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Title IX Update: Where Are We Now, What Have We Learned, and Where Are We Going?

TITLE IX UPDATE: WHERE ARE WE NOW, WHAT HAVE WE LEARNED, AND WHERE ARE WE GOING?

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A. Should Recipients Apply Post-August 14, 2020 Title IX Policies to Pre-August 14, 2020 Conduct?

In the Preamble, the Department set forth that it will not enforce the new Title IX regulations retroactively.[1] In an August 5, 2020 blog posted on its website, the Department further stated:

> The Department will only enforce the Rule as to sexual harassment that allegedly occurred on or after August 14, 2020. With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school's Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred. In other words, the Rule governs how schools must respond to sexual harassment that allegedly occurs on or after August 14, 2020.[2]

While courts generally followed the Department's statements about prospective application of the new Title IX regulations, a Federal District Court for the Northern District of New York ordered Rensselaer Polytechnic Institute (RPI) to apply its post-August 14, 2020 Title IX Policy (2020 RPI Title IX Policy) to pre-August 14, 2020 conduct.[3]

In its October 2020 decision, the Court granted a preliminary injunction requiring RPI to utilize its 2020 Title IX Policy for any hearing addressing the respondent's 2019 alleged sexual misconduct. As a part of the Court's analysis of whether the respondent met the requirements for

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[1] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Assistance, 85 Fed. Reg. at 30,072, 30,395, 30,534-35 (May 19, 2020) (announcing final rule), available at https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

[2] August 4, 2020 Department blog post is available at https://www2.ed.gov/about/offices/list/ocr/blog/20200805.html.

[3] *See* Exhibit A attached hereto, Summaries of Selected Post-August 14, 2020 Federal Lawsuits, for a more detailed discussion of *Doe v. Rensselaer Polytechnic Inst*., 2020 U.S. Dist. LEXIS 191676, 2020 WL 6118492 (N.D.N.Y., October 16, 2020) and other federal cases addressing the effective date of the new Title IX regulations.

preliminary injunctive relief, the Court examined the likelihood of success of respondent's Title IX sex discrimination claims. With respect to matters relating to the retroactive or prospective application of the new Title IX regulations, the Court opined:

- ". . . [W]hether the Department of Education would have penalized RPI for not complying with the new rules or not, it could easily have implemented the 2020 policy for [the respondent's] hearing because it must implement that policy for all future Title IX complaints. Instead, the defendant decided that it would be best to maintain two parallel procedures solely to ensure that at least some respondents would not have access to new rules designed to provide due process protections such as the right to cross-examination that have long been considered essential in other contexts." *Id*. at 17.
- The preamble itself is unclear what it means when it discusses retroactivity. It could mean that RPI's decision not to apply to the respondent's case was permissible or that schools would not face Department sanctions if they did not reopen previously completed hearings that did not follow the new Title IX rules. " . . . [I]f a hearing--the [respondent's] for example—occurs under the new rules after August 14, 2020, from a certain point of view that hearing would apply the new rules prospectively because the rules were in effect before the hearing itself took place." *Id*. at 26.
- The OCR blog post is not an authoritative statement entitled to *Auer* deference.[4] *Id*. at 27.
- "Under the [Department blog post], schools may maintain two parallel proceedings until every claim of sexual misconduct allegedly occurring prior to August 14, 2020 is resolved. But it is unclear when that day would come, because there may be several claims that a sexual assault occurred prior to August 14, 2020 that have yet to be brought to a school's attention." *Id*. at 27-28.
- RPI did not follow the Department's blog post. RPI's 2020 Policy provides that "a complaint of sexual misconduct will be investigated and adjudicated using the procedural provisions of the Policy *in effect at the time of the report* and the substantive provisions in effect at the time the conduct allegedly occurred." *Id*. at 28-29.
- RPI could not rely upon a previous Federal District Court for the Northern District decision that held RPI's 2018 Policy afforded students adequate protection because 1) the new rules had not been proposed at the time; and 2) the respondent in the instant case had marshalled substantial evidence to advance his sex discrimination claim. *Id*. at 29-30.

Although not binding authority, the *Doe v. Rensselaer Polytechnic Inst.* decision reminds recipients that analysis of how to proceed under the new regulations does not stop at the Preamble or Department website. Recipients must also consider the individual facts of the matter at hand and relevant case law in order to fully assess their compliance with the new Title IX regulations.

[4] The Court also noted that, despite RPI's argument that the Court was bound to defer to an agency's interpretations of regulations that it promulgates, the *Auer* deference for agency's interpretations of agency regulations applies to "an agency's authoritative, expertise-based, fair, or considered judgment." *See Auer v. Robbins*, 519 U.S. 452, 459-62, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997).

B. How to Communicate Title IX Regulatory Requirements Effectively to the Campus Community

1. What are the new regulatory requirements?

The Title IX regulations, which became effective on August 14, 2020, set out a number of new regulatory requirements for colleges and universities to address sexual harassment. Prior to the August 14, 2020 Title IX regulations, the Department of Education defined sexual harassment through a series of guidance documents, Dear Colleague letters, and FAQs that have all been rescinded.[5] Under the current regulations, sexual harassment, as defined by 34 C.F.R. § 106.30(a), means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the [institution] conditioning the provision of an aid, benefit, or service of the [institution] on an individual's participation in unwelcome sexual conduct;
(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [institution's] program or activity; or
(3) "Sexual Assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

Further, an institution must only take action when they have "actual knowledge" of sexual harassment in an education program or activity against a person in the United States. The Title IX regulation at 34 C.F.R. § 106.44(a) defines "education program or activity" as the "locations, events, or circumstances over which the [institution] 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."

In addition to defining sexual harassment, the Title IX regulations set out specific definitions for terms frequently used by institutions in Title IX-related policies, such as complainant and respondent, and specific requirements for responding to reports and formal complaints of sexual harassment. Notably, while the Title IX regulations state that supportive measures, which are defined as non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after filing a formal complaint or where no formal complaint has been filed, must be provided regardless of whether a formal complaint is filed, an institution is only required to initiate a grievance process when a formal complaint is filed. Further, 34 C.F.R. § 106.30(a) defines a formal complaint as "a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the [institution] investigate the allegation of sexual harassment." At the time of filing a formal complaint, the complainant

[5] *See* Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (January 2001) at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf; Dear Colleague Letter: Sexual Violence (April 4, 2011) at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; Questions and Answers on Title IX and Sexual Violence (April 2014) at https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf; and Q&A on Campus Sexual Misconduct (September 2017) at https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

must be participating in or attempting to participate in the institution's education program or activity.

Finally, the Title IX regulations outline the detailed requirements for a grievance process to address formal complaints of sexual harassment in 34 C.F.R. § 106.45, which must:

(1) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.
(2) Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence --- and provide that credibility determinations may not be based on a person's status as complainant, respondent, or witness;
(3) Require that any individual designated by [an institution] as Title IX Coordinator, investigator, decision-maker, or any person designated by [an institution] to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent;
(4) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;
(5) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the [institution] offers informal resolution processes, and a process that allows a temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action;
(6) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the [institution] may implement following any determination of responsibility;
(7) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;
(8) Include the procedures and permissible bases for the complainant and respondent to appeal;
(9) Describe the range of supportive measures available to complainants and respondents; and
(10) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege.

The 34 C.F.R. §106.45 grievance process further sets out the requirements for the Notice of Allegations to the parties, circumstances for mandatory and permissive dismissal, considerations for consolidating formal complaints, requirements for an investigation, procedures for a live

hearing, elements to be included in the determination of responsibility and written determination, bases for appeal, requirements for informal resolution, and recordkeeping requirements.

2. How do you communicate the regulatory requirements to students and staff?

As the 2020 Title IX regulations may have required minor or significant revision to an institution's policy or procedures, colleges and universities are tasked with communicating these changes to the campus community to assist students, faculty, staff, and third parties in understanding their rights under the institution's Title IX grievance process as well as any other discrimination, harassment, or misconduct policies and procedures that may cover conduct not otherwise within the Title IX jurisdiction.

a. Explaining Differences in Policies and Procedures addressing Sexual Misconduct

In the Preamble to the Title IX regulations, the Department of Education states,

> [N]othing in the final regulations prevents [institutions] from initiating a student conduct proceeding or offering supportive measures to students affected by sexual harassment that occurs outside the [institution's] education program or activity. Title IX is not the exclusive remedy for sexual misconduct or traumatic events that affect students. As to misconduct that falls outside the ambit of Title IX, nothing in the final regulations precludes [institutions] from vigorously addressing misconduct (sexual or otherwise) that occurs outside of the scope of Title IX or from offering supportive measures to students and individuals impacted by misconduct or trauma even when Title IX and its implementing regulations do not require such actions. The Department emphasizes that sexual misconduct is unacceptable regardless of the circumstances in which it occurs, and recognizing jurisdictional limits on the purview of a statute does not equate to condoning any form of sexual misconduct.

Where colleges and universities have developed multiple policies to address Title IX- and non-Title IX related sexual misconduct, it is important to provide clear definitions with the policy and/or procedures as to the scope of each policy/procedure. One way to do this is to create a detailed or simple (or both) roadmap or infographic outlining the process for each procedure and highlighting the differences between the various procedures. Below are examples from various public and private institutions:

- Duke University's Office for Institutional Equity publishes on its website a Reporting Process Flowchart.[6] This flowchart outlines what happens when the Office for Institutional Equity receives a report through online reporting or from responsible employees or referrals. As Duke provides three possible procedures, the flowchart outlines the steps or stages of each process with limited detail in a single flowchart.

- The University of Virginia Office for Equal Opportunity and Civil Rights publishes on its website separate flowcharts for each of its relevant procedures, including a Path of a

[6] *See* https://oie.duke.edu/file/reporting-process-1056wpng.

Report for the Grievance Process and one for the Procedures for Sexual or Gender-Based Misconduct.[7]

- The University of North Carolina publishes flow charts for each of its policies concerning discrimination, harassment, and sexual misconduct – a Flow Chart of Adjudication Process for Allegations of Conduct under the Policy on Prohibited Sexual Harassment under Title IX and a Flow Chart of Adjudication Process for Allegations of Conduct under the Policy on Prohibited Discrimination, Harassment, and Related Misconduct – which guide an individual through the reporting process with a series of yes/no questions.[8]

- Harvard University's flowchart on the Investigative Process for alleged violations of the University Sexual and Gender-Based Harassment Policy, which is published on its website, provides a brief description of each step and links to the relevant policies and procedures, as well as a page for writing notes about the process.[9]

- Loyola University – Chicago publishes on its website a simple flowchart for its Grievance Process for Title IX Sexual Harassment.[10] The Loyola flowchart identifies key steps, such as Formal Complaint, Notice to Parties, Investigation or Informal Resolution, Live Hearing, Finding, Sanction, and Appeal with timelines and links to the relevant portions of the policy.

In developing a flowchart to explain the differences between the institution's policies and procedures for responding to Title IX and non-Title IX sexual misconduct, an institution can clearly publicize to the University community the similarities and differences in the procedures. In addition, these simple or detailed flowcharts can assist Title IX Coordinators, investigators, and advocates in explaining the relevant procedures for responding to reports and resolution options to complainants, respondents, and their respective advisors. As many institutions conduct in-person or virtual in-person meetings contemporaneous with issuing a Notice of Allegations, these flowcharts can provide further clarity during those conversations. While it is important to explain the investigation or informal resolution process to the parties, flowcharts can guide the conversation and provide resources that the parties can return to when they have questions as to next steps. Further, publishing these resources broadly, such as through the institution's website, allows individuals access to resources while they are deliberating whether to report to the institution.

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[7] *See* https://eocr.virginia.edu/sites/eop.virginia.edu/files/University%20of%20Virginia%20Flowchart%20Misconduct%20Procedures%20FINAL.pdf and https://eocr.virginia.edu/sites/eop.virginia.edu/files/University%20of%20Virginia%20Flowchart%20Grievance%20Process%20FINAL.pdf.

[8] *See* https://eoc.unc.edu/wp-content/uploads/sites/201/2021/02/Sexual-Harasment-Policy-chart.pdf and https://eoc.unc.edu/wp-content/uploads/sites/201/2021/02/PPDHRM-chart.pdf.

[9] *See* https://flowchart.odr.harvard.edu/files/odrip/files/harvard-odr-investigation-process-flowchart.pdf?m=1534361071.

[10] *See* https://www.luc.edu/media/lucedu/equity/pdfs/Grievance%20Process%20Flowchart%20V2.pdf.

Institutions may also consider developing additional tools to describe specific aspects of the procedures – such as the role of an advisor, informal or alternative resolution, or the hearing. Here are a few examples from various public and private institutions:

- William & Mary publishes a number of additional flowcharts and resources on its Compliance & Equity Office website, including a Student Sexual Harassment/Assault Infrastructure organizational chart, which details the offices responsible for various aspects of response, investigation, and support and a Training Guide for University Advisors in Sexual Misconduct cases.[11]

- St. Olaf College has a dedicated section on its website to publish guides and flowcharts regarding its processes concerning sexual misconduct. This includes an Informal Resolution Process flowchart, an Investigation & Hearing Process flowchart, a Reporting and Support flowchart, and a Title IX Quick Guide.[12]

- University of Denver publishes flowcharts on its website outlining the two procedures – Title IX Sexual Harassment Procedure and Comprehensive Discrimination and Harassment Procedures – and also provides an infographic that briefly describes reporting options and resources as well as a guide for responsible employees on how to respond to reports of sexual misconduct.[13]

b. Explaining Differences in Terminology

While the Title IX regulations specifically define "complainant" and "respondent," the institution's Title IX grievance process may utilize other terminology for these roles, such as "reporting party" for complainant or "responding party" for respondent. When the grievance process uses this different terminology it is imperative that the policy provide a clear explanation of the terms and how they relate to the Title IX definitions. One example of this is the University of Southern California (USC) Policy on Prohibited Discrimination, Harassment, and Retaliation and Resolution Process for Sexual Misconduct,[14] which use "reporting party" instead of "complainant." However, the USC Policy clearly explains its use of "reporting party," stating,

> The U.S. Department of Education uses the term Complainant to refer to the individual who is reported to have experienced Title IX Sexual Harassment. The University chooses to use the term Reporting Party, which should be read as synonymous with Complainant under the Title IX regulations; a Reporting Party has all the same rights and procedural protections as a Complainant under Title IX's implementing regulations.

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[11] *See* https://www.wm.edu/offices/compliance/_documents/SexualMisconductInfrastructure.pdf, https://www.wm.edu/offices/compliance/title_ix_coord/title-ix-trainng/sexual-assault-training-guide-advisors-october-2019

[12] *See* https://wp.stolaf.edu/title-ix/guides/.

[13] *See* https://www.du.edu/equalopportunity/policies-procedures.

[14] *See* https://policy.usc.edu/files/2020/08/Policy-on-Prohibited-Discrimination-Harassment-and-Retaliation-8.14.204.pdf.

Another example comes from the University of Texas at Austin (UT). While the UT's Prohibition on Sexual Assault, Interpersonal Violence, Stalking, Sexual Harassment, and Sex Discrimination Policy[15] uses the term "respondent," they also define the term as "Responding Party" on their website. Swarthmore College's 2020-2021 Procedures for Resolution of Title IX Complaints against Students[16] refer to the complainant as the "reporting party" and the respondent as the "responding party;" however, "once a formal complaint process is initiated the terms 'complainant' and 'respondent' are used to refer to the 'reporting party' and 'responding party,' respectively."

c. Explaining Dismissals and Appeals

The Title IX regulations require institutions to have a grievance process that provides for the dismissal of a formal complaint in certain circumstances. Pursuant to 34 C.F.R. § 106.45(b)(3), the institution *must* dismiss a formal complaint when the conduct alleged in the formal complaint (1) would not constitute sexual harassment as defined in § 106.30 even if proved, (2) did not occur within the institution's education program or activity, or (3) did not occur against a person in the United States. In addition, an institution *may* dismiss a formal complaint or any allegations therein if (1) the complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint or any allegations, (2) the respondent is no longer enrolled or employed by the institution, or (3) specific circumstances prevent the institution from gathering sufficient evidence to reach a determination as to the formal complaint or allegations.

As an institution's procedures may require a dismissal from the Title IX grievance process, but may proceed pursuant to another process or procedure, it is important to provide clarity on the flow of this process. In addition, the institution's pre-August 14, 2020 Title IX process may not have had a dismissal process and additional education and resources may be necessary to assist the campus community in understanding the process. Indeed, complainants, respondents, and their advisors need to understand the implication of the dismissal. For example, will the institution proceed under another process if the formal complaint is dismissed from the Title IX grievance process, what are the differences between the processes, and will evidence gathered during an investigation prior to dismissal be considered during any subsequent process? These are examples of questions to be prepared to answer both in the institution's procedures as well as during any informational meeting that may be provided along with the dismissal. Institutions should consider whether to create a questions and answers or frequently asked questions document regarding dismissals and publish this information on their website or through a brochure or other materials. Having a specific document that addresses questions regarding dismissals provides additional resources to the community and for the Title IX Coordinator to share to explain individual aspects of the policy.

The Title IX regulations also require institutions to have a grievance process that provides for an appeal. Pursuant to 34 C.F.R. § 106.45(b)(8),an institution must offer both parties an appeal from a determination regarding responsibility and from the institution's dismissal of a formal

[15] *See* https://policies.utexas.edu/policies/prohibition-sex-discrimination-sexual-harassment-sexual-assault-sexual-misconduct

[16] *See* https://www.swarthmore.edu/sites/default/files/assets/documents/title-ix-office/2020-2021%20Procedures%20for%20Resolution%20of%20Title%20IX%20Complaints%20against%20Students.pdf

complaint on three bases – (1) procedural irregularity that affected the outcome of the matter; (2) new evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome of the matter; and (3) the Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter. The Title IX regulations' required appeals is not an exhaustive list and institutions may identify additional bases for appeal. Further, the written appeal decision must be provided to both parties simultaneously.

As discussed above with regard to dismissals, for some institutions the appeal process may be a new requirement. For these reasons, it is important to provide a clear process, with sufficient resources to explain the appeal process. In drafting and reviewing appeal processes, make sure it is clear at what point in the process someone may appeal – before sanction, after sanction, or both – and when the decision is final.

C. Practical Considerations in Staffing and Conducting Title IX Hearings

1. Why is a Title IX hearing needed?

Title IX requires colleges and universities to investigate all accusations of sexual harassment and maintain a safe environment on campus. Every institution must provide live hearings for Title IX grievance proceedings where findings of fact are at issue.

At either party's request, the institution must provide for the entire hearing to be conducted with the parties in separate rooms, with the parties able to see and hear each other in real time. Any party or witness may be allowed to participate in the hearing remotely. The institution must record all hearings, even if the hearing is in person.

2. Who comprises a hearing board?

A Title IX hearing board may be composed in a variety of ways. Due process does not proscribe that schools impose a fixed number of panelists on a hearing board, nor does it mandate how the board will function (ie, does the board have a voting chairperson, etc…).[17] There is no protected right to be heard by a hearing board modeled in a specific way, however, there can be legal challenges if schools provide for resolution to infractions that differ from what is provided for in codes of conduct. In effect - HAVE A PROCESS AND THEN FOLLOW IT.[18]

There are different hearing board models utilized by institutions. Some have boards composed of a single officer who manages the activity of the proceeding, considers the evidence brought forth

[17] Crane v. Hahlo, 258 U.S. 142, 147 (1922) ("No one has a vested right in any given mode of procedure (Railroad Co. v. Grant, 98 U.S. 398, 401; Gwin v. United States, 184 U.S. 669, 674) and so long as a substantial and efficient remedy remains or is provided due process of law is not denied by a legislative change. Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437, 439 (1903).

[18] Violations may be found when institutions engage in hearing board conduct or procedures that do not conform with what is explained in institutional codes of conduct. "Plaintiff has sufficiently alleged a provision of the Student Handbook that Muskingum has not complied with." Schaumleffel v. Muskingum Univ., Case No.: 2:17-cv-463, 23 (S.D. Ohio Mar. 6, 2018).

by parties and the investigative team, and who ultimately makes the final decision regarding responsibility of parties. This person has been known to be a senior member of the institution's student conduct team, an outside adjudicator, or other senior official at the institution. Other schools will conduct the hearing with a board chairperson who facilitates the hearing and advises the panelists but does not make the ultimate decision. The chair is joined by other panelists who review the evidence offered and will make a final determination of responsibility of the parties. Alternatively, using another model, the chair serves as a voting member of the hearing body. However, what is certain is that in an effort to ensure that there is no predisposition of bias in findings or the inference thereof, Title IX regulations dictate that neither the Title IX Coordinator nor the investigator may serve as the decision maker.[19]

Parties to Title IX hearings do not have a right to dictate the process used by institutions. For example, parties do not have a right to request a particular type of hearing, other than what is permitted in the institution's code of conduct. Either party may request that they be permitted to join via phone or electronically, however, the hearing must be conducted live with both parties present. Title IX does not require that parties to the live Title IX hearing be given the opportunity to voir dire members of the hearing panel or board. While some institutions choose to allow parties to know the names of the panelists and to request that they be replaced for cause due to potential conflicts of interests, parties do not have a right to voir dire possible panelists as defendants do in criminal trials.[20]

3. What is the role of advisors?

Both the complainant and respondent may be accompanied by an advisor during the hearing. The advisor's role at the hearing shall consist of (1) providing private advice to the party he/she is supporting and (2) cross examining the opposing party and other witnesses. The advisor can be anyone, including an attorney. While each party may arrange for their advisor of choice to attend the hearing at the party's own expense, the institution has the obligation to provide an advisor to assist a party at the hearing without fee or charge, upon request. In either scenario, the advisor may only participate in the hearing to the extent allowed under the Title IX policy.

Many institutions already allow parties to participate in hearings and the investigatory process with a support person of their choosing. Support persons generally serve as emotional support for the parties and assist parties with navigating and understanding the investigation process, including providing support during each portion of the hearing process and any meeting or interview that is associated with the investigation process.

In some instances, the support person and the advisor will be the same person, however, in others, the support person may choose to not engage in cross examination of other parties or

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[19] Gomes v. University of Maine System, Civil No. 03-123-B-W, 31 (D. Me. 2005) (""[A]n impartial and independent adjudicator `is a fundamental ingredient of procedural due process.'" Gorman, 837 F.2d at 15 "); Hill v. Bd. of Trs. of Michigan State Univ., 182 F. Supp. 2d 621, 628 (W.D. Mich. 2001) ("[I]n a university setting, a disciplinary committee is entitled to a presumption of honesty and integrity, absent a showing of actual bias.")

[20] "Allowing challenges for cause, but not voir dire, reduces the risk the committee hearing will be transformed into a full blown trial. On the other hand, if the parties are aware of reasons that would disqualify a committee member, they are allowed to bring them forward" Gomes v. University of Maine System, Civil No. 03-123-B-W, 36 (D. Me. 2005).

witnesses. Therefore, some institutions may choose to allow parties to have two people join them in the hearing, both the support person and the advisor, since cross examinations of parties and witnesses by an advisor are required by Title IX.

It is advised that institutions commit to a communication protocol to determine whether they will permit parties to have representation throughout the process; whether they will permit communication between the institution and the parties to go through a representative or other intermediary. Institutions choosing to not permit representation through others, may choose to allow advisors and support people to be copied on any correspondence or communication related to the investigation process at the direction of the complainant or respondent and make clear in their protocols that support people and advisors may not speak for parties, respond to questions on their behalf or initiate any other action on their behalf. Some institutions have "potted plant" rules for support people and advisors which do not permit such people to speak during investigatory and hearing processes. Unless the institution has a strict "potted plant" rule, institutions may allow advisors to ask clarifying questions and can discuss administrative issues such as scheduling or breaks for parties. In either model, it is advisable that the parties remain as the person who will raise any substantive questions and comments throughout the hearing and investigatory process.

It is also advisable for institutions to develop a protocol on whether they will permit witnesses to have support people participate in hearings and investigatory meetings. Given that Title IX dictates that witnesses need to be present for hearings for cross examination or their testimony will not be permitted, institutions should prepare for witnesses to want some support during the hearing process as well.

4. Who should serve as an advisor?

Providing accurate information, appropriate assistance and support is an essential role of the advisor and it is advisable that institutions who are asked to provide parties with advisors select individuals that understand the investigation process and their respective role within the process. As such institutions should encourage that advisors contact the Title IX Coordinator or Investigator with questions regarding the investigation and hearing process to ensure an understanding of their role. The Title IX Coordinator or Investigator should provide copies of applicable policies and procedures to the advisor upon request.

It is recommended that neither advisor nor support person be someone who is a witness in the same matter. In particular, if an advisor is also a witness, the institution would have to have a second advisor who could engage in the cross examination of that witness.

The conflict of interest concerns that apply to officials in Title IX proceedings do not apply to advisors. There is no concern about advisors appearing to be biased against complainants or respondents. It is advisable however, that institutions train advisors that they need not serve as zealot advocates of their parties, as a lawyer would engage with a client.

For institutions selecting advisors who are also employees of the organization, it is important to ensure that all parties be treated fairly by that employee during the investigatory process and

after the hearing is concluded to have no inference of retaliatory animus. The Title IX Final Rules preclude an advisor for a complainant or respondent from serving as a Title IX Coordinator, investigator, decision-maker, or facilitator of an informal resolution process in that same case. Additionally, any reporting duties that an employee would normally have in their course of employment within the institution would be suspended when they serve in the role of advisor.

If institutions provide for advisors who do not have a legal privilege under their state's law (e.g., attorney-client), the confidentiality of a party's disclosures outside the campus process, such as in a civil or criminal court may not be able to be maintained. Explaining any state or institutional privacy procedures is important for advisors to explain the limits of their confidentiality to the party they serve. The same rules that preclude parties from sharing confidential information also apply to their advisors.

5. How should we conduct the cross examination?

Title IX Regulations require that institutions develop a grievance process that allows for a live hearing with cross-examination. The Final Rule is also clear that at the live hearing, the cross-examination questions must be asked by the party's advisor and never by a party personally. A party could choose, however, not to submit to cross-examination. The regulations are clear that if a party, including witnesses, does not submit to cross examination, the decision-maker may not rely on any statement of that party in reaching a determination regarding responsibility. A party may decide not to ask their advisor to conduct cross-examination of the other party or any witness or to only certain witnesses.

Institutions may request that parties submit their questions for review by the adjudicator in advance of the questions being posed. This will give the adjudicator an opportunity to review questions for relevance. The hearing body must provide a rationale for questions that are not permitted to be asked. It is advisable for institutions to create a decorum policy that will be enforced throughout the hearing. This will permit the hearing officer to prohibit any party or advisor from questioning witnesses in an abusive, intimidating, or disrespectful manner.

Exhibit A

Summaries of Selected Post-August 14, 2020 Federal Lawsuits[1]

Case Information	Background	Key Holdings
Decided October 16, 2020 *Doe v. Rensselaer Polytechnic Institute*[2] United States District Court for the Northern	Underlying Incident and Title IX Process On an evening in January 2020, the complainant and respondent engaged in consensual sexual activity in the complainant's dorm room.[3] According to the respondent, the complainant plied him alcohol after they had consensual sex and pressured him to engage in additional sexual activity, including putting his hands around her neck. The complainant alleged that after their consensual sexual activity she and the respondent argued, and the respondent put his arms around her neck and squeezed in a	The Court granted the preliminary injunction for the respondent.[4] Sex Discrimination[5] The respondent alleged that the Institute discriminated him on the basis of sex in violation of Title IX for electing to hold his hearing under it former Title IX Policy instead of its 2020 Policy. The respondent also alleged that the Institute violated Title IX by selectively enforcing its misconduct policies to his detriment by dismissing his complaint against the complainant but allowing her claim based on the same encounter to proceed. The Court held that the new Title IX regulations should be applied retroactively. The Court stated:

[1] The selected cases specifically reference the effective date of the new Title IX regulations. This case summary contains graphic content.

[2] 2020 U.S. Dist. LEXIS 191676; 2020 WL 6118492.

[3] About a week prior to the incident, the complainant learned that the respondent videotaped her while she was undressing at his off-campus apartment. When confronted about the recording, the respondent offered reassurances that he had deleted the recording.

[4] "The Second Circuit requires a plaintiff seeking a preliminary injunction to prove four elements: '(1) a likelihood of irreparable harm; (2) either a likelihood of success on the merits or sufficiently serious questions as to the merits plus a balance of hardships that tips decidedly in [the movant's] favor; (3) that the balance of hardships tips in [the movant's] favor regardless of the likelihood of success; and (4) that an injunction is in the public interest.' The movant must make a 'clear showing' that each of these elements is met." **Citations omitted.**

[5] Under the Second Circuit's test for a Title IX sex discrimination claim, "a university runs afoul of the statute when it: '(1) takes an adverse action against a student or employee[;] (2) in response to allegations of sexual misconduct[;] (3) following a clearly irregular investigative or adjudicative process[; and] (4) amid criticism for reacting inadequately to allegations of sexual misconduct by members of one sex[.]'" **Citations omitted.**

District of New York 1:20-CV-1185	physical, non-sexual way. She also alleged that the respondent rubbed his penis against her back, buttocks, and legs without her consent. She also said that she asked the respondent to put his hands around her neck earlier in the night during the consensual sexual activity. In addition, the complainant alleged that the next morning the respondent engaged in sexual intercourse with her without her consent and eventually stopped after she complained she was in pain. Both parties acknowledge that the respondent had trouble getting out of bed during the night. The complainant also reported that during evening the respondent said he was under the influence of a couple substances. The complainant said that she may have unwillingly had sex with the respondent because she was afraid that he would hurt her. The respondent said that the psychological damage from being pressured to have sex resulted in him taking a medical leave of absence. The next week, the complainant's resident advisor reported the sexual assault to the Rensselaer Polytechnic Institute (RPI or Institute), and, a few days later, the Institute	• ". . . [W]hether the Department of Education would have penalized RPI for not complying with the new rules or not, it could easily have implemented the 2020 policy for [the respondent's] hearing because it must implement that policy for all future Title IX complaints. Instead, the defendant decided that it would be best to maintain two parallel procedures solely to ensure that at least some respondents would not have access to new rules designed to provide due process protections such as the right to cross-examination that have long been considered essential in other contexts." • The Preamble itself is unclear what it means when it discusses retroactivity. It could mean that the Department would determine the Institute's decision not to apply its 2020 Title IX Policy to the respondent's case was permissible or that schools would not face Department sanctions if they did not reopen previously completed hearings that did not follow the new Title IX rules. The Court also stated ". . . if a hearing--the [respondent's] for example—occurs under the new rules after August 14, 2020, from a certain point of view that hearing would apply the new rules prospectively because the rules were in effect before the hearing itself took place." • The OCR blog post is not an authoritative statement entitled to *Auer* deference.[6] • "Under the [Department blog post], schools may maintain two parallel proceedings until every claim of sexual misconduct allegedly occurring prior to August 14, 2020 is resolved. But it is unclear when that day would come, because there may be several claims that a sexual assault occurred prior to August 14, 2020 that have yet to be brought to a school's attention."

[6] The Court noted that, despite RPI's argument that the Court was bound to defer to an agency's interpretations of regulations that it promulgates, the *Auer* deference for agency's interpretations of agency regulations applies to "an agency's authoritative, expertise-based, fair, or considered judgment." *See Auer v. Robbins*, 519 U.S. 452, 459-62, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997).

	notified the respondent that it was initiating a Title IX investigation. In February 2020, the complaint filed her own complaint against the respondent. In June 2020, the respondent filed a Title IX complaint against the complainant alleging that he was too intoxicated to consent to sexual activity the night of the incident. In August 2020, the Institute concluded based on the preponderance of evidence standard that the respondent violated the school's sexual misconduct policy by sexually assaulting the complainant. The same day, the Institute dismissed respondent's Title IX complaint against the complainant. The Institute concluded based on the preponderance of evidence standard that the respondent failed to establish his allegations. Specifically, the Institute found that the respondent's participation in complex conversation, recall of details, ability to leave and re-enter the complainant's residence hall to smoke, and failure to prove that he did not willingly consume alcohol or initiate sexual activity with the complainant made his complaint insufficiently credible. On August 11, 2020, the respondent appealed the Institute's determination. He also requested that the Institute conduct the hearing under its new Title IX Policy. Citing the Department's blog post explaining that the new Title IX regulation is prospective, the	• RPI did not follow the Department's blog post. RPI's 2020 Policy provides that "a complaint of sexual misconduct will be investigated and adjudicated using the procedural provisions of the Policy *in effect at the time of the report* and the substantive provisions in effect at the time the conduct allegedly occurred." • RPI could not rely upon a previous court ruling that held its 2018 Policy afforded students adequate protection because 1) the new rules had not been proposed at the time; and 2) the respondent in the instant case had marshalled substantial evidence to advance his sex discrimination claim. Although the Court acknowledged there is little evidence in the record to date that the Institute has been criticized for reacting inadequately to allegations of sexual misconduct by members of one sex, it recognized the Second Circuit has noted "when combined with clear procedural irregularities in a university's response to allegations of sexual misconduct, even *minimal* evidence of pressure on the university to act based on invidious stereotypes will permit a plausible inference of sex discrimination." The Court further stated that the paucity of evidence in this regard does not meaningfully undermine [the respondent's] probability of success at trial. The Court also commented that the evidence of sex discrimination was not limited to the Institute's decision not to apply it new Title IX policy to the respondent's hearing. The Court stated: . . . RPI specifically noted that [the respondent's] complaint against [the complainant] was insufficiently substantiated because he failed to prove that he did not voluntarily consume alcohol and did not initiate sexual contact with [the complainant]. This raises a powerful inference of sex discrimination. After all, RPI's reliance on these twin findings is curious considering that even the 2018 policy makes no

	Institute rejected the respondent's request to apply the Institute's newly adopted procedures to his hearing. <u>Instant Complaint</u> In late September 2020, the respondent filed a complaint alleging that the Institute violated Title IX by 1) refusing to hold a hearing under its new Title IX policy adopted to comply with the Title IX regulations; and 2) dismissing his cross-complaint but allowing the complainant's complaint to proceed based on the same incident. The respondent also moved for a temporary restraining order and a preliminary injunction to prevent the Institute from moving forward with the hearing under its 2018 Title IX policies. The Court granted the temporary restraining order and set a hearing for the preliminary injunction.	mention of voluntary consumption of alcohol as a factor bearing on the question of a complainant's inability to consent due to excess intoxication. . . . Similarly, the 2018 policy does not provide any exceptions to the rule that "[c]onsent may be initially given but withdrawn at any time." As a consequence, RPI's specific finding that [the respondent] failed to prove that he did not initiate his sexual encounter with [the complainant] is once again bizarre, since it is apparently directly contrary to defendant's own sexual misconduct policies. In a vacuum, RPI's inventive use of its policies may not say much about the role [the respondent's] gender played in the process, but [the complainant's] complaint arising out of the same encounter was not subjected to any of these fabricated requirements. The two complaints concerned the same subject matter, of which only the two complainants had first-hand knowledge. From that duality of origin, the female's complaint proceeded without issue, the male's was struck down in part on grounds not contemplated anywhere in the policy's definition of consent. That inequitable treatment provides not inconsiderable evidence that gender was a motivating factor in RPI's treatment of [the respondent]. **Citations omitted.** The Court also stated that the remaining evidence for and against both parties made the Institute's differing results along gender lines seem outcome-oriented. The Court noted that the Institute seemed to credit the complainant's narrative over the respondent's without providing any reasons for doing so, Thus, the Court determined that the respondent had demonstrated a likeliness of success on sex discrimination claim.

		Selective Enforcement[7] The Court concluded that the respondent had provided adequate evidence that gender had been a motivating factor in Institute's treatment of him throughout its investigation of the complainant's allegations and its dismissal of his own. The Court noted: > [I]t would be difficult to conceive of a more similarly situated female student to [the respondent] than [the complainant], who was accused of sexual assault stemming from the same night and same incident that brought her allegations against him. Yet his claim against her was dismissed, while her claim against him remains. Thus, the Court concluded that the respondent had proven a likelihood of success on his selective enforcement claim. Irreparable Harm, Balance of Hardships, and Public Interest The Court held that the respondent sufficiently plead the remaining elements required for a preliminary injunction. The Court opined: • The respondent would face imminent and irreparable harm of participating in a disciplinary hearing that places his academic and professional future in jeopardy without confidence that he will not be subjected to discrimination on the basis of sex at that hearing;

[7] The Court explained that selective enforcement claim "asserts 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." **Citations Omitted.** The Court further explained that a plaintiff must demonstrate that: (1) "similarly situated female students . . . were treated differently during investigations and disciplinary proceedings concerning sexual assault; and (2) the defendant "had the requisite discriminatory intent." **Citations Omitted.**

		• "A harm is not irreparable where damages are unavailable; a harm is irreparable because damages cannot adequately capture the value of the thing the [the respondent] has lost." • The Institute's position that allowing a student found in violation of its policies to circumvent ramifications was troubling because it ignored its duty to ensure that its accused are not unjustly punished for their lifelong detriment. • "[T]he most critical issue at stake in the change from the old Title IX rules to the new is that respondents accused of sexual assault have a right to cross-examine their accuser at a live hearing . . . . Accordingly, the public interest would not be disserved by granting respondent's requested injunction. Quite the contrary. Thus, [the respondent] has adequately demonstrated every requisite element of a preliminary injunction, and that injunction must follow." After granting the preliminary injunction, the Court ordered mandatory mediation in December 2020. The Court entered a discovery schedule in April 2020.

Decided December 31, 2020 *Doe v. Princeton University*[8] United States District Court for the District of New Jersey 3:20-cv-4352	<u>Underling Incidents and Title IX Process</u> The parties' relationship involved consensual BDSM. The parties relationship also involved physical altercations. The respondent ended the relationship after the complainant admitted she cheated. The complainant later heard from others that the respondent has cheated on her. The respondent contends that complainant began to spread false information that he had physically abused her. He also alleged that through a series of texts the complainant said she wanted to punish him. According to the respondent, he reported the complainant's conduct as harassment to the residential college's Director of Student life and he suggested that the respondent seek mental health services. The complainant and respondent filed cross-complaints alleging sexually assault. Utilizing a three-person panel to investigate and	The Court dismissed the respondent's complaint.[9] <u>Erroneous Outcome and Selective Enforcement[10]</u> The respondent alleged the University's investigation featured "procedural and evidentiary errors" that led to a flawed outcome motivated by gender bias, including the following: • Substantial evidentiary weaknesses since the Panel failed to consider the complainant's motivation to lie; • Misconstrued exculpatory evidence for the respondent and evidence incriminating the complainant; • Inconsistent credibility determinations and prejudicial conclusions without sufficient evidentiary support; and • Significant procedural flaws affecting proof such as the Panel's failure to provide the respondent with a meaningful right to cross-examination and a live hearing. The respondent also alleged that the University engaged in selective enforcement by:

[8] 2020 U.S. Dist. LEXIS 247940.

[9] "In deciding a motion to dismiss . . . a district court is 'required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most favorable to the [plaintiff].' '[A] complaint attacked by a . . . motion to dismiss does not need detailed factual allegations.' . . . Assuming the factual allegations in the complaint are true, those '[f]actual allegations must be enough to raise a right to relief above the speculative level. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" **Citations omitted.**

[10] " . . . [T]he Third Circuit outlined the Title IX tests adopted by other circuits, including 'erroneous outcome,' 'selective enforcement,' 'deliberate indifference,' and 'archaic assumptions.' The Seventh Circuit observed these tests all address the same issue: whether sex was a motivating factor in a school's decision to discipline a student. The Third Circuit, in agreement with the Seventh Circuit, adopted the Seventh Circuit's test and held 'to 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.'"

	adjudicate the complaints, Princeton (Princeton or University) found the respondent responsible for the conduct alleged by the complainant but determined the evidence was insufficient to establish the complainant was responsible for the conduct alleged by the respondent. The University expelled the respondent and denied the respondent's appeal. Both parties violated the mutual no contact order. The complainant violated the no contact order by approaching the respondent when he was on a running trail and attempted to apologize to him. The University issued a warning to the complainant. The respondent accidentally called the complainant, and the University issued a warning to the respondent. The respondent self-reported that he also accidently liked one of the complainant's messages as he scrolled the messages to prepare a written response to complainant's allegations. The University convened a disciplinary process, issued a warning, but noted that the conduct would typically result in a three-month probation. <u>Instant Complaint</u> Plaintiff alleged violations of Title IX based erroneous outcome, selective enforcement, breach of contract, breach of implied covenant of good faith and fair dealing, and common	• Dismissing his concerns harassment but zealously pursuing the complainant's allegations, construing all inconsistencies in her favor; and • Reacting differently to the parties violating the NCO. The Court rejected the respondent arguments explaining that the respondent thoroughly detailed the problems he alleged plagued his disciplinary process but did not make any allegations that showed his sex was the reason for those problems. <u>Breach of Contract</u> The respondent argued that the University breached its own policy, followed procedures that were fundamentally unfair, and did not make a decision based on sufficient evidence. Specifically, the respondent contended that the University: • Failed to investigate sexual misconduct in a fair equitable way by providing him with a conflicted advisor; • Failed to apply the preponderance of evidence standard; • Disregarded exculpatory evidence for the respondent and incriminating evidence against the complainant; • Denied his request for an extension to file his appeal even though the University's policies allowed extensions for good cause; • Imposed the harshest penalty without a sufficient explanation and without comparison to other like complaints; • Imposed a penalty which was not based on the facts of the case or consistent with University precedent; and • Utilized fundamentally unfair Title IX investigatory procedures because 1) there was no mechanism for a party accused of sexual misconduct to question witnesses at a hearing before a neutral fact finder with power to make credibility

	law due process. The respondent also filed for a temporary restraining order and preliminary injunction to enjoin the University from enforcing its decision to expel the respondent, removing respondent's status as a full-time student, and preventing the respondent from attending classes and sitting for his upcoming exams pending resolution of the underlying merits." The Court denied the temporary restraining order and the University filed a motion to dismiss.	determinations, 2) a single investigator model was used, and 3) there was a bias against males. The Court rejected respondent's arguments for the following reasons. • The respondent selected his advisor. Also, the respondent allegations focused on the advisor's 's position as Director of Student Life of the Residential College and membership on the Residential College Disciplinary Board but not how the advisor's alleged conflict resulted in an adjudication that was not fair and equitable to the parties. • For nearly every determination, the Panel specified its findings were based on the preponderance of evidence standard. • The respondent alleged potential evidentiary issues with only one of the five incidents for which he was found responsible. Also, the Panel found numerous witnesses were credible, including the respondent's mother. • The respondent failed to allege that his extension request to file an appeal was made for good cause, and the respondent failed to provide the University any reason for his request for an additional 30 days to submit his appeal. • The respondent's punishment comports with University precedent for similar conduct, including that the University previously expelled a student for multiple acts of violence against their dating partner. • The Notice of Allegations sent to the respondent advising him of his rights during the process included a footnote explaining the respondent's right to cross-examine any party or witness by submitting proposed questions to the Panel. • Although the new Title IX regulations prohibit a single-investigator model, the rules did not become effective until August 14, 2020, and the Department itself noted it will not enforce these regulations retroactively. Moreover, the new Title

		IX regulations were not effective at any time during the respondent's proceedings. Breach of Implied Covenant of Good Faith and Fair Dealing New Jersey law requires that a party sufficiently plead that a breach of breach of the covenant of good faith and fair dealing claim is distinct from a corresponding breach of contract claim. The Court held the conduct underlying the respondent's breach of the implied covenant of good faith and fair dealing claim was identical to the conduct underlying his breach of contract claim.[11] Common Law Due Process: Fundamental Fairness in School Disciplinary Proceedings The University argued that the respondent 1) could not state a fundamental fairness claim where a private university failed to follow its internal rules; and 2) did not defend his fundamental fairness allegation in his opposition to the motion to dismiss. The Court treated the motion as unopposed on this claim and dismissed it without a merits analysis.

[11] " . . . [B]reach of the implied covenant of good faith and fair dealing may be an independent cause of action under three limited circumstances:(1) to allow the inclusion of additional terms and conditions not expressly set forth in the contract, but consistent with the parties' contractual expectations; (2) to allow redress for a contracting party's bad-faith performance of an agreement, when it is a pretext for the exercise of a contractual right to terminate, even where the defendant has not breached any express term; and (3) to rectify a party's unfair exercise of discretion regarding its contract performance." **Citations omitted.**

Decided February 23, 2021 *Doe v. Stonehill College*[12] United States District Court for the District of Massachusetts) 20-10468	<u>Underlying Incident and Title IX Process</u> During fall 2017, the complainant and the respondent engaged in consensual sexual activity. In November 2017, complainant alleged that the respondent digitally penetrated her, and she told the respondent to stop several times. The complainant further alleged that she was heavily intoxicated during the encounter. The respondent alleged that he and the complainant previously engaged in consensual sexual contact that involved his digital stimulation of complainant. The respondent also reported that he did not believe the complainant had consumed any alcohol prior to their meeting. The next morning, the complainant texted the respondent saying, "what just happened," "that wasn't consensual," and "that wasn't ok." The respondent responded "[p]lease forgive me for being a drunken idiot. I'd never want to hurt you," and "I'm so really sorry I know I fucked up, I totally misread the situation. What can I do to make it right?"	The Court dismissed the respondent's complaint.[13] <u>Title IX</u> Citing the Department's 2017 Questions and Answers on Campus Sexual Misconduct, the respondent argued that the College's operation of a separate process for handling cases of sexual misconduct distinct from other kinds of misconduct evidenced gender-based discrimination. The Court noted that the 2017 Q & A only referenced that schools should have the same evidentiary standard for both policies, and the College applied the preponderance of evidence standard to cases involving sexual misconduct and other misconduct.[14] The Court further stated " . . .even assuming without deciding that the Department of Education's guidance set forth in a Q&A document enjoys some measure of legal force or deference, the policies do not suggest discriminatory purpose here under the reasoning of that document." The Court also concluded: • The text implementing regulation of Title IX does not require a live hearing with cross-examination or any other particular procedure. • The Title IX statute imposes no requirement of a live hearing with cross-examination.

[12] 2021 U.S. Dist. LEXIS 32958; 2021 WL 706228.

[13] "To survive a motion to dismiss . . . 'a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' The court 'must accept all well-pleaded facts alleged in the Complaint as true and draw all reasonable inferences in favor of the plaintiff.' 'Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.' The Court 'may augment these facts and inferences with data points gleaned from documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice.'" **Citations omitted.**

[14] The procedures for the two policies differ.

	According to the respondent, he sent the texts because he believed the complainant did not want to accept responsibility for having sex with him. The complainant filed a Title IX complaint with Stonehill College (Stonehill or College) the next day. The College completed its investigation in late January 2018. In mid-February 2018, Stonehill determined that the respondent was responsible for committing sexual assault and expelled him. Stonehill denied the respondent's appeal in early March 2018. <u>Instant Complaint</u> Respondent contends that 1) maintaining a separate process for sexual misconduct distinct from other misconduct evidences gender-based discrimination; 2) he was denied an "equitable process" because he was not provided a live hearing with the opportunity to cross-examine live witnesses; 3) the College engaged in "selective enforcement;" and 4) the College reached an "erroneous outcome." The respondent also alleged breach of covenant of good faith and fair dealing; breach of common law duty of fairness; negligence and negligent infliction of emotional distress; and defamation.	• The respondent's due process arguments fail because the College is not a public university or a government actor and is not subject to due process requirements. • The new Title IX regulations requirements apply prospectively. The Court held the respondent's selective enforcement arguments failed because he provided no similarly-situated comparator of another gender. The Court found that the respondent's erroneous argument failed because he did not "allege particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding" and indicate that "gender bias was a motivating factor." The Court opined: • Even if the procedural and fact-based allegations were sufficient, respondent's contentions that sexual assault proceedings at the College have "invariably been male" and males "have been scapegoated in [College's] process" are unsupported by even minimal data or credible anecdotal references. • The College's decision itself was not a pure credibility choice between two diametrically opposed stories but rather was grounded in objective contemporaneous written evidence from the parties as well as many facts about the interaction undisputed by respondent and the complainant. • The omitted portion of a witness statement identified by the respondent was cumulative, weaker than the evidence from the parties' texts, and did not undermine confidence in the outcome. • Title IX did not require the College to provide the respondent advance notice of the first interview of the complainant or assign the investigation to an external, third-party investigator.

		• The College issued a blanket, mutual no-contact order but it did not limit the respondent's education or participation in the Title IX process in any way. • Despite respondent's claims that the complainant was not questioned about the details of the alleged assault, the investigators gained the pertinent information by asking the complainant to expand upon and clarify her written complaint. • Despite the respondent's assertion that the Dean failed to review the "facts gleaned" in the investigation, the Dean relied upon the investigative report. • It was reasonable for the College to conclude that the respondent violated College policy with respect to consent when he digitally penetrated the complainant without any verbal consent or any physical cue other than the lack of an objection to a back rub. The Court also considered the sum of the totality of all of the circumstances and concluded that the respondent failed to plausibly plead articulable doubt. • Prior to the decision, the respondent twice had the opportunity to review all of the facts gathered by the College and respond to them, once orally and later in writing. • The investigators went back to the respondent for further detail in light of information provided by the complainant. • "In short, the process complied with the Policy, comported with governing Title IX rules, and provided [the respondent] with a fair opportunity both to respond to the factual recitation set forth by the investigators and either submit more evidence or request the investigators obtain more evidence. By this process, it also tested [the respondent's] and [the complainant's] statements."

		• "The respondent's recitation of events corroborated virtually all of [the complainant's] rendition except her verbal rejection of sexual activity." • " . . . [U]nlike in many cases, Stonehill possessed contemporaneous objective written evidence of non-consent in the form of [the complainant's] allegation and [the respondent's] admission both uttered the morning after in their undisputed text messages." <u>Breach of Contract</u>[15] The respondent alleged that the College breached its contract with him by not following the procedures outlined in the Colleges Sexual Misconduct Policy and engaging in a fundamentally unfair investigation.[16] For the same reasons as above, the Court ruled that that the respondent's breach of contract theory failed. The Court further held: The Policy did not require Stonehill to provide [the respondent] with [the complainant's] initial complaint or advance notice of her interview and it did not require hiring an external investigator. A student reading the policy could not reasonably expect Stonehill to take those steps. Further, the Policy does not state that students will receive reasoning from the Dean of Students beyond an "outcome letter" and the Final Report (both of which the respondent received). The Policy states that

[15] "'Under Massachusetts breach of contract law as to private academic institutions, two tests are relevant to [the respondent's] breach of contract claim . . . The first test looks at the terms of the contract established between the college and the student and asks whether the reasonable expectations of the parties have been met.' . . . . The second test is whether the procedures followed were 'conducted with basic fairness.'" **Citations omitted.**

[16] The respondent did not allege that the College's disciplinary process was arbitrary and capricious or made in bad faith.

		sanctions for being found responsible of sexual misconduct can include dismissal. The Court did find the College should have informed the respondent that the complainant told a witness the morning after the incident that "it wasn't ok." The Court also concluded that lone violation was insufficient to support a breach of contract claim. The Court also noted that the respondent was able to raise the issue on appeal.[17] The respondent alleged that he was denied basic fairness because he was not provided a live hearing or an opportunity to cross examine the complainant. However, basic fairness under Massachusetts law does not entitle parties to a live hearing or cross-examination. <u>Breach of Covenant of Good Faith and Fair Dealing and Breach of Common Law Duty of Fairness</u> The Court explained that it had previously held that this inquiry is essentially identical to the analysis under the breach of contract claim and the standard applied to the basic fairness of the proceedings. Thus, for the same reasons as articulated above, the Court concluded that the respondent had not stated a plausible claim as to a breach of implied covenant of good faith and fair dealing or common law duty of fairness in his contractual relationship with the school.

[17] The College determined this violation was not one that resulted in significant prejudice such that it impacted the outcome. The Court noted this was the same information he determined was cumulative.

		Negligence[18] and Negligent Infliction of Emotional Distress[19] The respondent alleged the College was negligent because it breached a duty of care to the respondent by failing to ensure that policies and procedures were fundamentally fair; failing to ensure that policies and procedures complied with federal and state law; failing to adequately train administrators, staff, and employees; and failing to ensure that administration, staff, and employees adhered to the policy. The Court stated: > [The respondent's] Amended Complaint does not allege a single fact that, if true, would show Stonehill knew that the Title IX team of Krentzman, Bamford, and Jordan was unfit to oversee [the respondent's] case. [The complainant] alleges that Stonehill's Sexual Misconduct policy requires every staff member and investigator to be annually trained on how to conduct an investigation . . . Nowhere does he allege that this training did not occur or was deficient, or that the Title IX coordinator and investigators were otherwise unfit. Rather, he makes the conclusory statement in his brief that alleged procedural errors must mean that the investigators were either "acting deceptively" or were "unsupervised, not properly trained, and incompetent."

[18] "To state a negligence claim under Massachusetts law, a plaintiff must allege that (1) the defendant owed the plaintiff a duty of reasonable care; (2) the defendant breached that duty; (3) damage resulted; and (4) the defendant's breach caused that damage." **Citations omitted. "**In Massachusetts, negligent supervision 'occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge or reassignment.'" **Citations omitted.**

[19] **"**To state a claim for negligent infliction of emotional distress, a plaintiff must allege: '(1) negligence; (2) emotional distress; (3) causation; (4) physical harm manifested by objective symptomatology; and (5) that a reasonable person would have suffered emotional distress under the circumstances of the case.'" **Citations omitted.**

		The Court held that because the respondent failed to sufficiently allege negligence his negligent infliction of emotional distress also failed. <u>Defamation</u>[20] The Court held that respondent failed to plead facts sufficient to support his claim that the College defamed him by issuing a "false" investigative report. The Court noted the investigators determined based on a preponderance of the evidence it is more likely than not that respondent violated College policy. Moreover, the Court concluded that investigators' recommendation was opinion which is not a basis for defamation in Massachusetts.

[20] "In Massachusetts, to state a defamation claim, a plaintiff must allege '[1] the defendant was at fault for the publication of a false statement regarding the plaintiff, [2] capable of damaging the plaintiff's reputation in the community, [3] which either caused economic loss or is actionable without proof of economic loss.' To be actionable, the statement alleged "must be one of fact rather than of opinion." **Citations omitted.**