M.D. PA, Sept. 26, 2024) (3/5)

Ogletree Deakins Bricker Graydon

The Court denied University defendants' motion to dismiss

- Alleged Policy, Practice, or Custom of leniency for first-time offenders ("one free Title IX violation")
  - Complainant alleged another other female students reported sexual harassment or assault, but no action was taken following the first report, resulting in the same person assaulting someone else
  - Another female student reported sexual harassment by the same student that assaulted Complainant, but was told University officials would only take action if harassment occurred another time
  - If true, this is evidence of a specific University policy at least partly responsible for the continued harassment of Complainant
  - Complainant also alleged she was not informed of her Title IX rights or right to supportive measures, and was not told how to file a formal complaint, resulting in delay and creating a heightened risk of harassment

12

Zavada v. East Stroudsburg Univ., 2024 WL 4311492 (M.D. PA, Sept. 26, 2024) (4/5)

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- Student Misconduct Officer (SMA) – Individual liability for denial of equal protection under the Fourteenth Amendment
  - Court ruled Complainant sufficiently alleged that Student Conduct Officer had authority to take corrective action to address the harassment, but responded with deliberate indifference
    - SMA had actual knowledge of alleged stalking and harassment – Complainant alleged she reported the Nov. 2021 harassment to the SMA
    - SMA was deliberately indifferent – Complainant alleged that following her first report, the SMA did nothing in response; that when Complainant met with SMA to report Jan. 2022 incident, SMA suggested she was lying or must have done something to provoke it
    - Even though the SMA was not the formal Title IX officer, as a student misconduct officer she had the authority to take corrective action

13

Zavada v. East Stroudsburg Univ., 2024 WL 4311492 (M.D. PA, Sept. 26, 2024) (5/5)

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Court:

- "Additionally, [University] Defendants' argument that only a Title IX Coordinator can take corrective action for Title IX violations **is a falsehood."**
- "[SMA] was a student misconduct official, so it follows that she had the authority to respond to [Plaintiff's] complaint of student conduct in the form of harassment."

14

Lilly v. Univ. of California-San Diego, 2024 WL 4370777 (S.D. Cal., Sept. 30, 2024) (1/4)

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- Warning: discussion of suicide
- Motion to Dismiss Second Amended Complaint
- U.S. Dist. Court, Southern District of California
- Allegations of Title IX retaliation and deliberate indifference against UCSD Regents, a rowing coach, and an associate athletic director
- Some claims dismissed – others remain in the case

15

Lilly v. Univ. of California-San Diego, 2024 WL 4370777 (S.D. Cal., Sept. 30, 2024) (2/4)

Ogletree Deakins Bricker Graydon

Complaint filed against University on behalf of the estate of a student who took his own life (Decedent), alleging, in part, Title IX retaliation and deliberate indifference

- Title IX retaliation
  - Decedent alleges that, in retaliation for Decedent's complaints about the mishandling of sexual misconduct allegations brought against a teammate, his rowing coach subjected him to verbal and psychological abuse
  - Decedent alleges he reported the coach's abuse and retaliation on several occasions, but the University failed to take any responsive measures, resulting in Decedent resigning from the team
  - The Court denied the University's motion to dismiss – if allegations taken in light most favorable to Decedent, the University had actual notice of the coach's retaliatory conduct
  - While Ninth Circuit has not addressed "whether a student must be harassed a second time before the institution's non-responsiveness becomes actionable," allegation that coach continued to berate Decedent during team Zoom meetings supported inference that Decedent remained vulnerable to harassment (despite COVID shutdown)

16

Lilly v. Univ. of California-San Diego, 2024 WL 4370777 (S.D. Cal., Sept. 30, 2024) (3/4)

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- Circuit Split on issue of whether a student must be harassed a second time for its non-responsiveness to be actionable
  - 6th Cir. (Kentucky, Michigan, Ohio, and Tennessee) – deliberate indifference must cause the plaintiff to experience an additional incident of misconduct
  - 1st, 10th, and 11th Cirs. (Maine, Mass., New Hampshire, Puerto Rico, Rhode Island, Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah, Alabama, Florida, Georgia) – sufficient for the deliberate indifference to make the plaintiff vulnerable to further harassment or assault
- Not the issue in this case because there *are* allegations that additional harassment took place after it was reported to University officials – so it passes MTD under either standard

17

Lilly v. Univ. of California-San Diego, 2024 WL 4370777 (S.D. Cal., Sept. 30, 2024) (4/4)

Ogletree Deakins Bricker Graydon

- Title IX deliberate indifference to sexual harassment – claim dismissed
  - Allegations that coach made sexually-themed remarks to male team members "regularly" and "repeatedly" sufficiently alleges sexual harassment that was severe and pervasive to deprive Decedent of the benefits provided by the University (participating on the rowing team)
  - But, allegations did not support inference that University had notice and knowledge of the harassment
    - Fact that assistant athletic director observed coach's behavior during team practice does not constitute actual notice
    - Complaint did not include facts supporting inference that Decedent informed assistant athletic director of the coach's sexually harassing behavior when Decedent reported retaliation

18

McAvoy v. Dickinson College, 115 F.4th 220 (3rd Circuit, Aug. 16, 2024) (1/4)

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- Motion for Summary Judgment
- Third Circuit Court of Appeals (Pennsylvania, New Jersey, and Delaware)
- Conduct occurred in Oct. 2017 – pre-2020 Title IX regs
- Complainant alleged College acted with deliberate indifference in response to her sexual assault claim in violation of Title IX – she also asserted a breach of contract claim

19

McAvoy v. Dickinson College, 115 F.4th 220 (3rd Circuit, Aug. 16, 2024) (2/4)

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- Steps taken in response to the report:
  - Initial meeting with TIXC where Plaintiff did not identify the Respondent
  - Second meeting with TIXC where Plaintiff identified Respondent and requested an investigation
  - Issuance of No Contact Directive and Notice of Investigation 5 days after second meeting with TIXC
  - Advice from TIXC that they would try to complete the process within 60 days, consistent with their Policy – warning of possible delay because of imminent winter break
  - Appointment of 2 external investigators
  - Ongoing requests and discussion of support
  - Status updates provided to her advisor upon request
  - Draft Report issued in 4 months with opportunity for feedback
  - Final Report issued in 5 months
  - Review by panel to affirm or reject the findings
  - Sanction of probation (specific to the facts)
  - Appeal by both parties

20

McAvoy v. Dickinson College, 115 F.4th 220 (3rd Circuit, Aug. 16, 2024) (3/4)

Ogletree Deakins Bricker Graydon

- Lower court granted College's motion for summary judgement – Third Circuit affirmed – Not Deliberate Indifference
  - **Unreasonable delay** in resolving her claim and failing to communicate about delay
    - While investigation and resolution of claim took 6 months rather than the Policy's 60-day objective, College informed Complainant that it would likely take longer than 60 days because of holidays and the need to balance thoroughness and fairness, and Complainant's advisor provided a status update every time she asked
    - The timeframe was reasonable given the circumstances – the investigation involved hiring outside investigators, numerous interviews, a lengthy report, and review panel process to ensure fairness
    - The college initiated the investigation promptly, and there was no evidence it was attempting to sabotage resolution of the complaint by delaying
    - While no-contact order was not issued until 5 days after Complainant provided Respondent's name, there was no indication Complainant was in any immediate danger, and she had not had contact with him for over a month

21

McAvoy v. Dickinson College, 115 F.4th 220 (3rd Circuit, Aug. 16, 2024) (4/4)

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- **Failing to enact additional "accommodations"** to protect her from encountering Respondent
  - When Complainant and Respondent were assigned the same dorm, the College intervened and Respondent chose different housing
  - Complainant's request that Respondent not participate in a theater event was honored – while he was in the audience, she never asked that he be barred from attending
  - On other occasions when she reported concerns about encountering Respondent, she never asked for additional accommodations (such as an offer to set separate cafeteria times that she decided not to pursue)
  - It was appropriate for College to consider Complainant's views on handling various encounters as she was a young adult attending college as opposed to a minor child
- **Offering informal resolution** even though College's policy did not allow it for sexual assault cases
  - Failing to adhere to internal policy, standing alone, is not enough to demonstrate deliberate indifference
  - Evidence did not demonstrate College was attempting to minimize the incident – it provided mental health and academic support, responded to requested accommodations, conducted a thorough investigation, and did not attempt to dissuade her from pursuing Title IX claim

22

Wassel v. Pennsylvania State Univ., 2024 WL 2057514 (M.D. Pa., May 7, 2024) (1/4)

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- Motion to Dismiss
- U.S. Dist. Court, Middle District of PA
- Former student filed Title IX sex discrimination and Equal Protection complaint based on University's deliberate indifference to majorette coach's alleged harassment of Complainant related to her weight and assertions about promiscuity

23

Wassel v. Pennsylvania State Univ., 2024 WL 2057514 (M.D. Pa., May 7, 2024) (2/4)

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- Court denied University's motion to dismiss
- University made several arguments in favor of dismissal:
  - **Plaintiff didn't allege harassment based on sex, but only on sex stereotypes**
    - Rejected by the court
  - Harassment was based on sex – "Harassment based on noncompliance with sex stereotypes *is* harassment based on sex" – no need to show animus against women
    - After Complainant told her Coach that she had been sexually assaulted, the coach allegedly began calling her a "slut" and a "whore" – these terms usually refer to women, and are based on sex stereotypes
    - Coach's alleged harassment of Complainant based on her weight was plausibly motivated by Complainant's noncompliance with a sex-stereotyped view of what a proper woman should like

24

Wassel v. Pennsylvania State Univ., 2024 WL 2057514 (M.D. Pa., May 7, 2024) (3/4)

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- Quote from the Court:

"Penn State is welcome, inadvisable as it may be, to argue to a jury that [the coach] was acting in a gender-neutral manner when she harassed [Plaintiff] as a "slut" and a "whore" for being sexually assaulted and demeaned [Plaintiff] for not being 'petite and razor-thin.' But this all depends on what develops during discovery."

25

Wassel v. Pennsylvania State Univ., 2024 WL 2057514 (M.D. Pa., May 7, 2024) (4/4)

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- **No denial of educational benefits**
  - Rejected by the Court
  - Circuit Courts are split on whether Supreme Court's holding that harassment must result in denial of educational benefits applies to teacher-on-student harassment – Third Circuit implies it does not, but parties briefed the issue so Court applied the test
  - Complainant plausibly alleged denial of educational benefits - she suffered mental health issues because of the harassment and required hospitalization, her grades dropped, she had to take coursework over the summer, and stopped attending a stretching class taught by the coach – the Court said this was a sufficient denial
- **No actual knowledge and deliberate indifference**
  - Rejected by the Court
  - Complainant plausibly alleged University knew about harassment, and, based on previous reports by another student of coach's harassment, it acted with deliberate indifference when it did "not to put significant safeguards in place to prevent future abuse."

26

Cases Brought By Student Respondents

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Doe v. Rutgers, State Univ. of New Jersey, 2024 WL 4319594 (D. New Jersey, Sept. 27, 2024) (1/2)

Ogletree Deakins | Bricker Graydon

- Respondent was suspended for two years for Title IX Stalking and Title IX Dating Violence
- Respondent filed suit, alleging University's Title IX process was impacted by anti-male gender bias
- Court denied University's motion to dismiss the complaint
- External Pressure – The 2011 Dear Colleague Letter and University's creation of a comprehensive action plan to combat sexual and dating violence – while these pressures are a relevant factor, standing alone, they are not sufficient to meet Respondent's pleading burden

28

Doe v. Rutgers, State Univ. of New Jersey (2/2)

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- Disparate Treatment - Respondent plausibly alleged that Complainant's misconduct reports were treated as more urgent and serious than Respondent's reports
  - University argued it was not required to report Respondent's allegations that Complainant assaulted him because he did not file a complaint
  - The Third Circuit has rejected a similar argument raised by another university – that students were treated differently because one failed to file a complaint
  - For purposes of a motion to dismiss, drawing all reasonable inferences in a light most favorable to Respondent, he plausibly alleged sex was a motivating factor for treating his report differently
- Procedural Flaws (Erroneous Outcome) - Respondent plausibly alleged University reached an erroneous outcome
  - The third-party decisionmaker (TPD) found Complainant feared for her safety after the first stalking incident even though she was in a relationship with Respondent at the time and continued to have a consensual sexual relationship with him for four months following the incident
  - The TPD found Respondent followed Complainant onto a bus that was returning to the off-campus building where Respondent and Complainant lived even though Respondent explained he "was simply going home" and the next bus would not arrive for 26 minutes
  - Taken together, these allegations raise a plausible inference that sex motivated the University's disciplinary process and decision

29

Gash v. Rosalind Franklin Univ., 117 F.4th 957 (7th Circuit, Sept. 24, 2024) (1/1)

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- Respondent was expelled for allegedly sexually assaulting another student– sued University under Title IX and state contract law
- District court granted University's motion to dismiss – Seventh Circuit Court of Appeals affirmed as Respondent failed to show University's actions were motivated by discrimination against males
  - Public pressure based on 2011 and 2014 federal guidance – the guidance documents were rescinded, and public pressure alone cannot support claim of discrimination
  - Alleged University arbitrarily extended its jurisdiction to off-campus conduct to pursue the complaint against him in violation of the university's own policies and the 2020 Title IX regulations, indicating sex bias
    - Respondent's claim that University extended its jurisdiction because of sex bias was conclusory and not supported by any evidence
  - Procedural mistakes – While University committed errors during the investigation, this did not indicate sex-based discrimination – "At most, they demonstrate a pro-victim or pro-complainant bias that cannot support a claim for sex discrimination because both men and women can be victims of sexual assault."

30

Boermeester v. Carry, 100 Cal.App.5th 383 (Ct. App. 2nd Dist. California, March 7, 2024) (1/3)

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- Respondent expelled from private University for committing intimate partner violence
- Initially, Second District Court of Appeals held Respondent had a right to cross-examine adverse witnesses at a live hearing – the California Supreme Court reversed, holding student did not have such a right
- Remanded to Court of Appeals to resolve remaining issues raised on appeal
- Respondent argued University's use of a combined investigator-adjudicator procedure and appeal process denied him fair process, and the University's findings were not supported by substantial evidence

31

Boermeester v. Carry (2/3)

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Was there substantial evidence supporting University's determination?

- Respondent argued there was no physical evidence that Complainant suffered physical harm, and evidence that Respondent grabbed and pushed her was uncorroborated hearsay
  - Nothing in University's definition of physical harm required visible marks lasting at least 48 hours
  - Complainant said it hurt when Respondent grabbed her hair and hit her head against a wall, and Respondent pushed on her neck hard enough to make her cough – this is physical harm even if it does not leave lasting visible marks
  - Legal term "hearsay" not significant here – formal rules of evidence not required in administrative proceedings
  - While Respondent later recanted, "there is nothing questionable about choosing to find a victim's initial statement more credible than a later recantation of that statement, particularly in domestic violence cases."

32

Boermeester v. Carry (3/3)

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Did combined investigator-adjudicator process deny fair process?

- No. "While it is possible that a specific combined investigator-adjudicator process could be structured in an unfair manner, a holding that a combined investigator-adjudicator process can never be fair would be inconsistent with current California law, which has recognized that a combined investigatory and adjudicative model does not, without more, deprive an accused student of a fair hearing."

Did Respondent receive adequate appellate process?

- Yes. Respondent received "considerable" process: the investigation, a sanctions panel, the Misconduct Appellate Panel (which recommended a two-year suspension), and the final decisionmaker (VP for Student Affairs), who determined expulsion was appropriate sanction.

33

Poe v. Lowe, 2024 WL 4778042 (M.D. Tenn. Nov. 13, 2024) (1/1)

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- Plaintiff (a man) heard that Roe was a rapist and re-posted some communications on social media to that effect.
- Roe's father complained about three students – Poe and two women.
- Poe was investigated and suspended. The women were not.
- Poe argued that this was selective enforcement in violation of Title IX
- The Court held that this was sufficient to survive a motion to dismiss.

34

Cases Brought By Employees

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Does 1-4 v. Butler Univ., 2024 WL 3566220 (S.D. Ind., July 28, 2024) (1/2)

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- Motion to Dismiss
- U.S. Dist. Court, Southern District of Indiana
- Case stems from student-athletes' allegations that University's athletic trainer abused them – Butler University is a named Defendant, along with the trainer
- Athletic Trainer filed a Crossclaim against Butler – this decision relates to Butler's MTD

36

Does 1-4 v. Butler Univ., 2024 WL 3566220 (S.D. Ind., July 28, 2024) (2/2)

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- Title IX sex discrimination – trainer alleged University discriminated against him based on his sex when it fired him after conducting an unfair investigation
- Butler argued for dismissal based on the crossclaims mislabeling the claim as Title IX when it should be Title VII – not a reason to dismiss
- Butler argued that Title VII is the only avenue for relief – court disagreed and said not a reason to dismiss
  - Seeking access to an education is not a required element to prevail under Title IX – the statute, by its terms, reaches employment discrimination
  - Ct concluded that the 7th Cir. Case of *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996) is no longer good law under more recent SC precedent
  - No discussion of the Spending Clause
- Compare this analysis of Title VII with the next case (which cited to *Waid*…)

37

Joseph v. Bd. of Regents of the Univ. System of Georgia, 2024 WL 4705544 (11th Cir., Nov. 7, 2024) (1/5)

Ogletree Deakins Bricker Graydon

- Consolidated Cases involving 2 different employees at 2 different institutions
- 11th Cir: Alabama, Florida, and Georgia
- Affirmed in part, reversed in part
- Key issue: Whether Title IX provides an implied right of action for sex discrimination in employment.

38

Joseph v. Bd. of Regents of the Univ. System of Georgia (2/5)

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- Employment sex discrimination claims brought under Title IX
  - Circuit Courts are split on whether Title VII's rights and remedies preclude employment discrimination claims under Title IX

39

Joseph v. Bd. of Regents of the Univ. System of Georgia (3/5)

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- 11th Circuit's answer: Title IX does not create an implied right of action for sex discrimination in employment.
  - U.S. Supreme Court has held Title IX provides implied right of action for **students** who complain of sex discrimination, and a private right of action for retaliation for an employee's complaint about discrimination against students
  - While the Supreme Court has construed the text of Title IX as not excluding employees, the Supreme Court has not extended the implied private right of action under Title IX to sex discrimination for employees
  - 11th Circuit stated it was "unlikely that Congress intended Title VII's express private right of action and Title IX's implied right of action to provide overlapping remedies."

40

Joseph v. Bd. of Regents of the Univ. System of Georgia (4/5)

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- Former professor's Title IX retaliation claim based on his participation in an investigation of his conduct
  - Several students complained that professor had sexually harassed them
  - The professor alleged that during the investigation he received a negative evaluation and was pressured to resign
  - The Eleventh Circuit ruled he did not state a claim under Title IX "because he seeks to protect only his participation in the Title IX investigation of complaints against him, not his reporting of other violations."

41

Joseph v. Bd. of Regents of the Univ. System of Georgia (5/5)

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- Former women's basketball coach
  - She repeatedly raised concerns and complaints about funding disparities vs. men's team, and filed a formal complaint in early 2019
  - In 2018/2019, concerns were raised about the coach's treatment of staff and athletes
  - An investigator was hired – the investigator's report found every member of the team reported "serious concerns regarding player mistreatment" – coach was terminated
  - Coach sued for Title VII sex discrimination – Summary Judgment Motion
    - Title VII claim based on her association with a protected group (the women's team) – no evidence her sex mattered
    - Retaliation for engaging in protecting activity – coach failed to show that University's reasons for termination (turmoil surrounding the women's basketball team and findings in the investigation report) were pretext

42

Cases Brought Involving Athletics

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Niblock v. University of Kentucky, No. 5:19-394 (E.D. Kentucky, Oct. 28, 2024) (1/4)

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- This class action lawsuit, filed in 2019, alleges that the University's current varsity sports offerings do not fully and effectively accommodate the interests and abilities of female students.
- On July 31, 2023, the Court ordered it would apply the 1979 policy interpretation (three-part test), and issued an opinion on August 4 explaining its reasoning.
- Three-day bench trial held August 7-9, 2023.
- On Oct. 28, 2024, the Court entered judgment in favor of the University on Title IX claim – Plaintiffs "failed to prove the selection of sports and levels of competition at UK do not effectively accommodate the interests and abilities of UK's female students."

44

Niblock v. University of Kentucky, No. 5:19-394 (E.D. Kentucky, Oct. 28, 2024) (2/4)

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- On July 31, 2023, the Court ordered it would apply the 1979 policy interpretation (three-part test), and issued an opinion on August 4 explaining its reasoning.
  - In July 2024, University asked the court to reconsider its decision in light of *Loper.*
  - Court denied motion, explaining Sixth Circuit cases applying three-part test remain good law, and *Kisor* controls in challenges to agency interpretations of regulations.
- Plaintiffs alleged University did not meet any of the three safe harbor prongs:
  1. Statistical disparity
  2. History and continuing practice of program expansion
  3. Interests and abilities have been fully and effectively accommodated

45

Niblock v. University of Kentucky, No. 5:19-394 (E.D. Kentucky, Oct. 28, 2024) (3/4)

Ogletree Deakins Bricker Graydon

Court's findings:

- Prong 1: Participation opportunities substantially proportionate to female student enrollment – Not Met
  - University would need 59 or 116 additional female athletic opportunities, enough to field viable varsity teams in lacrosse, field hockey, and equestrian since at least 2012-13
- Prong 2: History and continuing practice of program expansion – Not Met
  - Not appropriate to include cheer and dance team in count of female varsity athletic positions, or to count junior varsity soccer team
  - University added only 1 female varsity team in past 25 years,
  - While interest and ability survey was not discriminatory, the review committee relies on it to the exclusion of other measures, and only counted students that left contact information

46

Niblock v. University of Kentucky, No. 5:19-394 (E.D. Kentucky, Oct. 28, 2024) (4/4)

Ogletree Deakins Bricker Graydon

- Prong 3: – University Met: Plaintiff female students did not show sufficient *actual* unmet interest and ability
  - While there was unmet interest, there was not sufficient evidence to show that enough female students had the ability to compete at varsity level
  - Not enough students left contact information on the interest and ability survey
  - Number of participants on club teams not conclusive – not all participants may have ability or interest in varsity level

47

Transgender Participation in Athletics Litigation

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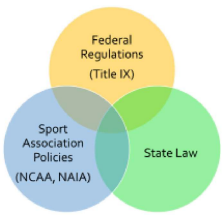

Do these state laws conflict with Title IX?

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Some courts have said yes

- Arizona: *Doe v Horne*, 2023 WL 4661831, (D. Ariz. July 20, 2023) (at the preliminary injunction phase, Arizona's law violated Title IX.)
- Indiana: *A.M. by E.M. v. Indianapolis Pub. Sch.*, 617 F. Supp. 3d 950, 969 (S.D. Ind. July 26, 2022) (granting a preliminary injunction against transgender participation in athletics under Title IX; case later dropped after student transferred to a school that is not covered by the law.)
- 4th U.S. Circuit Court: *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, 98 F.4th 542, 561 (4th Cir. 2024), *cert. denied sub nom. WV Secondary Sch. Activities v. B. P. J.*, No. 24-44, 2024 WL 4805904 (U.S. Nov. 18, 2024) (in the West Virginia case, the court ruled 2-1 that the state's transgender sports ban violated Title IX.)

One court has said no (but this ruling was vacated and remanded in April 2024)

- West Virginia: *B. P. J. v. W. Va. State Bd. of Educ.*, No. 21-00316, 2023 WL 1118175 (S.D.W. Va. Jan. 5, 2023) (granting summary judgment to the state, dissolving the injunction and holding that the state's definition of "biological sex" was "substantially related to athletic performance and fairness in sports" and that the state law mirrored Title IX.)

49

Are these state laws unconstitutional?

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Some courts have said yes.

- Arizona: *Doe v. Horne*, 2023 WL 4661831, (D. Ariz. July 20, 2023) (at the preliminary injunction phase, Arizona's law violated the Equal Protection Clause of U.S. Constitution.)
- Idaho: *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023) (upholding a district court's decision granting a preliminary injunction, Idaho's law violated the Equal Protection Clause of U.S. Constitution.)
- Utah: *Roe v. Utah High School Activities Ass'n*, No. 220903262, 2022 WL 3907182 (Utah Dist. Ct. Aug. 19, 2022) (granting a preliminary injunction against a categorical ban under the Utah Constitution's equivalent of an equal protection clause.)

One court has said no (but this ruling was vacated and remanded in April 2024)

- West Virginia: *B. P. J. v. W. Va. State Bd. of Educ.*, No. 2:21-00316, 2023 WL 1118175 (S.D.W. Va. Jan. 5, 2023) (granting summary judgment to the state, dissolving the injunction and holding that the state's definition of "biological sex" was "substantially related to athletic performance and fairness in sports" and that the state law mirrored Title IX.)

50

Gaines et al v. NCAA et al (N.D.Ga.) filed March 14, 2014 (Ongoing)

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- Several college athletes filed a lawsuit against the NCAA and a few member institutions over its transgender athlete policies claiming that the NCAA's policies discriminate against women and violate Title IX because it denies women equal opportunities.
- Specifically, Plaintiffs argue that allowing biological males who identify as transgender women to compete in women's sports, even with testosterone suppression, deprives female athletes of a fair chance to compete and win.
- Class action lawsuit seeks a nationwide ban on transgender women participating in women's NCAA sports, and the invalidation of all athletic records of transgender women who have participated in NCAA events. The plaintiffs also want to ban transgender women from using women's locker rooms, restrooms, and showers at NCAA institutions.
- **Status: Ongoing. In July, the Defendants filed motions to dismiss the case, but on October 23, 2024, Plaintiffs filed their Second Amended Complaint**

51

Don't Be a Stranger!

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52

Thank You

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