# CAMPUS COURTS IN COURT: THE RISE IN JUDICIAL INVOLVEMENT IN CAMPUS SEXUAL MISCONDUCT ADJUDICATIONS

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*This Article analyzes the recent wave of litigation involving students accused of sexual misconduct and tried in campus judiciaries. Historically, federal courts have concluded that universities themselves, rather than judges, are best suited to determine appropriate disciplinary procedures for adjudicating student conduct violations, but that has begun to change. The U.S. Department of Education's 2011 reinterpretation of Title IX, combined with the efforts of activist students, faculty, and administrators, pressured universities to adopt procedures that all but ensured schools would find more accused students responsible in campus sexual misconduct cases. Tentatively at first, and more aggressively in the past several years, courts have ruled against universities in lawsuits filed by accused students. Judges have expressed concerns about colleges failing to respect the due process or procedural fairness rights of their students, discriminating against accused students in violation of Title IX, and failing to adhere to their own contractual obligations. Since the 2011 policy change, more than 500 accused students have filed lawsuits against their college or university, a wave of litigation that has continued even after the Department of Education rescinded the 2011 guidance in 2017. More than 340 of those lawsuits have been brought in federal court; colleges have been on the losing end of more than 90 federal decisions, with more than 70 additional lawsuits settled by the school prior to any decision. While change is on the horizon in the form of proposed new Title IX regulations issued by the Department of Education, this rapidly evolving body of law is transforming the relationship between higher education and the judiciary in ways that have implications far beyond the particular issue of campus sexual misconduct.*

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## INTRODUCTION

In a March 2016 opinion, F. Dennis Saylor, U.S. District Judge for the District of Massachusetts, commented on the altered environment that has come to guide campus sexual assault adjudications. "In recent years," he recognized, "universities across the United States have adopted procedural and substantive policies intended to make it easier for victims of sexual assault to make and prove their claims and for the schools to adopt punitive measures in response."[1] Saylor appreciated the "laudable" aim "of reducing sexual assault, and providing appropriate discipline for offenders," but he considered it "another question altogether" whether "the elimination of basic procedural protections—and the substantially increased risk that innocent students will be punished—is a fair price to achieve that goal."[2]

Two years later, William Martinez, U.S. District Judge for the District of Colorado, observed how the policy changes detected by Saylor had transformed lawsuits related to campus discipline. Traditionally, he noted, this litigation was "as likely as not to arise from matters closer to the core of the academic process, such as cheating . . . or disruptive protests," as from allegations of sexual assault.[3] "More recently," he explained, "it appears that the overwhelming ma-

1. Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 572 (D. Mass. 2016).
2. *Id.*
3. Doe v. DiStefano, No. 16-cv-1789-WJM-KLM, 2018 U.S. Dist. LEXIS 76268, at *22 (D. Colo. May 7, 2018).

jority of academic discipline lawsuits arise from sexual misconduct allegations that in most cases could also be the basis of a felony prosecution."[4]

A nineteen-page letter from 2011 initiated this transformation. On April 4, 2011, the Department of Education's Office for Civil Rights ("OCR") issued a Title IX[5] "Dear Colleague" letter that set forth a number of specific procedures that federally funded colleges and universities[6] needed to use when adjudicating student-on-student sexual misconduct allegations.[7] Around the same time, OCR began to aggressively investigate large numbers of institutions for alleged Title IX violations.[8]

These developments did not occur in a vacuum. College-aged (18-to-24-year-old) women experience a higher rate of sexual assault than any other age or gender group.[9] Many do not report the offense to authorities, and many assailants, in turn, are not prosecuted.[10] New activist organizations, such as Know Your IX, SurvJustice, and End

4. *Id.*

5. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2012), provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." "Discrimination" under Title IX includes student-on-student sexual harassment, including sexual assault. *See infra* Section II.D.

6. We use college or university interchangeably to refer to four-year undergraduate institutions. We also discuss policies of dozens of institutions, which use differing terminology. For ease of analysis, we generalize the allegations as "sexual assault" or "sexual misconduct" and the findings as "guilty" or "not guilty."

7. *See* U.S. Dep't of Educ., Office for Civil Rights, Opinion Letter (Apr. 4, 2011) [hereinafter Ali, Dear Colleague letter].

8. When OCR first made public a list of higher education institutions under Title IX investigation in May 2014, there were fifty-five institutions under investigation. Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i. By January 2017, 223 institutions were under investigation. Nick Anderson, *At First, 55 Schools Faced Sexual Violence Investigations. Now the List Has Quadrupled*, WASH. POST (Jan. 18, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/at-first-55-schools-faced-sexual-violence-investigations-now-the-list-has-quadrupled.

9. *See* SOFI SINOZICH & LYNN LANGTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013 (2014), https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf. The study defines "sexual assault" as completed and attempted rape, completed and attempted sexual assault, and threats of rape or sexual assault. The Bureau of Justice Statistics study figure of 1 in 40 female undergraduates, however, is far below the figures cited to accompany the 2011 guidance.

10. *The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system (last visited July 27, 2019).

Rape on Campus, highlighted the stories of students who said they had survived campus sexual assault and who maintained that their schools, which were mostly elite colleges, had mishandled their cases.[11] The national media devoted unparalleled attention to the issue, almost exclusively from the perspective of campus victims.[12] High-profile surveys suggested that one of every five female undergraduates had experienced some form of sexual assault while enrolled in school.[13]

Apart from a small number of civil libertarians and journalists,[14] and groups of law professors at Cornell, Harvard, and the University of Pennsylvania ("Penn"),[15] concerns about the rights of students ac-

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11. *See, e.g.*, Kristin Jones, *Lax Enforcement of Title IX in Campus Sexual Assault Cases,* CTR. FOR PUB. INTEGRITY, https://www.publicintegrity.org/2010/02/25/4374/lax-enforcement-title-ix-campus-sexual-assault-cases-0 (last updated Mar. 26, 2015, 4:42 PM).

12. *See, e.g.*, Katie J.M. Baker, *Rape Victims Don't Trust the Fixers Colleges Hire to Help Them*, BUZZFEED NEWS (Apr. 25, 2014, 11:35 AM), https://www.buzzfeednews.com/article/katiejmbaker/rape-victims-dont-trust-the-fixers-colleges-hire-to-help-the; Tyler Kingkade, *Amherst College Sexual Assault Policies Treat Alleged Rapists Better than Laptop Thieves*, HUFFPOST, https://www.huffingtonpost.com/2013/12/15/amherst-college-sexual-assault-policies_n_4402315.html (last updated Jan. 25, 2014); Richard Pérez-Peña, *At Yale, the Collapse of a Rhodes Scholar Candidacy*, N.Y. TIMES (Jan. 26, 2012), https://www.nytimes.com/2012/01/27/sports/ncaafootball/at-yale-the-collapse-of-a-rhodes-scholar-candidacy.html.

13. CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT (2017); Nick Anderson & Scott Clement, *1 in 5 College Women Say They Were Violated*, WASH. POST (June 12, 2015), http://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated.

14. *See, e.g.*, Richard Dorment, *Occidental Justice: The Disastrous Fallout when Drunk Sex Meets Academic Bureaucracy*, ESQUIRE (Mar. 25, 2015), https://www.esquire.com/news-politics/a33751/occidental-justice-case; Robby Soave, *How an Influential Campus Rape Study Skewed the Debate*, REASON (July 28, 2015, 3:00 PM), https://reason.com/blog/2015/07/28/campus-rape-stats-lisak-study-wrong; Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 11:53 PM), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html; Cathy Young, *Columbia Student: I Didn't Rape Her*, DAILY BEAST, https://www.thedailybeast.com/columbia-student-i-didnt-rape-her (last updated July 12, 2017, 2:53 PM).

15. Groups of law professors at Cornell, Harvard, and Penn have all expressed profound concern over what they perceive as a lack of concern for accused students' procedural rights in campus sexual misconduct adjudications. *See* Brief for Cornell Law School Professors as Amici Curiae Supporting Petitioner-Appellant John Doe at 4, Doe v. Cornell Univ., 80 N.Y.S.3d 695 (N.Y. App. Div. 2018) (No. 526013) ("This Court has an important role to play in ensuring that Cornell and other educational institutions . . . honor their commitments to provide important procedural protections, like the one at issue here, to students involved in campus sexual assault proceedings."); Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 14, 2014, 9:00 PM), https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html ("Harvard has adopted procedures for deciding cases of alleged sexual misconduct which lack the most basic elements of fairness and due process, are overwhelm-

cused in the altered environment at first received scant attention. Indeed, campus criticism of the new regime could carry considerable professional risk. After penning a *Chronicle of Higher Education* article titled "Sexual Paranoia Strikes Academe,"[16] Northwestern professor Laura Kipnis—herself a liberal feminist—was subjected to a Title IX investigation, which continued until she published a second piece in the *Chronicle* decrying her "Title IX Inquisition."[17]

This political, media, and activist pressure would have tested the strength of any system of adjudication. But the campus system was particularly vulnerable. Published in 1998, the foundational work on the subject, *The Shadow University*, exposed the meager rights that campus proceedings provided to accused students long before 2011.[18] Most campus systems lack independent adjudicators, minimize the accused student's right to cross-examination and legal representation, rely on evidence that the parties disclose voluntarily, and do not require schools to turn over exculpatory evidence.[19] The post-2011 environment featured one factor not present in *The Shadow University*—unelected bureaucrats who threatened the loss of federal funds if a school's "immediate and effective steps to end sexual harassment and sexual violence" did not conform to the administration's policy preferences.[20] Amid these threats, a college could plausibly have feared that a campus Title IX system that returned too many not-guilty findings could financially destabilize the school, by signaling that it was not conforming to federal policy preferences.

Unlike the criminal justice system, the Title IX system cannot send a student to jail.[21] But even so, a guilty finding has life-altering

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ingly stacked against the accused, and are in no way required by Title IX law or regulation."); Open Letter from Members of the Penn Law School Faculty 1 (Feb. 18, 2015), http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf ("We do not believe that providing justice for victims of sexual assault requires subordinating so many protections long deemed necessary to protect from injustice those accused of serious offenses.").

16. Laura Kipnis, *Sexual Paranoia Strikes Academe*, CHRON. HIGHER EDUC. (Feb. 27, 2015), http://laurakipnis.com/wp-content/uploads/2010/08/Sexual-Paranoia-Strikes-Academe.pdf.

17. Laura Kipnis, *My Title IX Inquisition*, CHRON. HIGHER EDUC. (May 29, 2015), http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf.

18. ALAN KORS & HARVEY SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES (1999).

19. *Id.* at 4–5; *see* Ali, Dear Colleague letter, *supra* note 7, at 12.

20. Ali, Dear Colleague letter, *supra* note 7.

21. Campus proceedings can, however, provide police and prosecutors with evidence that could be used in criminal proceedings, heightening concerns about the lack of due process—particularly, the lack of adequate representation—in such cases. *See* Jake New, *Making Title IX Work*, INSIDE HIGHER ED (July 6, 2015), https://www

consequences: the lost value of paid tuition and opportunity cost of time in college; suspension or expulsion in an economy in which a college degree confers enormous earning potential; likely loss of any future job or appointment that uses a background check; and status as a social outcast among the student's former peers—and increasingly, the broader society. The U.S. Court of Appeals for the Sixth Circuit acknowledged as much, writing that a student found responsible for sexual misconduct "'may face severe restrictions, similar to being put on a sex offender list, that curtail his ability to gain a higher education degree' . . . Thus, the effect of a finding of responsibility for sexual misconduct on 'a person's good name, reputation, honor, or integrity' is profound."[22]

It is no surprise, then, that students wrongfully found guilty (as well as students whose guilty findings may have been justified but were obtained without a fair procedure) have turned to the courts. Only a court ruling, or a legal settlement, can expunge their disciplinary records and restore their future prospects. Somewhat more surprising, however, has been the response from the federal judiciary. Stepping back from the traditional deference on campus disciplinary matters, courts have increasingly intervened, perhaps startled by the indifference to fairness and the pursuit of truth of academic institutions that in all other capacities champion both concepts.

This Article primarily analyzes this rapidly evolving body of law[23] by 1) discussing changes in the way courts consider campus procedures; 2) critiquing where courts have come up short; and 3)

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.insidehighered.com/news/2015/07/06/college-law-enforcement-administrators-hear-approach-make-title-ix-more-effective (detailing how, in a case involving a University of Wisconsin student, "[p]olice subpoenaed the Title IX records of the hearing and were able to use that as evidence against the student" in preparing criminal charges).

22. Doe v. Miami Univ., 882 F.3d 579, 600 (6th Cir. 2018) (citation omitted); *see also* Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 573 (D. Mass. 2016) (noting that campus Title IX proceedings leave students "marked for life as a sexual predator").

23. At the same time as the legal landscape is rapidly shifting, the regulatory landscape has begun to shift as well. In November 2018, the Department of Education issued a Notice of Proposed Rulemaking containing proposed new Title IX regulations that would change the way schools must adjudicate claims of sexual misconduct. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) [hereinafter Proposed Title IX Regulations]. Among other things, the proposed regulations would require schools to afford students a live hearing with an opportunity, through an advisor, to cross-examine one another. Because this article concerns the evolving case law surrounding due process on campus, we will not address the regulations in great detail here. Among other things, those regulations concern only Title IX adjudications, and the due process considerations that arise in campus sexual misconduct proceedings are equally pressing in the context of non-sexual misconduct cases involving potential suspension or expulsion.

discussing the judiciary's role on these issues going forward. We open with historical background before providing a statistical analysis of the post-Dear Colleague letter lawsuits from accused students. We then discuss rulings in the three primary areas in which federal courts have advanced accused students' lawsuits: due process, breach of contract, and Title IX. We respond to critiques of our thesis before concluding with a description of possible patterns for future decisions on this issue.

## I.
## Background

### *A. Case Law Prior to 2011*

Before 2011, decisions about the procedural rights of students accused of sexual misconduct were few and far between, with no discernable pattern in the rulings. Campus administrators, according to a 1993 survey from the National Association of College and University Attorneys, considered student-on-student sexual assault "hands down the most difficult issue that comes up" in their jobs.[24] In 1994, a court ordered Middlebury College to expunge the record of a student who the college had found guilty of an offense ("Disrespect for Persons"), reasoning that the college should have better informed the student of the disciplinary charges brought against him.[25] The next year, however, Valparaiso University prevailed in a lawsuit filed by an accused student that claimed the university had not granted him a fair hearing.[26] In 1997, SUNY Cobleskill was denied summary judgment on an accused student's claim that he was denied due process because he had no opportunity to submit questions for his accuser.[27] The same year, Brown settled a lawsuit from Adam Lack, whom it had found guilty of sexual assault, and released a statement expressing regret

24. Lisa Tenerowicz, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. Rev. 653, 659 n.33 (2001).

25. Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 246–47 (D. Vt. 1994).

26. Bob Brown, *Valparaiso University Rape Case Suit Dismissed*, NWI.com (Jan. 25, 1995), https://www.nwitimes.com/uncategorized/valparaiso-university-rape-case-suit-dismissed/article_%20af3aad33-eeea-5bb7-a7d7-e3f7e1ff3af7.html (reporting on Doe v. Hersemann, No. 2:93-cv-00292 (N.D. Ind. Jan. 24, 1995)). The accused student complained that the university adjudicator had failed to call witnesses he had recommended and had engaged in *ex parte* conversations with the complainant. *Id.*

27. Donohue v. Baker, 976 F. Supp. 136, 147 (N.D.N.Y. 1997). For the reluctance of courts to involve themselves in this general issue throughout the 1990s, see A. v. C. Coll., 863 F. Supp. 156 (S.D.N.Y. 1994).

"that its disciplinary system was unable to resolve the dispute between the parties satisfactorily."[28]

The policy environment changed in 1997, when OCR issued guidance requiring colleges and universities to adjudicate allegations of sexual assault: "In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis."[29] The guidance, reaffirmed in 2001, did not dictate specific procedures that institutions should use in adjudicating sexual assault claims.[30] These new OCR policies did not substantially change the legal environment,[31] and courts continued to differ on the appropriate role of the judiciary in ensuring fair procedures in Title IX tribunals. In the most important university victory from this era, *Gomes v. University of Maine System*, the court granted summary judgment to the University of Maine in a lawsuit filed by two accused students.[32] The opinion sought a "middle ground" between a recognition that "a university is not a court of law" and the need for "a public university student who is facing serious charges of misconduct that expose him to substantial sanctions [to] receive a fundamentally fair hearing"—but mostly deferred to the university's decisionmaking process.[33] Reasoning that a fair hearing need not "follow the traditional common law adversarial method," the court held that "due process in the context of academic discipline does not necessarily require students be given a list of witnesses and exhibits prior to the hearing," nor a right to legal representation in the proceedings.[34] The decision also rejected the students' arguments that the allegation against them required more robust proce-

28. *All Parties in Lack Case Agree to Settlement Ending Legal Proceedings*, BROWN UNIV. NEWS BUREAU (Dec. 31, 1997), http://www.brown.edu/Administration/News_Bureau/1997-98/97-063.html.

29. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13, 1997) [hereinafter 1997 OCR Guidance].

30. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512 (Jan. 19, 2001) [hereinafter 2001 OCR Guidance]. As a result, the guidance had little direct impact on how colleges handled sexual assault adjudications. *See* R. Shep Melnick, *The Department of Education's Proposed Sexual Harassment Rules: Looking Beyond the Rhetoric,* BROOKINGS: BROWN CTR. CHALKBOARD (Jan. 24, 2019), https://www.brookings.edu/blog/brown-center-chalkboard/2019/01/24/the-department-of-educations-proposed-sexual-harassment-rules-looking-beyond-the-rhetoric.

31. The Second Circuit did cite the 2001 guidance in denying an appeal from a University of Vermont Law student, who claimed the school had improperly disciplined him for an alleged sexual assault that had occurred before the start of classes. *See* Vaughan v. Vt. Law Sch., Inc., 489 F. App'x 505, 506 (2d Cir. 2012).

32. Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6 (D. Me. 2005).

33. *Id.* at 16.

34. *Id.* at 23.

dures than would be the case if they faced a plagiarism claim: "Under a due process analysis, distinguishing between charges of academic dishonesty and sexual assault slices too thin."[35]

By contrast, the era's highest-profile victory for an accused student came in a lawsuit against the University of the South.[36] The school found the student guilty after providing him with the complaint forty-five minutes before his disciplinary hearing; it never gave him a copy of the investigation file, including exculpatory evidence.[37] The court denied summary judgment to both sides on this record but articulated a more robust judicial role than that offered by the *Gomes* court. The decision rebuked the university for "regard[ing] its disciplinary proceedings as . . . immune from all but the most cursory judicial review," adding that when "proceedings involve actual punishment as opposed to making purely academic judgments, the Court's inquiries are even more searching."[38] At trial, a jury found for the accused student on his negligence claim—but only awarded him a semester's lost tuition. The outcome showed why later lawsuits from accused students would have scant attractiveness for lawyers working on contingency.[39]

Rulings such as these stood out because of their rarity. Then, four days after the *University of the South* opinion, the federal government revolutionized the campus Title IX adjudication system.

### *B. 2011 Policy Changes and a New Campus Environment*

The 2011 Dear Colleague letter,[40] supplemented in 2014 by a forty-six-page document titled *Questions and Answers on Title IX and Sexual Violence*,[41] responded to a belief that the nation's campuses

35. *Id.* at 24.

36. Doe v. Univ. of the S., No. 4:09-cv-62, 2011 U.S. Dist. LEXIS 35166 (E.D. Tenn. Mar. 31, 2011).

37. Brett A. Sokolow, *The Important Lessons of John Doe v. The University of the South (Sewanee)*, Ass'n Title IX Admins.' Blog (Oct. 14, 2011), https://atixa.wordpress.com/2011/10/14/the-important-lessons-of-john-doe-v-the-university-of-the-south-sewanee/.

38. *Univ. of the S.*, 2011 U.S. Dist. LEXIS 35166, at *34–35.

39. By contrast, lawsuits filed by complainants have yielded settlements in the high six-figure or low seven-figure range. *See* Tatiana Schlossberg, *UConn to Pay $1.3 Million to End Suit on Rape Cases*, N.Y. Times (July 18, 2014), https://www.nytimes.com/2014/07/19/nyregion/uconn-to-pay-1-3-million-to-end-suit-on-rape-cases.html; Marc Tracy, *Florida State Settles Suit over Jameis Winston Rape Inquiry,* N.Y. Times (Jan. 25, 2016), https://www.nytimes.com/2016/01/26/sports/football/florida-state-to-pay-jameis-winstons-accuser-950000-in-settlement.html.

40. Ali, Dear Colleague letter, *supra* note 7.

41. Office for Civil rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [hereinafter OCR 2014 Q&A].

faced an epidemic of sexual assault. President Barack Obama himself stated that "it is estimated that 1 in 5 women on college campuses has been sexually assaulted during their time there—1 in 5."[42] At the time of the policy change, there were slightly more than ten million female undergraduate students.[43]

Every significant procedural change created by the Dear Colleague letter (which, unlike the 2001 guidance,[44] was issued without notice or the opportunity for public comment) increased the likelihood of a guilty finding. Schools needed to reduce the standard of proof to a "preponderance of the evidence" (meaning more likely than not, or approximately 50.01% proof) in sexual assault adjudications—even if the institution used a higher standard for other, non-sexual offenses (including physical assault).[45] A study from the Foundation for Individual Rights in Education ("FIRE") found that as of April 2011, thirty-nine of the nation's top hundred colleges and universities did not use a preponderance standard in handling sexual assault allegations.[46] Some of those institutions used a "no evidentiary standard" or one that did not align with any of the traditional evidentiary standards. Other institutions used a higher standard of proof (mostly "clear and convincing evidence," which is approximately eighty percent proof).[47] By 2016, all of these schools adopted the preponderance standard.[48] Although the distinction between these evidentiary standards in a campus proceeding might seem primarily academic, the requirement that schools adopt a lower standard (particularly where they were previously using a higher one) sent a message to campus fact-finders and

42. Glen Kessler, *One in Five Women in College Sexually Assaulted: The Source of This Statistic*, WASH. POST (May 1, 2014), https://www.washingtonpost.com/news/fact-checker/wp/2014/05/01/one-in-five-women-in-college-sexually-assaulted-the-source-of-this-statistic.

43. *Undergraduate Enrollment*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/coe/indicator_cha.asp (last updated May 2019).

44. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, at i (2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf ("The guidance was the product of extensive consultation with interested parties, including students, teachers, school administrators, and researchers. We also made the document available for public comment."). *See generally* Ali, Dear Colleague letter, *supra* note 7.

45. Ali, Dear Colleague letter, *supra* note 7.

46. *Standard of Evidence Survey: Colleges and Universities Respond to OCR's New Mandate*, FIRE (Oct. 28, 2011), https://www.thefire.org/standard-of-evidence-survey-colleges-and-universities-respond-to-ocrs-new-mandate.

47. *Id*.

48. *See Spotlight on Due Process 2017*, FIRE, https://www.thefire.org/due-process-report-2017 (last visited July 27, 2019) [hereinafter *Spotlight on Due Process 2017*].

disciplinarians, intentionally or not, that they were expected to lean more towards the accuser and against the accused.[49]

The guidance also required all schools whose procedures featured some type of appeals process (as virtually all did) to allow complainants to appeal not-guilty findings.[50] Defenders of this provision analogized campus sexual assault adjudications to civil litigation, where both parties can appeal.[51] This analogy glosses over the dramatic differences between campus adjudications and civil proceedings in a court of law, where far more robust procedural protections exist as a counterbalance to the lower standard of evidence.[52] Due process advocates, for their part, pointed out the similarities between the dual right of appeal and "double jeopardy," noting the parallels between campus sexual assault proceedings and criminal trials.[53]

The Supreme Court has described cross-examination as the "greatest legal engine ever invented for the discovery of truth,"[54] but OCR's 2011 guidance "strongly" discouraged allowing the accused student to cross-examine the accusing student.[55] This provision effectively discouraged any cross-examination, since most schools prevent a lawyer or any other representative from speaking on behalf of either party at a hearing.[56] The 2014 Q&A document mostly affirmed the principles laid down in 2011, but also suggested that allowing direct

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49. *See* Conor Friedersdorf, *What Should the Standard of Proof Be in Campus Rape Cases*?, ATLANTIC (June 17, 2016), https://www.theatlantic.com/politics/archive/2016/06/campuses-sexual-misconduct/487505. As discussed by Friedersdorf,

> under a "preponderance of the evidence" standard, an adjudicator who finds against an accuser is arguably saying that it's more likely than not that he or she is lying (though it is technically possible that the evidence is split right down the middle). I suspect that will cause many adjudicators to feel some pressure, if only self-imposed, to render verdicts that validate the claims of accusers . . . .

*Id.*; *see also* Ali, Dear Colleague letter, *supra* note 7, at 10–11.

50. Ali, Dear Colleague letter, *supra* note 7, at 12.

51. *See* CHRIS LOSCHIAVO & JENNIFER L. WALLER, ASS'N FOR STUDENT CONDUCT ADMIN., THE PREPONDERANCE OF EVIDENCE STANDARD: USE IN HIGHER EDUCATION CAMPUS CONDUCT PROCEDURES, https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf (last visited Oct. 3, 2019).

52. *See* Joe Cohn, *Campus Is a Poor Court for Students Facing Sexual-Misconduct Charges*, CHRON. HIGHER EDUC. (Oct. 1, 2012), https://www.chronicle.com/article/Campus-Is-a-Poor-Court-for/134770 (detailing "the laundry list of procedural safeguards present in civil trials but absent in sexual misconduct hearings").

53. *See, e.g.*, Andrew Kloster, *The Violence Against Women Act and Double Jeopardy in Higher Education*, 65 STAN. L. REV. ONLINE 62 (2012).

54. California v. Green, 399 U.S. 149, 158 (1930) (quoting 5 J. WIGMORE, EVIDENCE § 1367).

55. Ali, Dear Colleague letter, *supra* note 7, at 12.

56. *See Spotlight on Due Process 2017*, *supra* note 48, at 4–7.

cross-examination by the accused student could, in and of itself, "perpetuate a hostile environment" and thus risk a Title IX violation.[57]

A 2017 FIRE study, which examined the procedures of the nation's top fifty-three colleges and universities (according to *U.S. News & World Report*), found that 60.4% did not provide accused students with a meaningful right to cross-examination.[58] Moreover, several institutions—including Brandeis, Brown, Lehigh, the University of Michigan, Penn, Princeton, Tufts, the University of Southern California, and several branches of the University of California system—allowed students accused of other offenses to cross-examine witnesses but denied that right to students accused of sexual misconduct.[59] A survey of thirty-six institutions by Miami University Law Professor Tamara Rice Lave reached similar results, with one in three schools providing no mechanism at all for the accused student to pose questions to the accuser.[60]

The Dear Colleague letter did not explain why OCR imposed the procedures that it did. In 2016, then-OCR head Catherine Lhamon cited a single pre-2011 resolution letter involving one university, Georgetown in 2003, in which OCR required adjudicating student-on-student sexual assault complaints under the preponderance of evidence standard.[61] Perhaps the most candid explanation for the choices in the new guidance came in 2017 from Senator Patty Murray (D-Washing-

57. OCR 2014 Q&A, *supra* note 40, at 31.

58. *See Spotlight on Due Process 2017*, *supra* note 48, at 9. According to the report, cross-examination is meaningful when the respondent has

> [t]he ability to pose relevant questions to witnesses, including the complainant, in real time, and respond to another party's version of events. If questions are relayed through a panel or chairperson, there must be clear guidelines setting forth when questions will be rejected, and the reason for refusing to pose any rejected question should be documented.

*Id.* at 3.

59. *Id*. at 9.

60. *See* Tamara Rice Lave, *A Critical Look at How Top Colleges and Universities are Adjudicating Sexual Assault*, 71 MIAMI L. REV. 377, 396 (2017). Many schools in the latter category used a "single-investigator" model, in which one person, with no hearing, interviews the parties, reviews other evidence, and then determines guilt. A 2014 Obama administration report hailed the "very positive results" of this model, which by its design ensures that no cross-examination occurs, but which the administration suggested "encourage[s] reporting and bolster[s] trust in the process, while at the same time safeguard[s] an alleged perpetrator's right to notice and to be heard." WHITE HOUSE, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 3, 14 (2014), https://www.justice.gov/ovw/page/file/905942/download.

61. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Senator James Lankford (Feb. 17, 2016) (on file with authors). Lhamon also cited a second resolution letter (Evergreen State College), but that case involved an allegation against a professor, not a student.

ton), who contended that "[t]he standard of proof guidance provided in the [2011] letter has led to more women and men coming forward about their sexual violence experiences."[62] Murray's suggestion sounds plausible, but no data suggest that awareness of a school's Title IX standard of proof (or other adjudication procedures) factors into reporting decisions by students.[63]

OCR also advanced its policy goals through Title IX investigations of individual schools.[64] In a critical move, Lhamon authorized OCR to investigate not merely the case that generated the initial complaint, but all sexual assault adjudications at the school for a three-year span—significantly upping the burden (financial and otherwise) for a university under investigation, even if the school had done nothing wrong.[65] As Professors Jacob Gersen and Jeannie Suk Gersen observed, "The transformation of the Title IX grievance procedure over several decades wrought a corresponding transformation in the OCR's job of oversight. No longer was it simply monitoring whether schools were engaging in discriminatory acts. Rather, OCR's task became specifying . . . schools' policies, procedures, and organizational forms."[66]

In 2014, a University of Maine administrator conceded that this federal pressure made inevitable a rush to judgment on individual allegations. "I expect that that can't help but be true," Dean Robert Dana told National Public Radio ("NPR"). "Colleges and universities are

62. Press Release, U.S. Senate Comm. on Health, Educ., Labor & Pensions, Murray Urges DeVos Not to Undermine Campus Sexual Violence Survivors, Instead Suggests Steps DeVos Should Take to Support and Protect Survivors (Sept. 6, 2017), https://www.help.senate.gov/ranking/newsroom/press/murray-urges-devos-not-to-undermine-campus-sexual-violence-survivors-instead-suggests-steps-devos-should-take-to-support-and-protect-survivors-; *see also* Michelle Hackman, *New Education Department Rules to Change Procedures for Campus Sexual-Assault Cases*, WALL STREET J., (Oct. 31, 2018, 6:37 PM), https://www.wsj.com/articles/new-education-department-rules-to-change-procedures-for-campus-sexual-assault-cases-1541025460 (quoting former Justice Department official Anurima Bhargava, who stated, "If someone tells their story and then they need to be questioned on it, that can be an incredibly invasive and traumatizing experience.").

63. MATT J. GRAY ET AL., SEXUAL ASSAULT PREVENTION ON COLLEGE CAMPUSES 75 (2016).

64. *Title IX: Tracking Sexual Assault Investigations*, CHRON. HIGHER EDUC., https://projects.chronicle.com/titleix (last visited July 28, 2019).

65. Tyler Kingkade, *The Trump Administration Inherited Hundreds of Unresolved Title IX Complaints*, BUZZFEED NEWS (Mar. 6, 2017, 10:30 AM), https://www.buzzfeed.com/tylerkingkade/heres-why-so-many-title-ix-complaints-are-taking-years-to-be.

66. Jacob Gersen & Jeannie Suk Gersen, *The Sex Bureaucracy*, 104 CAL. L. REV. 881, 902 (2016).

getting very jittery about it."[67] Since campus disciplinary processes do not generally provide robust protections for accused students,[68] Dana's comment likely would have applied to any campus issue for which the federal government aggressively urged a crackdown.[69] The federal pressure, however, imposed a particular risk for wrongful findings in sexual assault adjudications for two reasons.

First, in adjudications of sexual misconduct, colleges too often lack the tools to gather the evidence necessary to reach the truth.[70] Colleges cannot compel witness testimony (or, indeed, even the complainant's testimony).[71] They cannot subpoena text messages, phone records, video evidence, or photographs.[72] Police might be forbidden to disclose relevant evidence, even exculpatory evidence, obtained in a concurrent criminal investigation. Colleges often choose to provide summaries of evidence, prepared by an investigator, rather than the transcripts of interviews themselves—producing decisions based on incomplete evidentiary records.[73]

Second, conflicts of interest can undermine the fair treatment of accused students in campus sexual misconduct proceedings. Scholar Stephen Henrick listed three principal areas of concern—financial, careerist, and reputational—with the post-Dear Colleague letter regime.[74] Any not-guilty finding runs the risk of the complainant filing

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67. Tovia Smith, *Some Accused of Sexual Assault on Campus Say System Works Against Them*, NPR (Sept. 3, 2014, 3:31 AM), https://www.npr.org/2014/09/03/345312997/some-accused-of-campus-assault-say-the-system-works-against-them.

68. *See Spotlight on Due Process 2017*, *supra* note 48, at 9 (highlighting the lack of due process protections in non-sexual misconduct procedures).

69. KORS & SILVERGLATE, *supra* note 18, at 289–311.

70. By contrast, in addressing allegations of academic misconduct, the faculty member bringing the claim would supply for the hearing panel or the adjudication officer the most significant evidence—the allegedly plagiarized paper, the exam on which cheating allegedly occurred—as a matter of course.

71. *See* Doe v. Univ. of Cincinnati, 872 F.3d 393, 405 (6th Cir. 2017); Nokes v. Miami Univ., No. 1:17-cv-482, 2017 U.S. Dist. LEXIS 136880, at *38–39 (S.D. Ohio Aug. 25, 2017).

72. At some institutions, the campus police force has powers equivalent to a local police force. *See*, *e.g.*, *Frequently Asked Questions*, DUKE CAMPUS POLICE, https://police.duke.edu/faq (last visited July 28, 2019) ("Duke police officers are University employees, commissioned by the state of North Carolina. They have authority to carry weapons, issue citations and make arrests just like municipal officers."). The lawsuits in this Article do not involve cases initiated by campus police forces, but rather by university administrators who do not have such legal powers.

73. *See, e.g.*, Doe v. George Washington Univ., 321 F. Supp. 3d 118, 125 (D.D.C. 2018); Doe v. Amherst Coll., 238 F. Supp. 3d. 195, 202–03 (D. Mass. 2017); Doe v. Univ. of Notre Dame, No. 3:17CV298-PPS/MGG, 2017 WL 1836939, at *9 (N.D. Ind. May 8, 2017), *vacated*, 2017 WL 7661416 (N.D. Ind. Dec. 27, 2017).

74. Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 81–83 (2013).

an OCR complaint. Administrators who face protests from campus victims or their faculty allies could risk future advancement. And in the current environment, virtually any university seen as indifferent to the plight of campus victims risks bad publicity.[75] To this list could be added a bureaucratic issue: the explosion of Title IX officials hired by colleges and universities since 2011 creates a subtle pressure to bring forth as many allegations as possible, since increased reporting conveys the officials' success in changing campus culture.[76]

There are numerous examples of how university self-interest can distort fairness in campus proceedings. Baylor University responded with (at best) indifference to many sexual assault allegations against members of its football team, which had generated millions of dollars annually for the university.[77] It took more than fifteen years after receiving the first complaint for Michigan State to investigate Dr. Larry Nassar, whose presence on its faculty brought the prestige of his affiliation with USA Gymnastics.[78] The university's first investigation then cleared Nassar, who would ultimately be convicted of molesting hundreds of women and girls.[79] With federal funds at stake, the same financial pressures that lead some universities to sweep accusations of sexual assault under the rug can lead others to abandon basic fairness for those accused of the offense, as can pressure from faculty, students, and community activists.[80]

In retrospect, the wave of procedurally questionable findings in post-2011 adjudications could have been foreseen. As Harvard Law Professor Nancy Gertner, a former federal judge, has written, the "new standard of proof, coupled with the media pressure, effectively create[d] a presumption in favor of the woman complainant. If you find against her, you will see yourself on 60 Minutes or in an OCR investi-

75. *Id.* at 82–83.

76. Harry Painter, *Title IX Compliance and Then Some*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Apr. 4, 2014), https://www.jamesgmartin.center/2014/04/title-ix-compliance-and-then-some.

77. Jessica Luther & Dan Solomon, *Silence at Baylor*, TEX. MONTHLY (Aug. 20, 2015), https://www.texasmonthly.com/article/silence-at-baylor.

78. Tim Evans et al., *How Larry Nassar Abused Hundreds of Gymnasts and Eluded Justice for Decades*, INDYSTAR, https://www.indystar.com/story/news/2018/03/08/larry-nassar-sexually-abused-gymnasts-michigan-state-university-usa-gymnastics/339051002 (last updated Apr. 4, 2018, 12:59 PM).

79. *Who Is Larry Nassar?*, LANSING ST. J., https://www.lansingstatejournal.com/pages/interactives/larry-nassar-timeline (last visited July 28, 2019).

80. *See* STUART TAYLOR JR. & KC JOHNSON, UNTIL PROVEN INNOCENT 144–48 (2007) (describing pressure from a group of Duke University faculty calling themselves the "Group of 88" to punish Duke lacrosse players wrongly accused of rape).

gation where your funding is at risk. If you find for her, no one is likely to complain."[81]

## II.
## 2011-Present: The Judiciary Takes Notice

Reversing the previously slow pace of litigation, the years since the 2011 Title IX policy changes have featured at least 347 federal lawsuits, and more than 150 in state courts.[82] Colleges have more often than not been on the losing side of these rulings. Even their victories typically reflect not judicial confidence in the integrity of campus Title IX processes, but the traditional deference courts give to internal university proceedings. In the first ruling in favor of a university after the Dear Colleague letter, for instance, a district court held for the University of Montana—and then added, "From a normative perspective, the process applied to [the accused student] and the behavior of University officials in investigating and prosecuting this matter offends the Court's sense of fundamental fairness and appears to fall short of the minimal moral obligation of any tribunal to respect the rights and dignity of the accused."[83]

The record of university setbacks has generated comments even from figures not known as spokespersons for accused students on campus. In April 2016, Gary Pavela, a longtime educational consultant and fellow for the National Association of College and University Attorneys (NACUA), observed, "In over 20 years of reviewing higher education law cases, I've never seen such a string of legal setbacks for universities, both public and private, in student conduct cases. Something is going seriously wrong. These precedents are unprecedented."[84] A 2017 white paper from the National Center for Higher

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81. Nancy Gertner, *Sex, Lies, and Justice*, Am. Prospect (Jan. 12, 2015), https://prospect.org/article/sex-lies-and-justice.

82. Samantha Harris & KC Johnson, Lawsuits Filed by Students Accused of Sexual Misconduct, 4/4/2011 Through 6/17/2019, https://docs.google.com/spreadsheets/d/e/2PACX-1vQNJ5mtRNzFHhValDrCcSBkafZEDuvF5z9qmYneXCi0UD2NUaffHsd5g4zlmnIhP3MINYpURNfVwSZK/pubhtml# (last updated Oct. 16, 2019) [hereinafter Harris & Johnson, Database]. Around ninety-five percent of these complaints involved allegations of sexual assault, at least according to the university's code. The other complaints centered on allegations of dating violence or speech- or conduct-related sexual harassment. All the lawsuits stemmed from cases adjudicated through the school's Title IX-related disciplinary procedures.

83. Doe v. Univ. of Mont., No. 9:12-cv-00077-DLC, at 12 (D. Mont. May 10, 2012) (order denying motion for temporary restraining order).

84. Jake New, *Out of Balance*, Inside Higher Ed (Apr. 14, 2016), https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault. Pavela added, "University sexual misconduct

Education Risk Management (NCHERM), which sells sexual assault investigation/adjudication/consulting services to schools across the country, similarly concluded that universities are "losing case after case in federal court on what should be very basic due process protections. Never before have colleges been losing more cases than they are winning, but that is the trend as we write this."[85] In 2019, Stanford Law Professor Michele Dauber, a strong supporter of complainants' rights, denounced the "unfortunate" trend in judicial decisions even as she conceded that the courts were "opening the floodgates to second-guessing institutional decisions" on Title IX adjudications.[86]

### *A. Case Law by the Numbers*

As of August 16, 2019, no fewer than 298 of the post-Dear Colleague letter lawsuits (191 in federal court) have yielded substantive decisions, at various stages of the legal process.[87] District courts in the Third, Fourth, and Sixth Circuits have produced the most rulings in favor of an accused student; courts in the Sixth Circuit have featured the most rulings overall (39) on this issue.[88] Among lawsuits filed after January 1, 2015, judges permitted the accused student to file under a pseudonym (usually John Doe) slightly more than two-thirds of the time—an unintentional reminder of the secrecy of campus proceedings, but also the stigma associated with even a false allegation of sexual assault.[89] Judges nominated by Barack Obama, George W. Bush, and Bill Clinton have made most of the decisions in these law-

policies are losing legitimacy in the eyes of the courts. That's a disaster for Title IX enforcement. And OCR shares ample responsibility for it." *Id.*

85. NEDDA BLACK ET AL., THE 2017 NCHERM GROUP WHITEPAPER: DUE PROCESS AND THE SEX POLICE 2–3 (2017), https://cdn.tngconsulting.com/website-media/ncherm.org/unoffloaded/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf.

86. Serena Cho & Asha Prihar, *Montague Suit to Proceed to Trial*, YALE DAILY NEWS (Apr. 3, 2019, 1:16 AM), https://yaledailynews.com/blog/2019/04/03/montague-suit-to-proceed-to-trial.

87. KC Johnson, Outcomes/Latest Rulings in Post-Dear Colleague Letter Lawsuits, https://docs.google.com/spreadsheets/d/1vecZ0L6yuqlyaci2fA6F6vOE-cMOUkOpchZMqkCAW8c/edit#gid=0 (last visited Nov. 5, 2019) [hereinafter Johnson, Outcomes and Rulings].

88. KC Johnson, Federal Outcomes/Latest Rulings in Post-Dear Colleague Letter Lawsuits, https://docs.google.com/spreadsheets/d/1d_PSqO8eZGmw9ybh45DTeD4I7NGpLF8zajoQRAK3Frk/edit#gid=0 (last visited Nov. 5, 2019) [hereinafter Johnson, Federal Outcomes and Rulings].

89. *See, e.g.*, Doe v. N.Y. Univ., No. 1:19-cv-00744, at 2 (S.D.N.Y. Jan. 24, 2019) (granting plaintiff's application to proceed under a pseudonym because "[t]his lawsuit involves highly sensitive information regarding a sexual encounter and alleged assault. Disclosing the names of the Plaintiff and the alleged victim would constitute an invasion of privacy and presents a serious risk of damage to the reputations of both.").

suits; no meaningful statistical correlation exists between the outcome and who nominated the judge.[90]

The most striking statistical finding from the federal decisions database involves gender, which is the clearest predictor of how a judge will rule on a lawsuit from an accused student in a Title IX case. Universities have been on the losing side in fifty-three percent of the district court decisions from male judges, but only thirty-three percent of those made by female judges.[91]

The chronology of federal filings reflects the surging number of lawsuits overall. In the twenty-one months following the April 4, 2011 Dear Colleague letter, only seven federal lawsuits were filed, and 2013 brought just seven more complaints.[92] That figure jumped to twenty-five lawsuits in 2014; forty-five in 2015; forty-seven in 2016; and seventy-eight in 2017.[93] The 2018 calendar year featured an additional seventy-eight complaints; through August 16, 2019, fifty-eight federal complaints have been filed.[94]

Of the 298 decisions in state and federal court, colleges have been on the losing side in 151; they have prevailed in 134.[95] (Decisions in eleven cases were neutral or mixed; two rulings, along with all other filings in the cases, were sealed.) This list does not include at least seventy-four federal lawsuits that the institutions settled before the judge rendered any substantive decision in the case.[96] Schools settle for all sorts of reasons, and because settlement terms are typically confidential, it is difficult to read much into the settlement statistics.

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90. One exception to this pattern exists, involving Obama-nominated judges from the fifteen states, plus Washington, D.C., that the Democrats have carried in every presidential election since 2000. They have sided with accused students only forty-one percent of the time (in eleven of twenty-seven cases), and have produced some of the most aggressively pro-university rulings since 2011, the most notable of which are *Doe v. Loh*, No. PX-16-3314, 2018 U.S. Dist. LEXIS 53619 (D. Md. Mar. 29, 2018), *aff'd*, 767 F. App'x 489 (4th Cir. 2019); *Austin v. Univ. of Oregon*, 205 F. Supp. 3d 1214 (D. Or. 2016), *aff'd* 925 F.3d 1133 (9th Cir. 2019); *Yu v. Vassar College*, 97 F. Supp. 3d 448 (S.D.N.Y. 2015); and *Bleiler v. College of the Holy Cross*, No. 11-11541-DJC, 2013 U.S. Dist. LEXIS 127775 (D. Mass. Aug. 26, 2013).

91. *See* Johnson, Federal Outcomes and Rulings, *supra* note 88.

92. *See* Harris & Johnson, Database, *supra* note 82.

93. *Id.*

94. *Id*.

95. *See* Johnson, Outcomes and Rulings, *supra* note 87.

96. For a full listing, see KC Johnson, Pre-Decision Federal Settlements, https://docs.google.com/spreadsheets/d/1xPUcbL-JaNQqQMt1lszncDbVhwHt92eLaDPfuzEywtA/edit#gid=0 (last visited Nov. 5, 2019) [hereinafter KC Johnson, Settlements].

We do know, however, that sometimes the mere filing of a lawsuit has prompted fairer treatment for the student in question.[97]

Of the 151 decisions with colleges on the losing side, sixty came from state court.[98] Unlike the federal decisions, nearly all state court decisions represented a final judgment, setting aside the institutional discipline. Sometimes these decisions gave the university the option to subject the accused student to another, fairer, disciplinary hearing.[99] In other decisions, a state judge has prohibited the university from pursuing the matter again.[100]

California appellate courts in particular have shown concern with the unfairness of campus procedures at both public and private institutions. In an October 2018 decision regarding a case at UC Santa Barbara, a panel of the Second Appellate District found it "ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy."[101] The opinion concluded by noting, "The lack of due process in the hearing here precluded a fair evaluation of the witnesses' credibility. In this respect, neither [party] received a fair hearing."[102] Three months later, another panel of the same state appeals court deemed USC's Title IX procedures "incompatible" with an effort "to uncover the truth"; for the court, it was "virtually unavoidable" that the university's single-investigator model, which denied both a hearing and cross-examination, would produce a finding beset by "deficiencies."[103]

In the ninety-one federal court setbacks for colleges and universities, the most common outcome (forty-three) has been the college settling after losing a motion to dismiss (in one case, at Brandeis University, the student did not settle but voluntarily dismissed his claim after receiving a strongly favorable opinion denying the univer-

97. *See, e.g.*, Transcript of Proceedings at 13–14, Doe v. Univ. of Chicago, No. 1:17-cv-03781 (N.D. Ill. May 24, 2017), ECF No. 22. The judge commented that, after the filing of the lawsuit, the university had set aside the original disciplinary decision and reheard the case under the fairer procedures the accused student had requested.

98. *See* Harris & Johnson, Database, *supra* note 82.

99. *See, e.g.*, *In re* Jacobson v. Blaise, 69 N.Y.S.3d 419, 425–26 (N.Y. App. Div. 2018).

100. *See, e.g.*, Doe v. Skidmore Coll., 59 N.Y.S.3d 509, 517 (N.Y. App. Div. 2017); Doe v. Univ. of S. Cal., 246 Cal. App. 4th 221, 253 (2016); Mock v. Univ. of Tenn.-Chattanooga, No. 14-1687-II (Tenn. Ch. Ct. Aug. 4, 2015).

101. Doe v. Regents of the Univ. of Cal., 238 Cal. Rptr. 3d 843, 856 (Cal. Ct. App. 2018).

102. *Id*.

103. Doe v. Allee, 242 Cal. Rptr. 3d 109, 135–37 (Cal. Ct. App. 2019).

sity's motion to dismiss).[104] In twenty of the cases, a judge denied the school's motion to dismiss and the matter remains pending.[105] An accused student has successfully obtained either a preliminary injunction or a temporary restraining order in seventeen cases; two of those cases (University of Virginia, University of Michigan) are still ongoing, fourteen settled following the court's issuance of either a preliminary injunction or temporary restraining order (TRO), and one (Oklahoma City University) settled after the court later denied the university's motion to dismiss.[106]

It is much less common, but not unprecedented, for these cases to proceed to later stages of litigation. Seven university setbacks have come when federal courts denied the university's motion for summary judgment.[107] Four more came when the student outright prevailed either at summary judgment (George Mason University, George Washington University, James Madison University) or in a bench trial (Brown University).[108]

All but three[109] of the accused students' federal lawsuits have proceeded primarily on due process, breach of contract, and/or Title IX claims. These claims have been, however, supplemented by a wide range of legal theories including libel,[110] First Amendment,[111] equal protection,[112] false imprisonment,[113] malicious prosecution,[114] negligence,[115] negligent supervision,[116] defamation,[117] breach of implied

104. *See infra* Case Appendix, Table 1.A; Johnson, Federal Outcomes and Rulings, *supra* note 88.

105. *See infra* Case Appendix, Table 1.B.

106. *See id.* We have counted two additional cases in which an accused student obtained a TRO elsewhere in this database, after later rulings in the case went beyond the reasoning of the TRO ruling. Doe. v. Pa. State Univ., 276 F. Supp. 3d 300 (M.D. Pa. 2017); Doe v. Brown Univ., No. 2016-cv-17-S, 2016 U.S. Dist. LEXIS 191390 (D.R.I. Apr. 25, 2016).

107. *See infra* Case Appendix, Table 1.D. The universities settled all but one of these cases after their setbacks: the Boston College case is scheduled for trial in fall 2019.

108. *See infra* Case Appendix, Table 1.C.

109. Doe v. Loyola Univ. of Chi., No. 18-cv-7335, 2019 U.S. Dist. LEXIS 135925, at *5, *11 (N.D. Ill. Aug. 13, 2019) (granting motion to dismiss in part and denying in part and noting the university did not seek to dismiss the Title IX and breach of contract counts); Johnson v. W. State Colo. Univ., 71 F. Supp. 3d 1217 (D. Colo. 2014); Faiaz v. Colgate Univ., 64 F. Supp. 3d 336 (N.D.N.Y. 2014).

110. Wells v. Xavier Univ., 7 F. Supp. 3d 746, 749–50 (S.D. Ohio 2014).

111. *Johnson*, 71 F. Supp. 3d at 1229.

112. Doe v. Ohio State Univ., No. 2:16-cv-00171, slip op. at 10–13 (S.D. Ohio Aug. 20, 2018).

113. Faiaz v. Colgate Univ., 64 F. Supp. 3d 336, 356 (N.D.N.Y. 2014).

114. Gischel v. Univ. of Cincinnati, 302 F. Supp. 3d 961, 969 (S.D. Ohio 2018).

115. Doe v. Univ. of St. Thomas, 240 F. Supp. 3d 984, 994–95 (D. Minn. 2017).

116. Complaint at 2–3, Tsuruta v. Augustana Univ., No. 4:15-cv-04150 (D.S.D. Sept. 28, 2015), ECF No. 1-1.

covenant of good faith,[118] intentional infliction of emotional distress,[119] negligent infliction of emotional distress,[120] and promissory estoppel.[121]

The next several sections of the Article will analyze the decisions in which universities have been on the losing side, focusing on the three areas that have dominated this emerging body of law. We will return to the university victories in our final section.

### *B. Due Process*

Although he issued a ruling strongly siding with the University of Oregon, U.S. District Judge Michael McShane acknowledged the "great debate nationally with regard to the level of due process that colleges should be required to afford students accused of sexual misconduct."[122] The Fourteenth Amendment prohibits states (and, therefore, public universities) from depriving any person of "life, liberty, or property, without due process of law."[123] Most circuits have applied the reasoning of *Goss v. Lopez* and recognized that accused students at a public university have either a property interest ("The State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause"[124]), a liberty interest ("The Due Process Clause also forbids arbitrary deprivations of liberty . . . [School discipline] could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment"[125]), or both.[126] The relevant legal precedents, however, provide

117. Jackson v. Liberty Univ., No. 6:17-cv-00041, 2017 U.S. Dist. LEXIS 122104, at *28 (W.D. Va. Aug. 3, 2017).
118. Doe v. Rider Univ., No. 3:16-cv-4882, 2018 U.S. Dist. LEXIS 7592, at *39 (D.N.J. Jan. 17, 2018).
119. Doe v. Univ. of Chi., No. 16-cv-08298, 2017 U.S. Dist. LEXIS 153355, at *30 (N.D. Ill. Sept. 20, 2017).
120. Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d 799, 826 (E.D. Pa. 2017).
121. Schaumleffel v. Muskingum Univ., No. 2:17-cv-463, 2018 U.S. Dist. LEXIS 36350, at *52 (S.D. Ohio Mar. 6, 2018).
122. Austin v. Univ. of Or., No. 6:15-cv-2257 (D. Or. Nov. 16, 2017), ECF No. 80 (order denying defendants' motion for attorney fees).
123. U.S. CONST. amend. XIV, § 1.
124. Goss v. Lopez, 419 U.S. 565, 574 (1975).
125. *Id.* at 574–75.
126. *But see* Charleston v. Bd. of Trs. of the Univ. of Ill. at Chi., 741 F.3d 769, 772 (7th Cir. 2013) ("[O]ur circuit has rejected the proposition that an individual has a stand-alone property interest in an education at a state university."). For a general review of the issue, see Dalton Mott, Comment, *The Due Process Clause and Stu-*

uncertain guidance about the full extent of protections for college students accused of serious criminal behavior like sexual assault.

*Mathews v. Eldridge* sets out the basic framework for deciding due process claims in administrative procedures. The decision, which regularly has been applied to campus sexual assault lawsuits, identified "three distinct factors" to be used in evaluating due process claims:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[127]

Two Supreme Court decisions from the realm of administrative law understand due process requirements in a way that would dramatically enhance the rights of accused students. First, in *Greene v. McElroy*, a McCarthy-era case involving an aeronautical engineer who lost his security clearance because of his ex-wife's supposed Communist ties, the Court held that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."[128] In this situation, "it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy."[129] Second, in *Goldberg v. Kelly*, a case that addressed the level of process due before the government terminates a person's welfare benefits, the Court held that principles of due process require "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."[130]

Before the Dear Colleague letter, however, courts tended to define due process requirements less stringently in educational settings than elsewhere. The influential Fifth Circuit opinion in *Dixon v. Alabama State Board of Education* held only that "due process requires

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*dents: The Road to a Single Approach of Determining Property Interests in Education*, 65 U. KAN. L. REV. 651, 659–60 (2017).

127. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

128. Greene v. McElroy, 360 U.S. 474, 496 (1959).

129. *Id.*

130. Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970).

notice and some opportunity for hearing before students at a tax-supported college are expelled for misconduct,"[131] adding that "a full-dress judicial hearing, with the right to cross-examine witnesses" was unnecessary.[132] *Goss v. Lopez* required only "rudimentary precautions" focused on students (at a high school, critically, and in a case that involved a suspension of only ten days) receiving "*some* kind of notice and . . . some kind of hearing,"[133] an "informal give-and-take between student and disciplinarian."[134]

Even decisions with limiting language, however, contained hints that the Supreme Court might endorse more robust due process protections on matters such as sexual assault adjudications. *Goss*, for example, raised the possibility that "longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures."[135] *Board of Curators of the University of Missouri v. Horowitz* recommended deference to academic judgments—but recognized "distinct differences between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former, but not the latter."[136]

The due process rulings could be read as suggesting that *adult* students facing *expulsion* for a *non-academic* disciplinary matter must receive a hearing at which they would be able to present evidence and cross-examine adverse witnesses. Until recently, however, courts have been unwilling to supply that level of procedural protection for students facing campus Title IX tribunals.

*Gomes*, one of the first cases to explore the scope of constitutional due process rights for accused students in this context, applied a narrow understanding of student due process rights[137] that the First Circuit had offered in *Gorman v. University of Rhode Island*.[138] In *Gorman*, a panel that included future Supreme Court Justice Stephen Breyer found it "no exaggeration to state that the undue judicialization of an administrative hearing, particularly in an academic environment, may result in an improper allocation of resources, and prove counter-

131. Dixon v. Ala. State Bd. of Ed., 294 F.2d 150, 151 (5th Cir. 1961).

132. *Id.* at 159.

133. Goss v. Lopez, 419 U.S. 565, 581 (1975).

134. *Id.* at 584.

135. *Id*.

136. Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 87, 89–90 (1978).

137. *See* Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6 (D. Me. 2005).

138. Gorman v. Univ. of R.I., 837 F.2d 7, 12 (1st Cir. 1988).

productive."[139] *Gorman* involved a student government senator accused of harassing behavior toward university employees, and the court found that due process was satisfied by URI granting the accused student notice, a right to be heard, and some opportunity for cross-examination, even though the proceedings did not "mirror common law trials."[140]

Applying *Gorman*'s reasoning, the *Gomes* court held that although the university's disciplinary process "was not ideal and could have been better"—among other things, the plaintiffs were denied access to potentially exculpatory evidence—it had "accorded the Plaintiffs the essential elements of due process" to which they were entitled in the context of a university adjudication.[141]

Since the Dear Colleague letter, however, courts have become increasingly sensitive to accused students' due process rights; thirty federal courts have issued favorable rulings on due process claims.[142] The most significant developments have come from the Sixth Circuit, which has handed down three decisions on the issue—each one increasingly protective of accused students' due process rights—as well as several district court opinions upholding an accused student's right to cross-examine witnesses, to present expert testimony, to have access to potentially exculpatory evidence, and to be adjudicated before a live hearing.[143]

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139. *Id.* at 15.

140. *Id.* at 16.

141. *Gomes*, 365 F. Supp. 2d at 10.

142. *See infra* Case Appendix, Table 2.A; Johnson, Federal Outcomes and Rulings, *supra* note 88. Two other cases deserve mention. First, a lawsuit against the University of Colorado survived a motion to dismiss on due process grounds. Doe v. DiStefano, No. 16-cv-01789, 2018 U.S. Dist. LEXIS 76268 (D. Colo. May 7, 2018). The court then denied the student's motion for summary judgment (the university did not file), and the two parties then settled before trial. Doe v. DiStefano, No. 16-cv-01789, 2019 U.S. Dist. LEXIS 95033 (D. Colo. June 5, 2019). *See* Harris & Johnson, Database, *supra* note 82. Second, the First Circuit held that the University of Massachusetts violated the due process rights of an accused student, James Haidak, by suspending him without giving him a chance to present his side of the story. The court also held, however, that the university did not violate Haidak's due process rights in the ultimate adjudication. Haidak v. Univ. of Mass.-Amherst, No. 18-1248, 2019 U.S. App. LEXIS 23482, at *35 (1st Cir. Aug. 6, 2019). We have classified both of those cases as mixed. *See* Johnson, Federal Outcomes and Rulings, *supra* note 88.

143. Doe v. Univ. of Mich., 325 F. Supp. 3d 821, 830 (E.D. Mich. 2018), *vacated sub nom.* Doe v. Bd. of Regents of Univ. of Mich., No. 18-1870, 2019 WL 3501814 (6th Cir. Apr. 10, 2019); Roe v. Adams-Gaston, No. 2:17-cv-00945, at 10, 12–15 (S.D. Ohio Apr. 17, 2018) (order granting preliminary injunction), ECF No. 46; Doe v. Ohio State Univ., 311 F. Supp. 3d 881, 889–93 (S.D. Ohio 2018); Nokes v. Miami Univ., No. 1:17-cv-00482, 2017 U.S. Dist. LEXIS 136880, at *37 (S.D. Ohio Aug. 25, 2017).

In the first of its three recent encounters with the issue, the Sixth Circuit displayed skepticism of broadly interpreting accused students' due process rights. That case, *Doe v. Cummins*, resulted from a 2015 lawsuit filed by two University of Cincinnati students who (in separate cases) had been found guilty of sexual assault: an undergraduate student claimed that UC had not considered exculpatory evidence in his case, and a law student challenged the fairness of his adjudication, in which his accuser informed the disciplinary panel that he was a "rapist" who was "going to Hell" before fleeing the room, thus avoiding questions the accused student wanted to ask her through the panel.[144] The lawsuit also challenged various aspects of UC's procedures, such as its decision not to clarify that accused students had a presumption of innocence and its refusal to allow the accused students to have meaningful legal representation during the hearing.[145] After the district court dismissed their complaint, the accused students appealed to the Sixth Circuit.

In a unanimous, unpublished opinion, the Sixth Circuit affirmed the district court's ruling, maintaining that whatever "defects" resulted from the investigations were "cured" by the accused students receiving some form of a hearing, with a right to appeal.[146] As for cross-examination, the panel conceded only that "due process *may* require a *limited* ability to cross-examine witnesses in school disciplinary hearings where, like here, credibility is at issue."[147] Though UC seemed to have fallen short of this standard in the law student's case, the court disposed of the problem by citing the student's ability to submit questions to his accuser in his initial disciplinary hearing (which UC had set aside because of additional procedural defects), coupled with his limited punishment of probation.[148]

The University of Cincinnati ("UC") quickly managed to fall short of *Cummins*' deferential standard. In September 2015, two UC students had sex after meeting on Tinder; there were no witnesses.[149] The female student subsequently filed a sexual assault complaint; a university investigator spoke to the two students and produced a report.[150] The case proceeded to a disciplinary hearing—at which

144. Doe v. Univ. of Cincinnati, 173 F. Supp. 3d 586, 595 (S.D. Ohio 2016), *aff'd*, Doe v. Cummins, 662 F. App'x 437, 454 (6th Cir. 2016).

145. *Univ. of Cincinnati*, 173 F. Supp. 3d at 599.

146. Doe v. Cummins, 662 F. App'x 437, 447 (6th Cir. 2016).

147. *Id.* at 448 (emphasis added).

148. *Id.* at 447–48.

149. Doe v. Univ. of Cincinnati, 223 F. Supp. 3d 704, 708 (S.D. Ohio 2016).

150. *Id.* at 706–07.

neither the complaining student nor the investigator appeared.[151] The result was this surreal exchange between the chair of the hearing panel and Doe, the accused student:

> [Chair]: Okay, so the complainant is not here. At this time I would have given Roe time to ask questions of the Title IX report. But again, they [sic] are not here. So we'll move on.
>
> So now, do you, as the respondent, Mr. Doe, have any questions of the Title IX report?
>
> [Doe]: Well, since she's not here, I can't really ask anything of the report.
>
> Is this the time where I would enter in like a situation where like she said this and this never could have happened? Because that's just—
>
> [Chair]: You'll have time here in just a little bit to direct those questions. Just—
>
> [Doe]: Then no, I don't have any questions for the report.[152]

After the panel found the accused student guilty, he filed suit and obtained a preliminary injunction.[153] The district court concluded that, given the lack of any opportunity for cross-examination and the importance of credibility to the case, "cross-examination was essential to due process."[154]

A Sixth Circuit panel unanimously affirmed the ruling.[155] The court admitted that the central holding of *Doe v. University of Cincinnati*—that the university "must provide a means for the [disciplinary] panel to evaluate an alleged victim's credibility, not for the accused to physically confront his accuser"—was "narrow."[156] But the opinion's expansive rationalization for this finding gave it outsized impact. Opening with the assertion that "the Due Process Clause guarantees fundamental fairness to state university students facing long-term exclusion from the educational process," the panel offered paeans to cross-examination's value in the pursuit of truth.[157] In perhaps the opinion's most interesting section, the court concluded that ensuring cross-examination of accusers in sexual assault cases (where credibility of the two parties was key) benefited not only the accused student, but also the university:

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151. *Id.* at 708.
152. *Id.*
153. *Id.* at 712.
154. *Id.* at 711.
155. *See* Doe v. Univ. of Cincinnati, 872 F.3d 393, 407 (6th Cir. 2017).
156. *Id.* at 406.
157. *Id.* at 396.

> UC assumes cross-examination is of benefit only to Doe. In truth, the opportunity to question a witness and observe her demeanor while being questioned can be just as important to the trier of fact as it is to the accused . . . Cross-examination is 'not only beneficial, but essential to due process' in a case that turns on credibility because it guarantees that the trier of fact makes this evaluation on both sides. When it does, the hearing's result is most reliable. Reaching the truth through fair procedures is an interest Doe and UC have in common.[158]

In September 2018, the Sixth Circuit issued its third and most conclusive opinion yet on the right to cross-examination, holding in *Doe v. Baum* that "if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."[159] The court also rejected the University of Michigan's argument that cross-examination was satisfied by allowing the accused student to point out inconsistencies in his accuser's written statement:

> Without the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives. Nor can the fact-finder observe the witness's demeanor under that questioning. For that reason, written statements cannot substitute for cross-examination.[160]

The University of Michigan petitioned the court to rehear the case *en banc*, "to make clear that direct cross-examination of the complainant and other adverse witnesses is *not* constitutionally required."[161] Without a recorded dissent, the Sixth Circuit denied the request.[162]

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158. *Id.* at 402. The *Cummins* panel, by contrast, had presented cross-examination as a detriment to the process. *See* Doe v. Cummins, 662 F. App'x 437, 448 (6th Cir. 2016) ("Any marginal benefit that would accrue to the fact-finding process by allowing follow-up questions in appellants' [disciplinary] hearings is vastly outweighed by the burden on UC.").

159. Doe v. Baum, 903 F.3d 575, 578 (6th Cir. 2018).

160. *Id.* at 582. District courts in the Sixth Circuit have expanded the principles in *Cincinnati* and *Baum* to include a due process requirement to cross-examine adverse witnesses and to have access to exculpatory evidence necessary to engage in meaningful cross-examination. Doe v. Ohio State Univ., 311 F. Supp. 3d 881, 889–93 (S.D. Ohio 2018); Nokes v. Miami Univ., No. 1:17-cv-00482, 2017 U.S. Dist. LEXIS 136880, at *37 (S.D. Ohio Aug. 25, 2017).

161. Appellees' Petition for Rehearing & Rehearing *En Banc* at 15, Doe v. Baum, No. 17-2213 (6th Cir. Sept. 21, 2018), ECF No. 46.

162. Doe v. Baum, No. 17-2213, 2018 U.S. App. LEXIS 28773, at *1 (6th Cir. Oct. 11, 2018).

During summer 2019, two more U.S. Courts of Appeals issued rulings in due process lawsuits from accused students. The first involved a student found responsible for sexual assault who was then suspended and lost his ROTC scholarship.[163] A Purdue investigator spoke to both students and then produced a report, which she did not give to the accused student (an ROTC official showed a redacted version of it to him for a few minutes; he discovered it wrongly claimed he had confessed to the offense).[164] The accuser did not appear for the hearing, nor did she submit a personal statement (a campus victims' advocate prepared a statement on her behalf instead).[165] Nonetheless, the court dismissed the complaint, holding that the accused student had no protected liberty or property interest in his continued education at Purdue and, thus, no due process rights flowing from his enrollment there.[166]

The Seventh Circuit reversed, holding that the accused student's mandatory disclosure of the Title IX finding to ROTC officials gave him a liberty interest. Analyzing the procedures in the case, the court reasoned that "Purdue's process fell short of what even a high school must provide to a student facing a days-long suspension."[167] The university's investigator declined to speak with the student's roommate, who the student said would corroborate his version of events; the failure to give Doe the investigative report was "fundamentally unfair."[168] This record meant the disciplinary proceeding itself might have fallen short of the requirement that "a hearing must be a real one, not a sham or pretense."[169] Purdue's handling of the case, the court concluded, lacked the "relatively formal procedures" necessary when universities adjudicate claims of "sexual violence," as opposed to typical academic misconduct.[170] Because Purdue had fallen short in so many other ways, the court held that it did not need to address the issue of cross-examination.[171]

Several weeks later, the First Circuit, hearing an appeal of a dating violence case from the University of Massachusetts ("UMass"), did consider the issue. It explicitly rejected *Baum*'s mandate that in cases turning on credibility, universities needed to allow the accused

163. Doe v. Purdue Univ., 928 F.3d 652, 658, 661 (7th Cir. 2019).
164. *Id.* at 657.
165. *Id.*
166. *Id.* at 658.
167. *Id.* at 663.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 664 n.4.

or his representative to conduct cross-examination.[172] The First Circuit did, however, hold that "due process in the disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel' "—so long as the third party "reasonably probe[s] the testimony" of the complaining witness.[173] The court then ruled for UMass on a set of facts—the disciplinary panelists ignored university guidance not to aggressively question the parties, thereby asking many of the accused student's questions that an administrator had improperly failed to present to the panel—that seem unlikely to recur in many other cases moving forward.[174]

Beyond the First and Sixth Circuits, the issue of cross-examination continues to work its way through the courts. As of this writing, the Eighth Circuit is also considering an appeal involving the question of cross-examination.[175] District courts in Colorado, Mississippi, New Mexico, and Texas—as well as California state courts—have all issued rulings in favor of the right to cross-examination.[176]

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172. *See* Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 69 (1st Cir. 2019).

173. *See id.* at 69–70.

174. *See id.* at 70–71.

175. Doe v. Univ. of Ark.-Fayetteville, No. 5:18-cv-05182, 2019 WL 1493701, at *8 (W.D. Ark. Apr. 3, 2019), *appeal docketed*, No. 19-1842 (8th Cir. Apr. 24, 2019).

176. *See* Norris v. Univ. of Colo., Boulder, 362 F. Supp. 3d 1001, 1020 (D. Colo. 2019) ("[W]ith the credibility of the parties in the investigation at issue, the lack of a full hearing with cross-examination provides evidence supporting a claim for a violation of his due process rights."); Oliver v. Univ. of Tex. Sw. Med. Sch., No. 3:18-cv-1549-B, 2019 U.S. Dist. LEXIS 21289, at *38 (N.D. Tex. Feb. 11, 2019) ("[I]n cases, such as this one, where there are significant factual disputes over whether the alleged misconduct occurred, additional procedural safeguards may be required such as presentation of the actual incriminating evidence, confrontation by adverse witnesses, and perhaps cross-examination of those witnesses."); Doe v. Univ. of Miss., 361 F. Supp. 3d 597, 613 (S.D. Miss. 2019) (allowing due process claim to proceed because "[i]t is at least plausible in this he said/she said case, that giving Doe an opportunity to cross-examine Roe could have added some value to the hearing"); Lee v. Univ. of N.M., No. 1:17-cv-01230, at 2 (D.N.M. Sept. 20, 2018), ECF No. 36 ("Lee's allegations plausibly support a finding that his sexual misconduct investigation resolved into a problem of credibility such that a formal or evidentiary hearing, to include the cross-examination of witnesses and presentation of evidence in his defense, is essential to basic fairness."). In addition, as described by the California Second District Court of Appeal:

> [W]hen a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses . . . is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (such as means provided by technology like videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments.

Doe v. Allee, 242 Cal. Rptr. 3d 109, 136–37 (Cal. Ct. App. 2019).

*Doe v. Baum* involved another due process issue unique to the post-Dear Colleague letter era: the student was not found guilty by the original adjudicator but was later found guilty when the accuser appealed from that finding.[177] This development deeply troubled the court, which noted that the university appeals panel had rendered credibility judgments without even hearing from, much less questioning, the parties.[178] The right of an accuser to appeal a not-guilty finding, which due process advocates have likened to double jeopardy,[179] was a key feature of OCR's April 4, 2011 Dear Colleague letter.[180] OCR rescinded this mandate in its September 2017 *Q&A on Campus Sexual Misconduct*, providing that "[a] school has discretion to reserve a right of appeal for the responding party based on its evaluation of due process concerns."[181] But the proposed new Title IX regulations would reinstate the requirement, providing that "[i]f a recipient offers an appeal, it must allow both parties to appeal."[182]

Other cases have also addressed the due process concerns raised by campus appeals boards' dubious outcomes. District courts granted summary judgment to accused students at George Mason University and James Madison University; in both instances, the institution at first found the student not guilty, only to overturn that finding after appeals processes in which the accused students could not respond to new evidence introduced on their accuser's behalf.[183]

Due process claims, of course, are available only to students who attend public universities. The post-2011 Title IX policy changes, however, applied equally to public and private institutions. Accused students at private schools increasingly have turned to breach of contract claims to challenge what they see as unfair disciplinary actions.

### *C. Breach of Contract*

Several lawsuits against private colleges have included due process claims, usually on the theory that following the dictates of the

177. Doe v. Baum, 903 F.3d 575, 580 (6th Cir. 2018).

178. *Id*.

179. *See, e.g.*, Kloster, *supra* note 53.

180. Ali, Dear Colleague letter, *supra* note 7, at 12 ("If a school provides for appeal of the findings or remedy, it must do so for both parties.").

181. Office for Civil Rights, U.S. Dep't of Educ., September 2017 Q&A on Campus Sexual Misconduct 5 n.21 (2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [hereinafter OCR September 2017 Q&A].

182. Proposed Title IX Regulations, *supra* note 23, at 142–43.

183. *See* Doe v. Alger, 228 F. Supp. 3d 713, 717–24 (W.D. Va. 2016); Doe v. Rector & Visitors of George Mason Univ., No. 1:15-cv-209, at 9 (E.D. Va. Feb. 25, 2016) (memorandum opinion).

Dear Colleague letter transformed the institution into an agent of the state. No court has accepted this argument, although a California district court recently requested additional briefing on the question of whether a Cal Tech administrator was a state actor for the purposes of the accused-student plaintiff's § 1983 claims against her.[184] The case settled, however, before the court could consider the question.[185] Judges in thirty-one cases, however, have issued favorable rulings on accused students' breach of contract claims.[186]

Breach of contract claims from accused students depend on whether the relevant state law considers the relationship between the student and the university to be contractual in nature, and the specifics of the school's disciplinary provisions. At their core, they employ the theory that the "relevant terms of the contractual relationship between a student and a university typically include language found in the university's student handbook."[187] To take a representative case: in 2016, a district court denied Brown University's motion to dismiss a lawsuit in which the accused student plausibly alleged that Brown's vice president had issued his interim suspension even though 1) the handbook reserved that authority to the "President, Dean of College, Dean of Graduate School, Dean of Medicine and Biological Sciences, and Senior Associate Dean for Student Life"[188]; 2) Brown officials had not responded to his request to identify the evidence against him despite the handbook's promise that "the case administrator *will respond* to requests from respondents and complaining witnesses during the prehearing phases of the student conduct procedures"[189]; 3) Brown had denied him a chance to make a mid-point statement in his disciplinary hearing even though the handbook gave him "an opportunity to offer a relevant response" to the evidence against him;[190] 4) he was not, despite the wording of the handbook, "given *every opportunity* to articu-

184. Doe v. Cal. Inst. of Tech., No. 2:18-cv-09178, slip op. at 7 (C.D. Cal. Apr. 30, 2019), ECF No. 35 ("[T]he Ninth Circuit appears to establish that a private school may become a state actor if the state 'shows interest' in the school's disciplinary proceedings for sexual misconduct, including whether the state issued regulations containing 'substantive standards or procedural guidelines that 'could have compelled or influenced'' the private school's decisions."); *see also* Jed Rubenfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, 96 TEX. L. REV. 15, 26 (2017).

185. Doe v. Cal. Inst. of Tech., No. 2:18-cv-09178 (C.D. Cal. May 23, 2019), ECF No. 38 (order granting joint stipulation for dismissal of entire action with prejudice).

186. *See infra* Case Appendix, Table 2.B.

187. Doe v. Brown Univ., 166 F. Supp. 3d 177, 191 (D.R.I. 2016) (quoting Havlik v. Johnson & Wales Univ., 509 F.3d 25, 34 (1st Cir. 2007)).

188. *Id.* at 193.

189. *Id.* at 194.

190. *Id.* at 195.

late relevant concerns and issues, express salient opinions, and offer evidence before the hearing body or officer"[191]; and 5) Brown named the case's hearing officer the day before the hearing, even though the handbook promised that he would have two days to file a request that the hearing officer recuse herself for bias.[192]

In short, the court maintained, Brown "must live with" the promises that it made,[193] even if many of its possible violations of the handbook's terms might have been highly technical.

The major breach of contract victories for accused students, however, have gone beyond the hyper-technical to rest their opinions on three broader principles. First, each of these decisions has held that academic institutions should receive scant deference when courts evaluate legal challenges to their Title IX disciplinary actions, in contrast to challenges of *academic* discipline (such as plagiarism). Second, each decision held that courts should explore not only whether the university violated contractual guarantees to the student by failing to follow its own procedures, as in the *Brown* decision, but also whether the school's procedures, in their totality, were so inequitable as to violate an implied (or explicit) right to fundamental fairness. Finally, courts have looked with particular skepticism on cases where a private institution issued a guilty finding despite strong evidence of the student's innocence or in light of seemingly arbitrary procedural actions, or both.

The most frequently cited of the breach of contract cases, *Doe v. Brandeis*, has appeared in twenty-eight other decisions; it also was prominently quoted in the Sixth Circuit's *Cincinnati* opinion.[194] It was the only opinion from a sexual assault lawsuit of any type cited in OCR's 2017 interim guidance rescinding the 2011 Dear Colleague letter.[195]

The case featured an unusual fact pattern involving two male students in a monogamous, long-term relationship.[196] Several months after the two broke up, one of the students filed the following complaint: "Starting in the month of September, 2011, the Alleged violator of Policy [his ex-boyfriend] had numerous inappropriate, nonconsensual sexual interactions with me. These interactions continued to occur un-

191. *Id.*
192. *Id.* at 196.
193. *Id*. at 194.
194. *See* Doe v. Univ. of Cincinnati, 872 F.3d 393, 401, 403–04, 407 (6th Cir. 2017).
195. *See* OCR SEPTEMBER 2017 Q&A, *supra* note 181, at 5 n.19.
196. Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 574 (D. Mass. 2016).

til around May 2013."[197] Brandeis did not allow the accused student to see the more detailed allegations his accuser subsequently made.[198] The university hired an outside investigator to interview the two students and a handful of their friends; there was no hearing.[199] The investigator found the accused student guilty of sexually assaulting his soon-to-be boyfriend the night they met by placing his date's hand over his clothed groin without advance consent.[200] The report also faulted him for, later in their relationship, awakening his sleeping boyfriend with kisses or looking at him in the nude, without advance permission, in their dorm's communal bathroom.[201] During the accused student's unsuccessful appeal, Brandeis officials refused to give him a written copy of the investigator's report on which his guilt was based.[202]

The court refused to dismiss the complaint on two separate grounds. First, it held that the accused student had plausibly claimed that specific Brandeis actions, such as the decision not to supply the investigator's report for use in the appeal, violated the handbook's promise to provide accused students with access to all educational records within forty-five days of a request.[203]

The ruling's primary analysis, however, focused on Brandeis's possible failure to provide "basic fairness" to the accused student.[204] "While that concept is not well-defined," the court noted, and "no doubt varies with the magnitude of the interests at stake," a "requirement that a university provide some level of 'fairness' clearly suggests that there is such a thing as an unfair proceeding, and that a failure to provide such a proceeding may be actionable under certain circumstances."[205]

The court twice noted that both sides agreed on virtually all the basic facts of the case,[206] which allowed the opinion to read more like a summary judgment ruling. The school refused to supply the accused student with the specifics of many of the charges against him—and then used the fact that his accuser told a more consistent story against

197. *Id.* at 575.
198. *Id.* at 583.
199. *Id.* at 579.
200. *Id.* at 587.
201. *Id.* at 587–88.
202. *Id.* at 584.
203. *Id.* at 598.
204. *Id.* at 600.
205. *Id.* at 601.
206. *Id.* at 569, 573 n.1.

him.[207] Brandeis denied the accused student the right to cross-examine his accuser—which, since the case came down to credibility, "may have had a very substantial effect on the fairness of the proceeding."[208] The university would not give the accused student the investigator's notes, or interview witnesses he said would rebut the report.[209] Its decision to have a single person investigate, prosecute, and adjudicate the case posed what the opinion termed "obvious" problems.[210] It denied the right to a meaningful appeal.[211] Finally, it lowered the standard of proof to preponderance of evidence for sexual assault, while keeping it at a clear-and-convincing standard for all other campus disciplinary offenses, seemingly "as part of an effort to tilt the playing field against accused students, which is particularly troublesome in light of the elimination of other basic rights of the accused."[212]

The *Brandeis* opinion, in short, stood for the proposition that in evaluating a contested allegation of sexual assault, courts need to go beyond simply determining whether a university followed its own procedures. In addition, citing to the relevant Massachusetts law, the court held that university procedures that presumed the complainant was a victim so biased the process as to deny the respondent basic fairness, and therefore provided independent grounds to hold against the school.

In June 2018, the First Circuit became the first federal appellate court to side with an accused student in a post-Dear Colleague letter breach of contract claim.[213] On a crowded, dark dance floor at a student organization's campus cruise, a female Boston College ("B.C.") student said that she was digitally penetrated from behind—but neither she nor her friend saw her attacker.[214] She turned around and pointed at a tall, male student, who was covering the event for a campus newspaper—even, he recalled, as another male student slipped past him, saying, "Sorry, dude, that was my bad."[215] Police immediately detained and then arrested the student journalist.[216] The prosecutor, however, dropped all charges after forensic tests on the student's

207. *Id.* at 604.
208. *Id.* at 605.
209. *Id.* at 605–06.
210. *Id.* at 606.
211. *Id.*
212. *Id.* at 607.
213. Doe v. Trs. of Bos. Coll., 892 F.3d 67 (1st Cir. 2018).
214. *Id.* at 75.
215. Doe v. Trs. of Bos. Coll., No. 15-CV-10790, 2016 WL 5799297, at *2 (D. Mass. Oct. 4, 2016), *aff'd in part, vacated in part*, 892 F.3d 67 (1st Cir. 2018).
216. *Trs. of Bos. Coll.*, 892 F.3d at 74–75.

hands showed no trace of the accuser's DNA and an enhanced dance floor video was analyzed.[217] B.C., however, chose to hold its hearing before the forensic or video evidence became available.[218] A college dean also instructed the disciplinary panel to put the other male student—who the accused student alleged was the actual attacker—at ease.[219] The panel found the accused student guilty after deliberating for two days, during which time a B.C. administrator contacted the panel chair to discourage returning a "no finding" conclusion.[220] (College procedures required the panel's deliberation to occur in private; the accused student claimed that the administrator's influencing the panel violated that promise.) The district court, declining to "second guess the thoroughness or accuracy of a university investigation," granted summary judgment to B.C.[221]

The First Circuit reversed the dismissal of the breach of contract claim.[222] "Under the standard of reasonable expectations," Judge Juan Torruella wrote for a unanimous panel, "it is reasonable for a student to expect that the B.C. Student Guide's language stating that '[t]he Board will meet in private to determine whether the accused is responsible or not[,]' means exclusion of outside influences in the Board's deliberations."[223] The opinion also held that B.C.'s actions violated an obligation to treat the accused student with basic fairness:

> Just like it is reasonable for a student to expect that a school's basic fairness guarantee excludes outside influences in the Board's deliberations, it is also reasonable for a student to expect that a basic fairness guarantee excludes having an associate Dean of Students request Board members to give special treatment to the prime alternative culprit in a case in which the key defense is that someone other than the accused student committed the alleged sexual assault.[224]

The *Brandeis* and *Boston College* decisions based their applications of "basic fairness" on Massachusetts law, which requires that when a university hearing is held, "it must be conducted fairly."[225] A 2019 district court opinion from Connecticut utilized the concept even

217. *Id.* at 75.
218. *Id.* at 78.
219. *Id.* at 77–78.
220. *Id.* at 78.
221. Doe v. Trs. of Bos. Coll., No. 15-CV-10790, 2016 WL 5799297, at *12, *27 (D. Mass. Oct. 4, 2016), *aff'd in part, vacated in part*, 892 F.3d 67 (1st Cir. 2018).
222. *Trs. of Bos. Coll.*, 892 F.3d at 95.
223. *Id.* at 86.
224. *Id.* at 87.
225. Cloud v. Trs. of Bos. Univ., 720 F.2d 721, 725 n.2 (1st Cir. 1983) (citing Coveney v. President & Trs. of Holy Cross Coll., 445 N.E.2d 136, 139 (Mass. 1983)).

though Connecticut state decisions did not require it to do so, while also denying that campus sexual assault decisions are entitled to deference from federal courts.[226] The case involved former Yale basketball captain Jack Montague, who was expelled in the middle of his senior season after the university found him guilty of sexual assault.[227] The process that Yale used in Montague's case was highly unusual. Amidst complaints that the school was not doing enough to crack down on campus sexual assault, Yale Title IX officials learned, second-hand, that a female student had a "bad" experience with Montague almost a year prior.[228] They reached out to her, but she was initially reluctant to file a formal complaint.[229] A Title IX official arranged one final meeting, which included the chair of the Yale Title IX disciplinary committee, at which the student agreed to serve as a witness if the office itself filed the complaint.[230] Yale did so—but then granted the female student all the rights of a complainant (ability to make an opening statement, ability to be present for the entire hearing) during the hearing, which was presided over by the same disciplinary committee chair who had helped design the atypical procedures employed in the case.[231]

After Montague sued on grounds of both breach of contract and Title IX, Yale declined to file a motion to dismiss, instead seeking summary judgment after the completion of discovery.[232] The court held that "because Montague's expulsion was based on sexual misconduct, and not 'a genuinely academic decision,'" it need not "confer deference to Yale on the breach of contract claims."[233] The court also rejected Yale's request to evaluate the complaint using an "arbitrary and capricious" standard, noting that, in any event, the evidence presented raised "an issue of fact for the jury with respect to whether Yale's actions were arbitrary and capricious."[234] Montague had raised several individual counts alleging breach of contract, and most of them survived summary judgment: whether Yale Title IX officials improperly manipulated procedures, whether the committee chair improperly assigned himself to hear Montague's case, whether the

226. Montague v. Yale Univ., No. 3:16-cv-00885-AVC, at *20, *48–49 (D. Conn. Mar. 29, 2019), ECF No. 177.
227. *Id.* at *17.
228. *Id.* at *5–6, *12.
229. *Id.* at *13.
230. *Id.*
231. *Id.* at *12–15, *37–40.
232. *Id.* at *2.
233. *Id.* at *20.
234. *Id.* at *20 n.42.

university improperly granted the accuser full rights as a complainant even though she did not file the complaint, and whether Yale found Montague guilty despite evidence that did not meet the preponderance standard.[235]

As with the *Brandeis* and *Boston College* decisions, the court allowed each of these claims to be viewed through a broader prism of fairness. It denied Yale summary judgment on the "basic fairness" count, noting that Montague had identified a sufficient level of factual dispute over whether the "proceedings, considered as a whole, deprived him of basic fairness."[236] This ruling raised the possibility that the jury could find that Yale adhered to the specific terms of its contract but nonetheless failed to treat Montague with sufficient fairness. Yale settled before the case reached a trial.[237]

A May 2017 decision involving Notre Dame also employed the fairness concept, albeit more implicitly. Here, the district court issued a preliminary injunction after confronting evidence that the university seemed indifferent to acquiring evidence that might challenge the accuser's version of events.[238] The opinion expressed profound concern about a laundry list of problems that may have rendered Notre Dame's judicial process "arbitrary and capricious in a number of respects."[239] The court found that the generalized notice provided to the accused student, John Doe, "could not be further from revealing particular policy violations implicated, much less specific allegations of John's objectionable conduct."[240] The university's investigator also did not consider all of the text messages exchanged between John and his accuser, Jane Doe, even though some of these texts "might well have called into question Jane's credibility."[241] At the hearing, the university allowed Jane Doe to introduce what was essentially character evidence about John, while prohibiting John from doing the same.[242] The

235. *Id.* at *31–43.
236. *Id.* at *49.
237. Asha Prihar & Serena Cho, *Montague and Yale Settle Lawsuit*, YALE DAILY NEWS (June 26, 2019), https://yaledailynews.com/blog/2019/06/26/montague-and-yale-settle-lawsuit/.
238. Doe v. Univ. of Notre Dame, No. 3:17-cv-298, 2017 WL 1836939, at *10 (N.D. Ind. May 8, 2017), *vacated*, 2017 WL 7661416 (N.D. Ind. Dec. 27, 2017). Although the injunction was later vacated by the parties' joint request as part of the resolution of the case, its reasoning remains relevant to the analysis of breach of contract claims in this setting.
239. *Id.* at *27.
240. *Id.* at *28.
241. *Id.* at *30.
242. *Id.* at *31 (noting that in a case involving a long-term relationship, "context matters," and expressing concern that while Jane was permitted to introduce evidence of previous "angry outbursts" by John, John was prohibited from introducing evidence

university also severely limited John's ability to review important evidence, giving him just 2.5 days to review what the court called a "data dump" and forbidding him from making photocopies; it required all questions for witnesses to be submitted in advance, foreclosing the possibility of any "follow-up questions based on a witness's answers"; and it required John to defend himself against serious charges "essentially on his own."[243]

The court harshly criticized the university's contention that meaningful representation was unnecessary because the disciplinary process was simply "educational":

> When asked at the preliminary injunction hearing why an attorney is not allowed to participate in the hearing especially given what is at stake—potential dismissal from school and the forfeiture of large sums of tuition money—Mr. Willerton, the Director of the Office of Community Standards and a member of the Hearing Panel, told me it's because he views this as an "educational" process for the student, not a punitive one. This testimony is not credible. *Being thrown out of school, not being permitted to graduate and forfeiting a semester's worth of tuition is "punishment" in any reasonable sense of that term*.[244]

This last statement was particularly significant because the court rebuked a rationale commonly offered by universities when defending disciplinary processes that provide little to no due process.[245]

As with the Notre Dame case, the accused student in a 2018 lawsuit against George Washington University ("GW") focused his complaint on alleged breaches of the handbook's specific promises chiefly regarding his appeal, rather than explicitly urging the court to deem the university's handling of his case unfair.[246] Implicitly, however, his complaint raised the issue, especially as developments in the case exposed evidence of university indifference to strong claims of innocence.[247]

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that Jane had "threatened suicide and had falsely claimed that John had violated the No Contact Order").

243. *Id.* at *27–35.

244. *Id.* at *34–35 (emphasis added).

245. *See, e.g.*, ASS'N FOR STUDENT CONDUCT ADMIN., STUDENT CONDUCT ADMINISTRATION & TITLE IX: GOLD STANDARD PRACTICES FOR RESOLUTION OF ALLEGATIONS OF SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 1 (2014), https://www.theasca.org/files/Publications/ASCA%202014%20Gold%20Standard.pdf ("While television shows such as *Law and Order* might be the only frame of reference that parents, students, and others may have, we must teach them that campus proceedings are educational and focus on students' relationships to the institution.").

246. Doe v. George Washington Univ., 321 F. Supp. 3d 118, 123 (D.D.C. 2018).

247. *See, e.g.*, *id.* at 121.

The accuser told a GW disciplinary panel that at a party more than two years earlier, she drank five cups of beer and a large cup of a strong mixed drink, in addition to having consumed more alcohol earlier in the evening.[248] That left her, she testified, unable to consent to sex, and she was so traumatized that she ran out of the accused student's room and down eight flights of stairs.[249] In what seemed like critical inculpatory evidence, a friend told the panel that she phoned as the accuser was riding to the accused student's apartment—and that the accuser was so intoxicated that she was slurring her words.[250] The panel returned a guilty finding, which the accused student appealed.[251] He cited two pieces of new evidence: a statement from a student who had been out of the country during the disciplinary hearing, but recalled the accuser as lucid on the night of the incident; and an expert report from a toxicologist opining that the accuser would have been unable to stand or speak on the night in question—much less run down eight flights of stairs—if she had consumed as much alcohol as she claimed.[252] GW's procedures held that if the appellate officer found the accused student's new evidence crossed a threshold of "viability," the officer would turn the case over to an appeals panel for a re-hearing.[253] Despite the seemingly strong evidence, the appellate officer denied the appeal, arguing that the new information would not have changed the hearing's outcome.[254]

The court granted summary judgment to the accused student after concluding that—despite contractual promises to the contrary—the GW official "failed to appreciate the separate roles of a fact-finder (a hearing or appellate panel in the GW system) and a gatekeeper."[255] That the administrator filed an affidavit saying he had behaved similarly in all appeals during the previous six years particularly troubled the judge.[256] Concluding that the university's appellate officer "appears to have long misinterpreted his function," the court ordered GW to submit the accused student's appeal directly to an appellate panel,

248. *Id.* at 120.
249. *Id*.
250. *Id.*
251. *Id.*
252. *Id.* at 121.
253. *Id.* at 122. GW's handbook provided, "A timely *appeal will be reviewed* by the Executive Director of Planning & Outreach or designee *to determine its viability* based on the criteria in Article 33," which defined the appeals criteria as "new information that is relevant to the case, that was not previously presented at the hearing or conference, and that significantly alters the finding of fact." *Id.*
254. *Id.* at 122.
255. *Id.* at 125.
256. *Id.*

bypassing the appellate officer.[257] The GW appellate panel was ordered to consider not only the witness statement and the toxicology report, but also phone records subpoenaed by the accused student, which showed no record of any call between the accuser and her friend during the time the accuser rode to the accused student's apartment—undermining a critical piece of inculpatory testimony offered during the disciplinary hearing.[258] Even after rehearing the appeal under court order, GW upheld the guilty finding.[259] The court then denied the university's motion to dismiss the complaint, deeming the Appeals Board's guilty finding was "divorced from the evidence."[260] Only then did George Washington settle the case.[261]

While the specifics of the *Brandeis*, *Boston College*, *Notre Dame*, *Yale*, and *George Washington* decisions differed, the judges involved approached each case similarly. Each decision recognized that a fairer procedure might have yielded a different outcome and probed why the institution had not adjudicated the case fairly. ("GW has embarrassed itself" with its illogical handling of the appeal, Judge Rosemary Collyer bluntly informed the university's lawyer during oral argument.[262]) While the due process lawsuits and breach of contract cases like these took differing paths, they reached the same destination: a court unwilling to accept a circumscribed role in evaluating the fairness of a serious university disciplinary process.

These cases also involved students who presented highly credible claims of innocence, all but inviting the question of whether unfair procedures explained the outcomes. Most breach of contract lawsuits have come from cases where the merits of the college's guilty finding were harder to determine, but even here, courts have intervened when university procedures seem particularly egregious. For instance, in fall 2015, a tumultuous relationship between two Cornell Medical School students ended with an encounter in which the accuser suffered a broken bone in her toe.[263] The female student filed a Title IX claim, but both parties had substantial credibility problems—the accuser's story changed dramatically over the course of the investigation; the accused

257. *Id.* at 128.
258. *Id.*
259. Doe v. George Washington Univ., 366 F. Supp. 3d 1, 11 (D.D.C. 2018).
260. *Id.*
261. *See* Notice of Dismissal with Prejudice, Doe v. George Washington Univ., No. 1:18-cv-553-RMC (D.D.C. Mar. 18, 2019), ECF No. 59.
262. Transcript of Motion Hearing at 10, Doe v. George Washington Univ., No. 1:18-cv-00553 (D.D.C. Nov. 27, 2018).
263. Transcript of Preliminary Injunction Hearing at 11, 27, Doe v. Weill Cornell Med. Coll. of Cornell Univ., No. 1:16-cv-03531 (S.D.N.Y. May 20, 2016).

student admitted that he had injured his former girlfriend, but contended the injury was accidental.[264] After a several-month process, Cornell used a single investigator to find the accused student guilty, but gave him probation due to the sense that both parties might have shared responsibility for the outcome.[265] The accused student accepted the punishment, which would have allowed him to receive his M.D. and then begin a prestigious seven-year residency program.[266] But the accuser appealed, and shortly before graduation, Cornell adjusted the punishment to delay awarding the student's degree for one year—curiously citing failure to appeal his initial punishment as among the grounds for the increased penalty.[267]

With his spot in the residency program now at risk, the student sought a preliminary injunction.[268] Cornell demanded near-total deference from the court and seemed unwilling or unable to explain the rationale behind either its procedures or the increased punishment.[269] After the university's lawyer suggested in court that the single investigator performed a role similar to a jury in a criminal trial, the judge asked, "Why would the investigator make a recommendation, then, of punishment?"[270] The unhelpful response: "That's the policy."[271] Cornell then claimed that losing his residency would not significantly harm the student, an argument the judge described as "insult[ing] my intelligence"; during the year suspension, he wondered, "What should [the student] do? Should he go out and get a job in a delicatessen?"[272] In granting the preliminary injunction, the court reminded Cornell that "there is at the end of the day something called the rule of law."[273]

Unlike some other significant breach of contract cases,[274] the Cornell student did not present evidence of actual innocence. Nonetheless, the university's arguments for why it reached the decision it did were so illogical as to trigger judicial concerns. These two areas—evidence of likely innocence ignored by the school, and seemingly arbitrary decisions by the university—have been the most common characteristics of breach of contract victories for accused students.

264. *Id.*
265. *Id.* at 10.
266. *Id.* at 22.
267. *Id.*
268. *Id.* at 1.
269. *Id.* at 20.
270. *Id.* at 18.
271. *Id.*
272. *Id.* at 23.
273. *Id.* at 36.
274. *See, e.g.*, Doe v. Brown Univ., 210 F. Supp. 3d 310, 320–21 (D.R.I. 2016).

### *D. Title IX*

Title IX, which prohibits sex discrimination at institutions receiving federal funds, was enacted in 1972. Although usually considered a law that protects the interests of women in higher education, the statute has in recent years become an increasingly common mechanism used by accused students to challenge unfavorable disciplinary decisions. The resulting rulings have ranged widely, from holdings that gender bias can be inferred when a school makes an irrational guilty finding[275] to decisions that framed the question so narrowly that it seemed as if any evidence short of overt anti-male sentiments from the Title IX coordinator would be insufficient to survive a motion to dismiss.[276] Perhaps this range is because courts confront a policy beset by a fundamental tension—OCR's willingness to use a gender-discrimination law to address a problem in which male and female students appear on both sides of the issue.

Although Title IX's statutory language refers only to sex discrimination, by 1977, courts had begun to hold that sexual harassment—at least of the *quid pro quo* variety—could constitute sex discrimination under Title IX.[277] In *Alexander v. Yale University*, a Connecticut district court denied Yale's motion to dismiss a female student's complaint under Title IX, challenging Yale's failure to respond to her complaint that one of her professors gave her a poor grade because she refused to submit to his sexual advances.[278] "[I]t is perfectly reasonable," the court opined, "to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education."[279]

In 1997, OCR released guidance holding that in addition to *quid pro quo* harassment by faculty, schools must respond to student-on-student harassment—including sexual assault—that creates a "hostile environment," because failing to do so "permits an atmosphere of sex-

275. Transcript of Motion to Dismiss Hearing at 40, Doe v. Johnson & Wales Univ., No. 1:18-cv-00106 (D.R.I. June 25, 2018), ECF No. 36.

276. *See* Bleiler v. Coll. of the Holy Cross, No. 11-11541-DJC, 2013 U.S. Dist. LEXIS 127775, at *19, *38 (D. Mass. Aug. 26, 2013).

277. *Quid pro quo* sexual harassment occurs when "[a] school employee explicitly or implicitly conditions a student's participation in an education program or activity or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature." 1997 OCR Guidance, *supra* note 29.

278. Alexander v. Yale Univ., 459 F. Supp. 1, 3–4, 7 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980).

279. *Id.* at 4.

ual discrimination to permeate the educational program and results in discrimination prohibited by Title IX."[280]

The Supreme Court affirmed this view in 1999, when it held in *Davis v. Monroe County Board of Education* that in some circumstances, schools could be liable to victims of sexual harassment for responding with "deliberate indifference" to certain acts of harassment between students:

> We consider here whether a private damages action may lie against the school board in cases of student-on-student harassment. We conclude that it may, but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, we conclude that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.[281]

While there has been much debate about what constitutes "severe, pervasive, and objectively offensive" harassment in the context of speech and other expressive activity,[282] there is no doubt that physical sexual misconduct meets this standard.[283] As a result, during the decade after *Davis*, several federal courts sided with female students who claimed that their universities had violated Title IX by responding with deliberate indifference to their reports of sexual assault.[284] Before the 2011 Dear Colleague letter, one male student successfully sued his college for gender discrimination under Title IX in the context of a school disciplinary action, although the case did not involve

280. 1997 OCR Guidance, *supra* note 29.

281. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999).

282. *See, e.g.*, DeJohn v. Temple Univ., 537 F.3d 301, 318–19 (3d Cir. 2008); Bair v. Shippensburg Univ., 280 F. Supp. 2d 357, 369–71 (M.D. Pa. 2003); Booher v. Bd. of Regents, N. Ky. Univ., No. 2:96-CV-135, 1998 WL 35867183, at *8 (E.D. Ky. July 22, 1998).

283. *See, e.g.*, Soper v. Hoben, 195 F.3d 845, 855 (6th Cir. 1999) (rape allegation "obviously qualifies as being severe, pervasive, and objectively offensive sexual harassment . . . ."); Kelly v. Yale Univ., No. CIV.A. 3:01-CV-1591, 2003 WL 1563424, at *3 (D. Conn. Mar. 26, 2003) ("There is no question that a rape, as alleged by Kelly, constitutes severe and objectively offensive sexual harassment under the standard set forth in *Davis*.").

284. *See* Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R-C.L. L. REV. 95, 100–01 (2010); *Kelly*, 2003 WL 1563424, at *4. Before the Dear Colleague letter, by contrast, no lawsuit brought by a student accused of sexual assault successfully survived a motion to dismiss a Title IX claim. In the highest-profile example, the Sixth Circuit issued a perfunctory, seven-page opinion affirming the district court's dismissal of a case on grounds that the student did not present "evidence of any voting member who has indicated that their decision was motivated by [his] sex." Mallory v. Ohio Univ., 76 F. App'x 634, 640 (6th Cir. 2003).

sexual assault. In *Yusuf v. Vassar College*, a student named James Weisman allegedly attacked his roommate, Syed Yusuf.[285] When Yusuf insisted on testifying against his attacker, Weisman's girlfriend told a Vassar administrator that Yusuf had sexually harassed her.[286] Despite the possible retaliatory motive, Vassar found Yusuf guilty and suspended him for one semester.[287] The Second Circuit held that "a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome" combined with an allegation of "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding" was enough for Yusuf to overcome the motion to dismiss.[288] The "erroneous outcome" test of this seminal decision, which has been cited in more than 500 cases,[289] would become the foundational point in the accused students' post-2011 lawsuits. At a scant six pages, the opinion offered only one sentence indicating the types of issues—"statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making"—that might "tend to show the influence of gender."[290]

The significant debate among courts deciding these types of accused-student Title IX claims has surrounded the extent to which a demonstrable bias against *accused students*, who are overwhelmingly male, is legally distinguishable from a demonstrable bias against men.

Title IX provides a remedy only for *intentional* discrimination: unlike in cases alleging racial discrimination,[291] courts have not allowed a cause of action under Title IX for instances in which the complained-of conduct merely has a *disparate impact* on members of one sex.[292] So it is not sufficient for a male student accused of sexual

285. Yusuf v. Vassar Coll., 35 F.3d 709, 712 (2d Cir. 1994).
286. *Id.*
287. *Id.* at 713.
288. *Id.* at 715.
289. According to a Shepard's Citation Service analysis available on Lexis, *Yusuf* has been cited in more than 500 other opinions.
290. *Id.*
291. *See* Ricci v. DeStefano, 557 U.S. 557, 557 (2009) ("Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact').").
292. *See, e.g.*, Doe v. Univ. of Denver, No. 16-cv-00152, 2018 WL 1304530, at *9 n.14 (D. Colo. Mar. 13, 2018) ("Plaintiff does not expressly assert a claim based on the disparate impact of DU's disciplinary system on males. Nor could he, given that most courts to address the issue have held that Title IX does not provide a private right of action for disparate impact claims."); Prasad v. Cornell Univ., No. 5:15-cv-322, 2016 U.S. Dist. LEXIS 161297, at *60 (N.D.N.Y. Feb. 24, 2016) ("[T]here is no private cause of action under Title IX for disparate impact claims."); Marshall v. Ohio

misconduct to provide evidence that a school's disciplinary procedures have a disproportionately adverse impact on male students; the plaintiff in such a case must show that there was discriminatory intent.

Initially, district courts refused to consider the possibility that evidence of policies and practices biased, even heavily, toward the rights of complainants could be considered evidence of a bias against males. In 2013, in *Bleiler v. College of the Holy Cross*, the court granted summary judgment to Holy Cross, reasoning that an institution's bias "'toward the rights of reporting complainants' . . . is not the same as the type of specific bias or discrimination against male students as required for [a] Title IX claim."[293] The court repeatedly cited the Dear Colleague letter as grounds for rejecting the student's claims that the college's procedures were unfair.[294] In *King v. DePauw University*, meanwhile, the court dismissed the relevance of data showing that DePauw returned guilty findings against more than eighty percent of accused male students, arguing that merely suggested "a bias against accused students."[295]

This line of argument crested in *Sahm v. Miami University*, which more than thirty subsequent opinions have cited.[296] The student's complaint presented compelling evidence that Miami had reached the wrong outcome: three friends of the accuser submitted affidavits challenging her version of events, including one who claimed the accuser tried to pressure her to produce favorable testimony.[297] It also portrayed the university's process as unfair (one student's affidavit revealed that Miami's investigator successfully discouraged her from giving exculpatory testimony at Sahm's hearing).[298] The investigator's behavior troubled the court, but—echoing the reasoning of *King* and *Bleiler*—it concluded that the record did "not suggest a gender bias against males so much as against students accused of sexual assault."[299] Moreover, "[d]emonstrating that a uni-

Univ., No. 2:15-cv-775, 2015 WL 7254213, at *5 (S.D. Ohio Nov. 17, 2015) ("[A]lthough Title IX prohibits intentional gender discrimination, it does not support claims of disparate impact.").

293. Bleiler v. Coll. of the Holy Cross, No. 11-11541, 2013 U.S. Dist. LEXIS 127775, at *38 (D. Mass. Aug. 26, 2013).

294. *See id.* at *9, *30.

295. King v. DePauw Univ., No. 2:14-CV-70, 2014 WL 4197507, at *10 (S.D. Ind. Aug. 22, 2014). The court did issue a preliminary injunction on the other grounds presented by King, for breach of contract.

296. Sahm v. Miami Univ., 110 F. Supp. 3d 774 (S.D. Ohio 2015).

297. *Id.* at 775; Complaint at 12–13, Sahm v. Miami Univ., No. 1:14-cv-00698-SJD (S.D. Ohio Sept. 3, 2014), ECF No. 1.

298. *Sahm*, 110 F. Supp. 3d at 775.

299. *Id.* at 778.

versity official is biased in favor of the alleged victims of sexual assault claims, and against the alleged perpetrators, is not the equivalent of demonstrating bias against male students."[300]

Despite these precedents, forty-eight post-Dear Colleague letter Title IX claims from accused students have survived either a motion for summary judgment, a motion to dismiss, or resulted in a grant of preliminary injunction.[301] Until mid-2017, most victories for accused students involved decisions where the judge offered minimal or no analysis;[302] cases with highly atypical behavior alleged of university administrators (a Title IX official who allegedly solicited a false claim;[303] a Title IX official allegedly giving a speech defining consensual sex as "grey rape"[304]); or cases where, according to the facts before the college, the female accuser also committed sexual assault, but the institution did not investigate.[305]

The exception to this early pattern of limited, tentative Title IX rulings came from the Second Circuit in *Doe v. Columbia University*. Overturning a district court opinion that offered an almost impossible standard for an accused student making a Title IX claim to meet prior to discovery,[306] a unanimous three-judge panel ruled that accused students alleging gender discrimination needed only to clear a "low standard" of "alleging facts giving rise to a plausible minimal inference of bias."[307] In the ruling's critical passage, the court held:

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300. *Id*.

301. *See infra* Case Appendix, Table 2.C. One other case deserves mention: Rossley v. Drake Univ., 342 F. Supp. 3d 904, 931 (S.D. Iowa 2018) (denying summary judgment to university on selective enforcement claim, based on an incident in which both parties were intoxicated). The *Rossley* court also granted the university's motion for summary judgment on the Title IX erroneous outcome and breach of contract claims, so we have identified the case as a mixed decision. *See* Johnson, Federal Outcomes and Rulings, *supra* note 88.

302. *See*, *e.g.*, Doe v. Williams Coll., No. 3:16-cv-30184, slip op. at 1–2 (D. Mass. Apr. 28, 2017), ECF No. 71.

303. *See* Doe v. Univ. of Chi., No. 16 C 08298, 2017 U.S. Dist. LEXIS 153355, at *6 (N.D. Ill. Sept. 20, 2017).

304. Doe v. Washington & Lee Univ., No. 6:14-cv-00052, 2015 U.S. Dist. LEXIS 102426, at *6 (W.D. Va. Aug. 5, 2015).

305. *See* Doe v. Amherst Coll., 238 F. Supp. 3d 195, 218 (D. Mass. 2017). For more on 2014–2016 Title IX decisions, see Joe Dryden, David Stader & Jeanne L. Surface, *Title IX Violations Arising from Title IX Investigations: The Snake Is Eating Its Own Tail*, 53 IDAHO L. REV. 639, 668–77 (2017).

306. *See* Doe v. Columbia Univ., 101 F. Supp. 3d 356, 369, 371 (S.D.N.Y. 2015), *vacated*, 831 F.3d 46 (2d Cir. 2016) (expressing doubt that pleading a biased investigation was sufficient to satisfy the first prong of *Yusuf*'s erroneous outcome test; and accepting, at the pleading stage, alternative explanations to gender bias under Title IX, such as a fear of bad publicity or a university's desire to treat rape complainants with sensitivity).

307. Doe v. Columbia Univ., 831 F.3d 46, 48 (2d Cir. 2016).

> A defendant is not excused from liability for discrimination because the discriminatory motivation does not result from a discriminatory heart, but rather from a desire to avoid practical disadvantages that might result from unbiased action. A covered university that adopts, even temporarily, a policy of bias favoring one sex over the other in a disciplinary dispute, doing so in order to avoid liability or bad publicity, has practiced sex discrimination, notwithstanding that the motive for the discrimination did not come from ingrained or permanent bias against that particular sex.[308]

Given the pressure to aggressively handle sexual assault claims, this standard was relatively easy for accused students to clear.[309] But outside the Second Circuit, courts declined to follow the *Columbia* court's reasoning, and a few took pains to distinguish it from the cases before them.[310]

Then, starting in fall 2017, courts began issuing bolder Title IX rulings—often by citing possible biases in the training materials used in campus tribunals. As far back as summer 2011, FIRE uncovered evidence of Stanford University's one-sided, accuser-friendly Title IX training materials.[311] Nonetheless, the requirement in the Dear Colleague letter, and later regulations,[312] that schools train not only Title IX investigators but also *adjudicators* attracted comparatively little attention, mainly because virtually all universities keep their training materials secret. As the content of some of these training materials has started to come to light, however, the training of adjudicators has raised significant questions of fairness.[313]

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308. *Id.* at 58 n.11.

309. *See* Rolph v. Hobart & William Smith Colls., 271 F. Supp. 3d 386, 401 (W.D.N.Y. 2017).

310. *See* Doe v. Purdue Univ., 281 F. Supp. 3d 754, 782 (N.D. Ind. 2017); Austin v. Univ. of Or., 205 F. Supp. 3d 1214, 1226 (D. Or. 2016). *But see* Doe v. Univ. of Colo., Boulder *ex rel*. Bd. of Regents of Univ. of Colo., 255 F. Supp. 3d 1064, 1076 (D. Colo. 2017) (finding no gender discrimination on the specific facts of the case, but recognizing that "if enforcement officials are regularly presented with a scenario involving the same two potential classifications—nurse and female . . . sexual assault suspect and male—there must come a point when one may plausibly infer that stereotypes about the protected classification (such as gender or ethnicity) have begun to infect the enforcement process generally.").

311. *See* Samantha Harris, *The Feds' Mad Assault on Campus Sex*, N.Y. POST (July 20, 2011, 4:00 AM), https://nypost.com/2011/07/20/the-feds-mad-assault-on-campus-sex (discussing Stanford hearing panel that was trained using materials suggesting that "everyone should be very, very cautious in accepting a man's claim that he has been wrongly accused of abuse or violence," and that one indication of an abuser is that he will "act persuasive and logical").

312. *See* 34 C.F.R. § 668.46 (2015).

313. *See, e.g.*, KC Johnson & Stuart Taylor, *The Title IX Training Travesty*, WKLY. STANDARD (Nov. 10, 2017, 4:00 AM), https://www.weeklystandard.com/kc-johnson-and-stuart-taylor-jr/the-title-ix-training-travesty. All of the training materials used in

In September 2017, a district court declined to dismiss an accused student's Title IX claim in *Doe v. Trustees of the University of Pennsylvania*, with adjudicator training playing a key role.[314] Atypically, the student had obtained the university's training materials before the motion to dismiss, after the organization that Penn hired to conduct the training had left its material on its website.[315] The training that Penn panelists received framed virtually any permutation of an accuser's behavior as consistent with the guilt of the accused.[316] The court concluded that the complaint plausibly alleged that Penn did not appropriately train panel members "to ensure compliance with Title IX" or "as investigators in handling sexual violence cases."[317]

Denying a motion to dismiss filed by Marymount University, a federal district court broadly interpreted what Title IX could require of a university in March 2018.[318] In a rarity, the case featured a statement by the adjudicator implying that he viewed male alleged victims more

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the article were either leaked to one of the authors, appeared as exhibits in litigation, or were produced after a public records request. The proposed new Title IX regulations explicitly address this issue and would require that "[a]ny materials used to train coordinators, investigators, or decision-makers may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment." Proposed Title IX Regulations, *supra* note 23, at 136.

314. Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d 799, 831 (E.D. Pa. 2017). Biased training also had played a key role in a victory, after a bench trial, by an accused student at Brown University. The court concluded, "It appears what happened here was that a training presentation was given that resulted in at least one panelist completely disregarding an entire category of evidence." Doe v. Brown Univ., 210 F. Supp. 3d 310, 342 (D.R.I. 2016).

315. Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d at 816–17.

316. *Id.* at 817 (noting that training materials attribute a wide range of problems with recall and affect in accusers to the role of trauma, while pointing out that many "apparent positive attributes" of an accused student have no relevance to guilt or innocence).

317. *Id.* Training also played a major role in the University of Mississippi's unsuccessful bid to dismiss the Title IX count in a lawsuit filed by an accused student. *See* Doe v. Univ. of Miss., No. 3:18CV-63, 2018 U.S. Dist. LEXIS 123181, at *10–11 (S.D. Miss. July 24, 2018). The court also cited the allegedly biased training to allow the accused student's due process claim to survive: "This is a he-said/she-said case, yet there seems to have been an assumption under Ussery's training materials that an assault occurred. As a result, there is a question whether the panel was trained to ignore some of the alleged deficiencies in the investigation and official report the panel considered." *Id*. at *28. This reasoning was foreshadowed by a May 2018 decision in a lawsuit against the University of Colorado: "[I]n the procedural due process context, Plaintiff need not allege gender bias, or indeed any bias on the basis of any otherwise legally protected group or class of individuals. To the contrary, any type of actual bias [in the investigation] is sufficient." Doe v. DiStefano, No. 1:16-cv-01789, 2018 U.S. Dist. LEXIS 76268, at **23–24 (D. Colo. May 7, 2018).

318. Doe v. Marymount Univ., 297 F. Supp. 3d 573, 584 (E.D. Va. 2018) (identifying the accused student's claims that he was deprived of "the opportunity to identify and interview potential witnesses, to gather exculpatory evidence, to meet with the

skeptically than female alleged victims. (The adjudicator asked a male alleged victim, "Were you aroused? . . . Not at all?"[319]) Rather than stopping the opinion at that point, however, the court listed several structural elements in the Marymount process—such as a failure to consider exculpatory evidence, the refusal to give the accused student a copy of the final investigative report, a disciplinary panelist who asserted that most complainants were truthful—whose implementation raised the possibility of gender bias.[320] The opinion concluded that such procedures biased against accused students "may well run afoul of Title IX" by "depriving students accused of sexual assault of the investigative and adjudicative tools necessary to clear their names even when there are no due process requirements."[321]

In May 2018, the district court in Rhode Island allowed a Title IX lawsuit to proceed against Johnson & Wales University in a ruling even broader than in the *Marymount* case.[322] As the campus disciplinary process was ongoing, the accused student's lawyer asked JWU administrators for a copy of the university's training materials. They refused without explanation.[323] JWU's lawyers tried to distinguish the case from the *University of Pennsylvania* ruling by noting that, unlike the Penn litigant, the student had no copy of the JWU training, and so could only infer it was biased.[324] The district court judge seemed deeply skeptical during oral argument and concluded the hearing by issuing a ruling from the bench.[325] "The fact that Mr. Doe asked for training material during the appeals process and it wasn't obtained or given to him," the court stated, provided enough evidence to allow the Title IX count to proceed.[326] The judge added, given the facts of the case, that he could "find no reason at all as to why . . . the result was

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adjudicator in person, and to cross-examine Roe" as issues that could raise concerns about gender bias).

319. *Id.* at 586.

320. *Id.* at 584.

321. *Id.* at 584 n.17. The new proposed Title IX regulations explicitly note that a recipient institution's treatment of either the complainant or the respondent in a Title IX proceeding may constitute sex discrimination: "A recipient's treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX. A recipient's treatment of the respondent may also constitute discrimination on the basis of sex under title IX." Proposed Title IX Regulations, *supra* note 23, at 135.

322. Transcript of Motion to Dismiss Hearing at 40, Doe v. Johnson & Wales Univ., No. 1:18-cv-00106 (D.R.I. June 25, 2018), ECF No. 36.

323. *Id.* at 39.

324. *Id.* at 22.

325. *Id.* at 39.

326. *Id.* at 39.

Mr. Doe's expulsion. The only inference that one could draw from that considering all the facts is that gender played a role."[327]

As district courts around the country broke new ground in evaluating the relationship between Title IX and the rights of accused students, the Sixth Circuit issued two important rulings on the question. First, *Doe v. Miami University* established a plaintiff-friendly test[328] for evaluating erroneous outcome Title IX complaints that moved beyond the *Bleiler/King/Sahm* trilogy. The *Miami* test included the complaint citing "statistical evidence that ostensibly shows a pattern of gender-based decision-making"; allegations of "external pressure" from the media and the federal government; a record in which every male charged with sexual misconduct in 2013–2014 was allegedly found guilty; the fact that "nearly ninety percent of students found responsible for sexual misconduct between 2011 and 2014 have male first-names"; and "an affidavit from an attorney who represents many students in Miami University's disciplinary proceedings, which describes a pattern of the University pursuing investigations concerning male students, but not female students."[329] This list was not exclusive; the court cited a necessity to examine "all" the evidence of gender bias before dismissing an accused student's complaint.[330]

Then, in September, the same Sixth Circuit panel that recognized a due process right to a live hearing with cross-examination in *Doe v. Baum* also revived the student's Title IX claim against the University of Michigan.[331] Denying the student an opportunity for cross-examination, the court concluded, was enough in and of itself to raise doubts about the accuracy of the school's finding, thus satisfying the first prong of the *Yusuf* erroneous outcome test.[332] Meanwhile, the possibility of gender discrimination was satisfied by the combination of federal pressure on the university to crack down on sexual assault and the appeals board's having "credited exclusively female testimony (from Roe and her witnesses) and rejected all of the male testimony (from Doe and his witnesses)."[333] The latter point added an additional element beyond *Miami* that district courts could cite to allow accused students' Title IX claims to proceed.[334]

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327. *Id*. at 40.
328. Doe v. Miami Univ., 882 F.3d 579, 592–93 (6th Cir. 2018).
329. *Id.* at 593.
330. *Id.* at 594.
331. Doe v. Baum, 903 F.3d 575, 587 (6th Cir. 2018).
332. *Id.* at 585–86.
333. *Id*. at 586.
334. *See, e.g.*, Doe v. Rhodes Coll., No. 2:19-cv-02336, at 9 n.4 (W.D. Tenn. June 14, 2019) (order granting in part and denying in part temporary restraining order)

In its *Purdue* decision, meanwhile, the Seventh Circuit rejected the *Yusuf* structure, and instead preferred "to ask the question more directly: do the alleged facts, if true, raise a plausible inference that the university discriminated against John 'on the basis of sex'?"[335] By mandating a more holistic review of the record, rather than having courts explore whether plausible gender discrimination exists only after looking for evidence of possible innocence of the accused, the *Purdue* standard likely would produce more plaintiff-friendly outcomes. In the case itself, the Seventh Circuit cited as plausible evidence of gender discrimination the combination of federal pressure from OCR, the investigator's decision to accept the accuser's credibility without speaking to her, and a gender-biased posting from the campus organization that prepared the accuser's statement to the disciplinary panel.[336]

While most of the significant Title IX court decisions involve claims brought under an erroneous outcome theory, there have recently been several cases in which accused students' Title IX selective enforcement claims have survived motions to dismiss.[337] In *Doe v. Rollins College*, for example, the court allowed a male plaintiff's selective enforcement claim to proceed because he had plausibly alleged that:

> [T]he information Rollins collected during the investigation could have equally supported disciplinary proceedings against [Plaintiff's accuser] Jane Roe for also violating the Sexual Misconduct Policy. Yet Rollins treated Jane Roe—a female student—differently. Preferentially even, as Plaintiff alleges. Such allegations sufficiently support a selective enforcement claim against Rollins.[338]

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("[A]lthough Defendant Rhodes is a private university, Plaintiff's claim here, regarding cross-examination, invokes due process concerns under Title IX, not a breach of contract theory.").

335. Doe v. Purdue Univ., 928 F.3d 652, 667–68 (7th Cir. 2019).

336. *Id.* at 668–70.

337. *See, e.g.*, Doe v. Syracuse Univ., 341 F. Supp. 3d 125, 139 (N.D.N.Y. 2018) (holding that the fact that university *sua sponte* initiated sexual assault proceedings against male plaintiff, but not against female student, based on an incident in which both parties were intoxicated, sets forth a plausible selective enforcement claim); Rossley v. Drake Univ., 342 F. Supp. 3d 904, 931 (S.D. Iowa 2018) (denying summary judgment to university on selective enforcement claim because "[t]here are factual questions as to whether Defendants' decision to initiate disciplinary proceedings against Plaintiff but not Jane Doe—even though they were both accused of sexual misconduct—was motivated by gender."); Doe v. Brown Univ., 327 F. Supp. 3d 397, 412 (D.R.I. 2018) (refusing to dismiss selective enforcement claim where university investigated alleged sexual assault by plaintiff against a fellow student, Jane Roe, but refused to investigate plaintiff's claim that Jane Roe had been the aggressor in the incident and had, in fact, sexually assaulted him).

338. Doe v. Rollins Coll., 352 F. Supp. 3d 1205, 1211 (M.D. Fla. 2019).

In *Doe v. Quinnipiac University*, a court denied summary judgment to the university on a Title IX selective enforcement claim stemming from a dating relationship between two students in which each student complained to the university about violent behavior by the other.[339] The university found the plaintiff responsible and punished him, but dismissed his complaint against his ex-girlfriend.[340] The student alleged that the university engaged in selective enforcement by using a different definition of "intimate partner violence" to adjudicate his ex-girlfriend's claim than it did to his own.[341] The court denied summary judgment on this claim, finding "a genuine dispute of material fact as to whether Quinnipiac applied materially disparate standards to the respective claims of intimate partner violence made by Plaintiff and Jane Roe."[342]

Overall, courts continue to struggle with how to appropriately apply Title IX to lawsuits from accused students. Since early 2018, some courts have seen Title IX as a tool to force universities to grant procedural protections for accused students. Others, by contrast, have interpreted the statute narrowly, and ruled against accused students absent unusually strong evidence of gender discrimination even prior to discovery. Overall, however, our analysis shows that universities do remain vulnerable at the motion to dismiss stage, since courts often recognize that much of the evidence necessary to test claims of gender bias remains solely within universities' possession.

## III.
## COUNTERARGUMENTS

Three principal arguments dispute the significance of the scores of decisions as an emerging body of law. The first suggests that the court decisions show that the current campus system is working well. A second downplays the effects of the decisions, on grounds that the pleading standard requires courts to greenlight dubious claims. A third diminishes college and university legal setbacks when compared to the total number of cases on the subject.

### *A. The System Is Working*

In a September 2015 debate, NYU Law Professor Stephen Schulhofer remarked, "Courts are certainly finding due process viola-

339. Doe v. Quinnipiac Univ., No. 3:17-cv-364, 2019 U.S. Dist. LEXIS 115089, at *39 (D. Conn. July 10, 2019).
340. *Id.* at *12, *17–18.
341. *Id.* at *32–33.
342. *Id.* at *35–36.

tions all over the place. A lot of colleges have really botched this problem . . . [T]hese decisions show that the system is working. The Department of Education has overreached. Many colleges have overreached, and courts are pushing back."[343] In a 2016 *Yale Law Journal* article, then-CUNY Law Dean Michelle Anderson similarly argued, "accused students are suing their colleges and universities in court and winning . . . And campuses are responding—as they must—when accused students prevail. So campuses face powerful legal incentives on both sides to address campus sexual assault, and to do so fairly and impartially."[344] The duo implied that colleges and universities—pressured from one side by OCR, the media, faculty, and campus activists and from the other side by the possibility of the accused student prevailing in court—would hit a sweet spot and develop fair procedures.[345]

It seems counterintuitive for strong defenders of campus adjudications to concede that colleges have "really botched this problem"[346] (Schulhofer) and have denied "accused students fairness in disciplinary adjudication, in ways that Title IX does not require and the Constitution will not stand" (Anderson).[347] More generally, neither Schulhofer nor Anderson explained how court defeats have caused, or would cause, institutions to adopt fairer policies. Virtually no evidence existed at the time her article appeared to support Anderson's assertion that "campuses are responding—as they must—when accused students prevail."[348] In fact, numerous examples suggest otherwise. In August 2018, a California Superior Court judge found UC Santa Barbara in contempt of court for failing to comply with a court decision ordering the university to grant more procedural rights to a student accused of sexual misconduct.[349] Between 2014 and 2018, at least four (Brown, Swarthmore, Notre Dame, and GW) institutions modi-

343. *Courts, Not Campuses, Should Decide Sexual Assault Cases*, INTELLIGENCE SQUARED U.S. (Sept. 16, 2015), https://www.intelligencesquaredus.org/debates/courts-not-campuses-should-decide-sexual-assault-cases (follow "TRANSCRIPT" hyperlink) [https://perma.cc/JF8K-S2L3].

344. Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform,* 125 YALE L.J. 1940, 1988 (2016).

345. *Courts, Not Campuses*, *Should Decide Sexual Assault Cases*, *supra* note 343, at 28.

346. *Id.*

347. Anderson, *supra* note 344.

348. *Id*.

349. Notice of Order Finding Regents of the University of California in Contempt of the Court's Judgment Granting Petition for Writ of Administrative Mandate, Doe v. Regents of the Univ. of Cal., No. 17CV03053 (Cal. Super. Ct. Aug. 10, 2018).

fied their policies to make them *less* fair to accused students in the aftermath of lawsuits.[350]

Moreover, recent statements by administrators suggest that universities will do everything they can, within legal limits, to avoid making changes to their Title IX adjudication processes that may be required by appeals court decisions or the Department of Education's proposed new Title IX regulations. For example, the Title IX coordinator for the University of California System stated in April 2019 that "we have no intention of adopting those aspects of the proposed Title IX rules that we believe would be harmful, unless and until we are absolutely legally required to do so."[351] The University of Michigan's president offered similar sentiments as his institution grudgingly complied with *Doe v. Baum*'s mandate for a live hearing with cross-examination.[352]

Quite beyond the reluctance of colleges to apply lessons from the court decisions to generate fairer policies, it is impossible to credit the argument that a system in which procedurally harmed students have to spend tens or hundreds of thousands of dollars in legal fees simply to get fair treatment is one that is "working" in any meaningful sense of the word.

### *B. The Decisions Reveal Little About University Unfairness*

A second counterargument was offered by Robb Jones, vice president at United Educators, which provides insurance to universities. In July 2017, Jones noted that many decisions came at the motion to dismiss stage, where the "court had to [accept the] pled facts as true," implying that the slew of rulings against schools reveal little about the

350. Doe v. Brown Univ., 210 F. Supp. 3d 310, 315–17 (D.R.I. 2016) (discussing elimination of clause allowing accused students to "be given every opportunity to . . . offer evidence before the hearing body or officer"); KC JOHNSON & STUART TAYLOR, THE CAMPUS RAPE FRENZY: THE ATTACK ON DUE PROCESS AT AMERICA'S UNIVERSITIES 161 (2017) (Swarthmore); Jeremy Bauer-Wolf, *One Person as 'Prosecutor, Judge, and Jury*,' INSIDE HIGHER ED (June 5, 2018), https://www.insidehighered.com/news/2018/06/05/george-washingtons-new-title-ix-processes-put-sexual-assault-cases-hands-single (George Washington); Katie Galioto, *Notre Dame Makes Changes to Title IX Policy*, OBSERVER (Aug. 28, 2017), https://ndsmcobserver.com/2017/08/title-ix (Notre Dame).

351. Suzanne Taylor, *UC Ensures Integrity of Title IX Process in Face of Uncertainty*, DAILY CALIFORNIAN (Apr. 8, 2019), http://www.dailycal.org/2019/04/08/uc-ensures-integrity-of-title-ix-process-in-face-of-uncertainty.

352. *Preventing All Forms of Sexual and Gender-Based Misconduct*, OFF. PRESIDENT U. MICH. (Jan. 29, 2019), https://president.umich.edu/news-communications/on-the-agenda/preventing-all-forms-of-sexual-and-gender-based-misconduct/ ("The change was necessary to follow the law, but U-M respectfully submits that the Sixth Circuit got it wrong.").

extent to which universities have mishandled Title IX cases.[353] As an initial matter, Jones' argument is belied by the fact that, in the two years since his statement, a number of accused students' lawsuits have survived motions for summary judgment.[354]

Jones' argument also fails to account for the significant disadvantages the student has at the pleading stage in a process that denies to nearly all accused students the type of discovery material that would be routine in criminal cases. In the context of accused students' lawsuits, motions to dismiss have combined a forgiving pleading standard (benefiting the student, albeit less so than before *Twombly* or *Iqbal*[355]) with a point in the lawsuit, prior to discovery, where many key facts remain off limits to the student (benefiting the university). The worst alleged fact about the student—the guilty finding for sexual assault—already is part of the court record. Meanwhile, potentially key evidence in the student's favor (biased training material, internal correspondence among the investigators or adjudicators, gendered patterns of enforcement and punishment, notes taken by the investigator, occasionally even the Title IX hearing transcript) remains closed. The Southern District of Indiana acknowledged the dilemma in denying IUPUI's motion to dismiss student Jeremiah Marshall's lawsuit, holding:

> [A]lthough Marshall's pleading may lack the contours of more particularized facts, the [university] Defendants do not deny that they are in sole possession of all information relating to the allegations made by and against Marshall, notably refusing, at all times, to share such information with Marshall or his attorneys. In this regard, the Defendants cannot have it both ways, restricting access to the facts and then arguing that Marshall's pleading must be dismissed for failure to identify more particularized facts.[356]

These disadvantages make it significant that so many complaints have survived motions to dismiss. Jones was correct, however, that some setbacks for colleges have seemed to depend on the pleading

353. KC Johnson, *On the* USA Today *Op-Ed*, ACAD. WONDERLAND (July 29, 2017), https://academicwonderland.com/2017/07/29/on-the-usa-today-op-ed/.

354. Doe v. Trs. of Bos. Coll., 892 F.3d 67 (1st Cir. 2018); Doe v. Quinnipiac Univ., No. 3:17-cv-364 (JBA), 2019 U.S. Dist. LEXIS 115089 (D. Conn. July 10, 2019); Doe v. Grinnell Coll., No. 4:17-cv-00079 (S.D. Iowa July 9, 2019), ECF No. 151; Montague v. Yale Univ., No. 3:16-cv-00885-AVC (D. Conn. Mar. 29, 2019), ECF No. 177. See discussion *supra* Section II.A.

355. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

356. Marshall v. Ind. Univ., 170 F. Supp. 3d 1201, 1210 (S.D. Ind. 2016).

standard.[357] In many denials of motions to dismiss, however, the opinion's tone or substance conveyed significant doubt about the legitimacy of the institution's actions. In refusing to dismiss John Doe's complaint against Brandeis University, for example, the district court described Brandeis' judicial process as "essentially an inquisitorial proceeding."[358] In an opinion denying Penn State's motion to dismiss a due process claim by an accused student, the district court noted that the university's "virtual embargo on the panel's ability to assess [the accuser's] credibility raises constitutional concerns."[359]

Even though these are not dispositive opinions, they matter a great deal in that they shed important light on how courts might view such claims going forward. And given the large number of cases that settle following the denial of a motion to dismiss, they provide the most important body of authority that both accused students and universities cite when briefing these cases. Finally, at least on the due process point, the suggestion that accused students benefit from the pleading standard seems misplaced, since a court finding that due process requires unsupplied cross-examination, timely notice, or a right to be heard would apply at the summary judgment stage as well.

### *C. College and University Victories*

A third counterargument seeks to diminish the significance of the college and university setbacks, arguing that schools have won as many decisions as they have lost. (The current federal tally as of the date this Article went to press is ninety-one university setbacks and ninety victories.[360]) The significance of these institutional victories, however, is considerably less impressive than the numbers would suggest.

Beyond seven rulings eroded by later appellate court opinions,[361] university victories divide into three categories: (1) purely procedural

357. *See, e.g.*, Doe v. Williams Coll., No. 3:16-cv-30184, slip op. at 2–3 (D. Mass. Apr. 28, 2017), ECF No. 71; Mancini v. Rollins Coll., No. 6:16-cv-02232, 2017 U.S. Dist. LEXIS 113160, at *18 (M.D. Fl. July 20, 2017). At the same time, especially in handling Title IX claims, courts often have seemed to give universities the benefit of the doubt, prompting a warning from the *Baum* court: "Our job is simply to ensure that Doe is not deprived of an opportunity to prove what he has alleged unless he would lose regardless." Doe v. Baum, 903 F.3d 575, 587 (6th Cir. 2018).

358. Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 607 (D. Mass. 2016).

359. Doe v. Pa. State Univ., 336 F. Supp. 3d 441, 450 (M.D. Pa. 2018).

360. *See* Johnson, Federal Outcomes and Rulings, *supra* note 88.

361. The Second Circuit's decision in *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. 2016) undermined the reasoning of *Routh v. University of Rochester*, 981 F. Supp. 2d 184 (W.D.N.Y. 2013) and *Yu v. Vassar College*, 97 F. Supp. 3d 448 (S.D.N.Y. 2015). The Title IX pleading standards adopted in *Doe v. Miami Univer-*

rulings that did not address the merits of the issue at hand; (2) lawsuits that failed to meaningfully challenge the guilt of the accused students; and (3) decisions where courts effectively endorsed questionable university procedures. The first two subsets of decisions present no real conflict with the numerous cases where universities were on the losing side. The third area, by contrast, highlights key elements of debate among the federal courts today.

Twenty-five cases were either decided on purely procedural grounds, meaning the court did not address the merits of the issue, or produced no written opinion from the court.[362] Many of these came in preliminary motions when the court considered the accused student's filing premature, addressed tangential elements in the complaint while leaving the critical issues pending, or noted that the student had not shown sufficient harm to justify immediate judicial action. In a late 2018 decision involving Harvard University, for example, the district court denied the accused student's motion for a temporary restraining order simply because Harvard did not plan to start an investigation for at least a month anyway; the court's order provided that if the parties could not agree to a resolution of the case before then, it would re-visit the issue.[363]

The rare commentary from these decisions addressing the merits of the university discipline tended to *criticize*, not endorse, the school's actions. In *Doe v. Board of Trustees of the University of Illinois*, for example, the district court granted summary judgment to Illinois after the accused student could not prove he had read the university handbook before enrolling, as required to sustain a procedu-

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*sity*, 882 F.3d 579 (6th Cir. 2018) and *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) likely would have precluded the dismissals in *Sahm v. Miami University*, 110 F. Supp. 3d 774 (S.D. Ohio 2015), *Doe v. Case Western Reserve University*, No. 1:14CV2044, 2015 U.S. Dist. LEXIS 123680 (N.D. Ohio Sept. 16, 2015), and *Doe v. College of Wooster*, 243 F. Supp. 3d 875 (N.D. Ohio 2017). *Salau v. Denton*, 139 F. Supp. 3d 988 (W.D. Mo. 2015) relied heavily for persuasive authority on *Sahm* and the district court decision that *Columbia* reversed. The central holding of the Sixth Circuit's published opinions in *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) and *Doe v. University of Cincinnati*, 872 F.3d 393 (6th Cir. 2017) contradicted the unpublished opinion in *Doe v. Cummins*, which held only that due process "may" require cross-examination and upheld a disciplinary action in which the accused student could not, in any way, cross-examine his accuser in the hearing that resulted in his determination of guilt. 662 F. App'x 437, 448 (6th Cir. 2016).

362. *See infra* Case Appendix, Table 3.A.

363. *See* Doe v. Harvard Coll., No. 1:18-cv-12462 (D. Mass. Dec. 18, 2018) (order denying in part motion for temporary restraining order and preliminary injunction), ECF No. 25.

ral due process claim under Seventh Circuit precedent.[364] In dicta, the opinion criticized a "sorely lacking" process that "falsely emulates a criminal inquiry, but lacks the ability of the accused to confront witnesses, be heard, or testify before the deciding panel"; despite granting summary judgment to the university, he urged it "to adopt a more fair and thorough procedure for handling sexual assault claims in the future."[365]

The cases from the first category of university victories, then, provide scant (if any) precedent that schools could cite to address merits-based claims. By contrast, the second category of university victories—involving lawsuits where the accused student likely would have been guilty even under a fairer procedure—sometimes has produced opinions useful to universities across the board.[366] Lawsuits in this second category are comparatively rare, but in thirty-four rulings, the accused student offered little or no reason to believe that the institution's decision was inaccurate.[367] While, technically, federal lawsuits solely address whether the institution's procedures conformed to the Constitution or the relevant law, courts have proven almost entirely unwilling to rule in favor of students who appear to have been guilty, even in cases with deeply unfair procedures.

The highest-profile example of this type of case came from the Fifth Circuit, in *Plummer v. University of Houston*.[368] Judge Edith Jones' dissent focused on the unfairness of the University of Houston's disciplinary procedures.[369] The school's Title IX coordinator occupied "the multiple, and inherently conflicting, roles of *advocating* for the female student, *investigating* the events, *prosecuting* [the accused students], *testifying* as a witness at their hearings, and *training* and *advising* the disciplinary hearing panels."[370] But video and photographic evidence corroborated the allegation of assault, and the "unique facts of this case" persuaded the panel majority to side with

364. Doe v. Bd. of Trs. of the Univ. of Ill., No. 2:17-cv-02180, slip op. at 27 (N.D. Ill. July 24, 2018), ECF No. 54.

365. *Id.* at *24–25.

366. *See, e.g.,* Pierre v. Univ. of Dayton, No. 3:15-cv-362, 2017 U.S. Dist. LEXIS 44442 (S.D. Ohio Mar. 27, 2017) (holding that the university is only required to provide a hearing board whose members are free of conflict of interest or bias, and that the student had failed to allege any facts that support such a finding of conflict or bias).

367. *See infra* Case Appendix, Table 3.B.

368. Plummer v. Univ. of Hous., 860 F.3d 767, 778 (5th Cir. 2017).

369. *Id.* at 778.

370. *Id.* at 780 (Jones, J., dissenting).

Houston, on grounds that fairer procedures would have produced the same result anyway.[371]

The Fifth Circuit was unusually blunt in linking the level of due process to which accused students were entitled to the likelihood of their guilt. The ruling exemplified how, in a fluid body of law, judges can easily craft decisions to uphold discipline of seemingly guilty students. Other such cases included those where the accused student was in jail at the time of the campus disciplinary hearing;[372] faced multiple, credible allegations of sexual assault;[373] or did not contest the allegations.[374] Courts in these cases exhibited the deference that once was routine for all campus disciplinary decisions, even if some procedural problems beset the college adjudication.

Excluding decisions that employed reasoning inconsistent with later circuit precedent, just over seventy-five percent of university victories in federal lawsuits, then, have involved decisions that either (1) did not address the merits of the institution's policies or (2) came in lawsuits where the student did not meaningfully challenge the finding of guilt.

Nonetheless, it is sometimes the case that courts rule in favor of universities even when the accused student both plausibly claimed that his school wrongly found him guilty and credibly challenged the fairness of the institution's procedures. Twenty-three decisions since the Dear Colleague letter's issuance have fallen into this category.[375] Rulings in this third category of university victories do show the limits of turning to courts to resolve college procedural abuses, and the need for greater political and cultural commitment to fair adjudication procedures on campus.

An accused student at the University of Arkansas, for example, had a compelling claim of innocence: testimony from a local police officer, the Uber driver who transported the accuser to his apartment, and the accused student's roommate all either corroborated his version of events or undermined his accuser's credibility.[376] As a result, the

371. *Id.* at 774.

372. *See* Uzoechi v. Wilson, No. 1:16-cv-3975, 2017 U.S. Dist. LEXIS 145644, at *3 (D. Md. Sept. 8, 2017).

373. *See* Doe v. Colgate Univ., 5:15-cv-1069, 2017 U.S. Dist. LEXIS 180267, at *2 (N.D.N.Y. Oct. 31, 2017), *aff'd*, 760 F. App'x 22 (2d Cir. 2019); Doe v. Univ. of S. Ala., No. 17-0394, 2017 U.S. Dist. LEXIS 145587, at *2 (S.D. Ala. Sept. 8, 2017).

374. *See* Doe v. Univ. of S. Fla. Bd. of Trs., No. 8:15-cv-682-T-30EAJ, 2015 U.S. Dist. LEXIS 69804, at *3–4 (M.D. Fla. May 29, 2015).

375. *See infra* Case Appendix, Table 3.C.

376. Doe v. Univ. of Ark.-Fayetteville, No. 5:18-cv-05182, 2019 WL 1493701, at *3 (W.D. Ark. Apr. 3, 2019); Complaint at 10, Doe v. Univ. of Ark.-Fayetteville, No. 5:18-cv-05182 (W.D. Ark. Sept. 14, 2018), ECF No. 1.

university's Title IX investigator found him not guilty.[377] The accuser appealed, presenting a different theory of the offense (use of force and incapacitation rather than incapacitation only). An appeals board, after a hearing in which the student had no right to direct cross-examination, reversed the finding by a 2-1 vote.[378]

The district court dismissed the subsequent complaint. On the plaintiff's Title IX claims, the court found he had failed to clear even the first prong of the *Yusuf* erroneous outcome test, casting no doubt on the accuracy of the outcome—even though the university's own investigator and one of the appeals board panelists had found him not guilty.[379] Taking a starkly dim view of the right to cross-examination in the campus sexual misconduct setting, the court also dismissed the student's due process claim, holding that the university has "an overwhelming interest in protecting potential victims of sexual assault from cross-examination that may be traumatic or intimidating, which could escalate or perpetuate a hostile environment on campus."[380] Curiously, the court reached this conclusion by citing to the 2011 Dear Colleague letter—which had been rescinded before the incident, the investigation, or the adjudication took place.[381]

Unlike the accused student at the University of Arkansas, who presented a compelling claim of innocence, the plaintiff in a case against the University of Maryland was unsympathetic. (According to *his* version of events, he initiated sex with a female student who had fallen asleep alongside another male student, who had then left the bed.[382]) Maryland found him guilty after a meeting—"not a hearing," as one administrator reminded him—at which he could only answer questions from the panel, rather than make a statement himself.[383] In a case where credibility played a key role, his accuser did not appear at the session.[384] Even if she had done so, no cross-examination would have occurred: since "anyone who has gone through a cross-examination never wants to go through a cross-examination again," President

377. *Univ. of Ark.-Fayetteville*, 2019 WL 1493701, at *11.
378. *Id.* at *13–14.
379. *Id.* at *39.
380. *Id.* at *25.
381. *Id.*
382. Doe v. Loh, No. PX-16-3314, 2018 U.S. Dist. LEXIS 53619, at *3 (D. Md. Mar. 29, 2018), *aff'd*, 767 F. App'x 489 (4th Cir. 2019).
383. Amended Complaint at 14, 15, Doe v. Loh, No. PX-16-3314 (D. Md. Mar. 29, 2017).
384. *Id.* at 15.

Wallace Loh explained, the university eliminated the practice in sexual assault cases.[385]

In a March 2018 ruling, the district court dismissed the student's complaint, finding that the university's "interests in the integrity of its disciplinary proceedings" trumped any right the accused student might have to cross-examination.[386] (For this point, the opinion oddly cited a 2005 Sixth Circuit opinion holding that in "a choice between believing an accuser and an accused . . . cross-examination is not only beneficial, but essential to due process."[387]) Maryland's procedures satisfied the "right to confrontation in educational settings"—by letting the accused student answer questions posed to him by panelists who had read an investigator's report that summarized the accuser's version of events.[388] The accused student appealed to the Fourth Circuit, but it affirmed the district court's opinion in a two-page, *per curiam* decision that provided no independent analysis of the legal issues in the case.[389]

These opinions suggest that while, overall, there is increasing skepticism from courts about fairness in campus sexual misconduct adjudications, courts are still an imperfect vehicle for students seeking relief from university punishments imposed without a fair process. Even seemingly strong complaints can fall short, depending on the venue or the judge assigned to the case, so advocates for procedural fairness in campus proceedings must continue to look for solutions beyond the courts.

## Conclusion: The Courts and Campus Adjudications

In the spring of 2018, twenty-three professors at Cornell Law School filed an amicus brief urging a New York appellate court to overturn a disciplinary action of their own university.[390] The key issue was typical—while Cornell procedures allowed for the accused student to submit "all" relevant questions through the disciplinary panel,

385. *See* E. Silverman, *University Makes Comprehensive Changes to Its Sexual Misconduct Policy*, Diamondback (Oct. 14, 2014), http://www.dbknews.com/archives/article_136dd9e2-5410-11e4-9751-0017a43b2370.html [https://kcjohnson.files.wordpress.com/2018/10/md-x-exam-article.pdf].

386. *Loh*, 2018 U.S. Dist. LEXIS 53619, at *23.

387. Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 641 (6th Cir. 2005).

388. *Loh*, 2018 U.S. Dist. LEXIS 53619, at *22.

389. Doe v. Loh, 767 F. App'x 489 (4th Cir. 2019).

390. Brief for Gregory S. Alexander et al. as Amici Curiae Supporting Petitioner-Appellant John Doe, Doe v. Cornell Univ., No. 526013 (N.Y. App. Div. July 12, 2018) (No. 526013). For reasons it did not explain, the Third Department denied leave to the professors to file their brief.

the panel had refused to ask key questions in his case.[391] "No process can be reliable or fair," the law professors wrote, "if a person accused of wrongdoing is unable to effectively challenge the accusations against him by testing his accuser's credibility. It is a truism in American criminal and civil justice systems that the best tool for achieving these ends is cross-examination."[392] Upholding the university's position, the faculty feared, would "leave students in Cornell Title IX matters with no right to test the credibility of their accusers at a hearing and would render the 'all questions' requirement in the policy a dead letter."[393] A Cornell victory in the appeal thus "poses a great threat of wrongful conviction to students who will face such proceedings in the future."[394]

A fundamental principle of academic freedom has been to keep the courts *out* of academic decision-making. It would be hard to imagine any issue other than campus sexual assault adjudications prompting nearly two dozen faculty members at an elite law school to urge judicial intervention to protect their students against their own university's policies—much less to predict an era of "wrongful conviction" if the courts did not act.

The non-responsiveness of the Cornell administration and Title IX bureaucracy to its law professors' concerns (similar non-responsiveness occurred at Harvard and Penn after comparable protests from their law school faculties[395]) shows how entrenched the current systems of adjudication have become on campus.

The proposed Trump-era Title IX regulations rely heavily on many of the court cases analyzed in this Article.[396] If adopted as written, they would ensure live hearings with cross-examination by advocates for the parties, and access (for both parties) to relevant evidence and training materials from the case.[397] They would also affirm that unfair procedures towards the accused can constitute gender discrimi-

391. Brief for Gregory S. Alexander et al. as Amici Curiae Supporting Petitioner-Appellant John Doe at 7, Doe v. Cornell Univ., No. 526013 (N.Y. App. Div. July 12, 2018).

392. *Id.* at 9–10.

393. *Id.* at 22.

394. *Id.* at 25.

395. Open Letter from Members of the Penn Law School Faculty, *supra* note 15; Bartholet, *supra* note 15.

396. Proposed Title IX Regulations, *supra* note 23, at 58 ("The proposed regulations thereby provide the benefits of cross-examination while avoiding any unnecessary trauma that could arise from personal confrontation between the complainant and the respondent. *Cf. Baum*, 903 F.3d at 583.").

397. Proposed Title IX Regulations, *supra* note 23.

nation in violation of Title IX,[398] a key question on which courts have come down on both sides.

It remains unclear, however, whether (or to what extent) the regulations will be adopted as written. Critics adopted a tactic of "flooding" the comment process, and advocacy groups have promised to sue to block the new rule.[399] Based on how public universities in the Sixth Circuit have addressed the *Baum* and *Cincinnati* decisions, moreover, it seems unlikely that universities will implement whatever rule is adopted in a manner that maximizes the rights of accused students. During the *Baum* oral argument, Judge Julia Smith Gibbons commented on the University of Michigan's denial of cross-examination in Title IX hearings nearly a year after the Court's *Cincinnati* decision, which had required the practice: "I can't get past," she said, "the University's indifference, defiance, or whatever you want to call it to our Circuit precedent."[400] Even after *Baum,* Michigan's newly created process left most of the key decisions in the hands of the single investigator.[401]

As long as universities continue their intransigence, accused students will likely continue to sue, and courts will need to respond. The path forward seems clearest on due process matters, where the most common demand—the need for cross-examination—is both clear-cut and rooted in relevant precedent. Here, the *Baum* model makes sense: in on-campus adjudications for sexual assault—and other serious allegations that turn largely on credibility, and about which universities possess no special expertise entitling them to deference—due process suggests that public universities must provide a hearing that allows for cross-examination by the accused or his/her advocate.[402] For that cross-examination to be meaningful, as district courts in the Sixth Circuit and even the post-*Haidak* First Circuit have held, accused stu-

398. *Id*.

399. Benjamin Wermund, *Advocates Hope to Flood DeVos' Title IX Proposal with Comments*, POLITICO (Nov. 30, 2018, 10:00 AM) https://www.politico.com/newsletters/morning-education/2018/11/30/advocates-hope-to-flood-devos-title-ix-proposal-with-comments-436503.

400. Oral Argument at 29:06, Doe v. Baum, 903 F.3d 575 (6th Cir. 2018) (No. 17-2213), http://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=recent/08-01-2018%20-%20Wednesday/17-2213%20John%20Doe%20v%20David%20Baum%20et%20al.mp3&name=17-2213%20John%20Doe%20v%20David%20Baum%20et%20al.

401. *See* UNIV. OF MICH., THE UNIVERSITY OF MICHIGAN INTERIM POLICY AND PROCEDURES ON STUDENT SEXUAL AND GENDER-BASED MISCONDUCT AND OTHER FORMS OF INTERPERSONAL VIOLENCE 3 (2018), https://hr.umich.edu/sites/default/files/um-policy-and-procedures-on-student-sexual-misconduct-and-other-forms-of-interpersonal-violence.pdf [https://perma.cc/H97M-4GZL].

402. *Baum*, 903 F.3d at 578.

dents must have access to exculpatory evidence uncovered during the university investigation.[403]

If the *Baum* model represents the likely future on due process, some of the questions first raised more than a decade ago in *Gomes* remain. First, while the *Gomes* court saw no connection between the nature of the alleged disciplinary offense and the process due to the student, courts more recently have (correctly) expressed doubts on this matter.[404] In declining to dismiss a due process claim against the University of Colorado, the court wondered "whether this context—wherein a plaintiff is accused of conduct which may form the basis for criminal prosecution—changes the *Mathews v. Eldridge* calculus in a manner requiring more than minimal notice and an opportunity to respond."[405]

Second, the *Gomes* court's reminder that universities are not courts, since their mission is primarily educational, remains a consistent university defense in nearly all due process lawsuits. As one court recently noted, however, universities have an academic interest not in arbitrarily expelling students but "in securing *accurate* resolutions of student complaints . . . ."[406] While a school's "educational mission is, of course, frustrated if it allows dangerous students to remain on its campuses[, i]ts mission is equally stymied, however, if [the university] ejects *innocent* students who would otherwise benefit from, and contribute to, its academic environment."[407]

In short, as universities increasingly address non-academic disciplinary matters, courts will need to recognize that the minimum required to satisfy due process will be higher than in academic disciplinary matters, where universities should receive deference. The Eighth Circuit appeal in the University of Arkansas case—which

403. District courts outside of the Sixth Circuit have found the reasoning of *Baum* and *Cincinnati* persuasive. *See* Doe v. Univ. of S. Miss., No. 2:18-cv-00153, at 8 (S.D. Miss. Sept. 26, 2018) (order granting in part and denying in part temporary restraining order), ECF No. 35; Lee v. Univ. of N.M., No. 1:17-cv-01230, at 2–3 (D.N.M. Sept. 20, 2018), ECF No. 36; Doe v. Pa. State Univ., 336 F. Supp. 3d 441, 450 n.66 (M.D. Pa. 2018). The First Circuit's *Haidak* model, by contrast, seems less likely to succeed, in that it trusts college panels to ask all the relevant questions on the accused student's behalf.

404. *See* Doe v. Univ. of Cincinnati, 872 F.3d 393, 404 (6th Cir. 2017) ("We acknowledge this procedure [cross-examination through a panel] may not relieve Roe's potential emotional trauma. Still, a case that 'resolve[s] itself into a problem of credibility' cannot itself be resolved without a mutual test of credibility, at least not where the stakes are this high.").

405. Doe v. DiStefano, No. 1:16-cv-01789, 2018 U.S. Dist. LEXIS 76268, at *22–23 (D. Colo. May 7, 2018).

406. Doe v. Pa. State Univ., 336 F. Supp. 3d 441, 449 (M.D. Pa. 2018).

407. *Id.*

raises due process questions of notice, fairness of the hearing, and cross-examination—will be the decision to watch in 2020.[408]

Less clear is how courts will respond to lawsuits filed against private universities—although here, as with due process, courts have become more skeptical of university actions in recent months. The most common successful cause of action, at least at the motion to dismiss stage, has been a Title IX claim. Yet courts have, as one lawyer who regularly represents universities put it, been "all over the place" on Title IX lawsuits from accused students, at least at the motion-to-dismiss stage.[409]

As previously noted, the *Marymount, Johnson & Wales*, and (to a lesser extent) *Baum* opinions all entertained the idea that procedures structurally biased against the accused could violate Title IX, even though not all accused students are male.[410] With a handful of exceptions, such as the system at Harvard Law School,[411] few campus sexual assault adjudications would conform to the vision of Title IX offered in those opinions. The proposed new Title IX regulations embrace the *Marymount*, *Johnson & Wales* approach, and this issue could produce significant rulings in the next twelve months in the Third Circuit (St. Joseph's University), Sixth Circuit (Oberlin College), Eighth Circuit (Drake University, the University of Arkansas), and Tenth Circuit (University of Denver) Courts of Appeals.[412]

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408. Doe v. Univ. of Ark.-Fayetteville, No. 5:18-cv-05182, 2019 WL 1493701 (W.D. Ark. Apr. 3, 2019), *appeal docketed*, No. 19-1842 (8th Cir. Apr. 24, 2019).

409. Transcript of Motion Hearing at 37, Doe v. George Washington Univ., No. 1:18-cv-00553 (D.D.C. Nov. 27, 2018).

410. *See supra* Section II.D.

411. Harvard Law's procedures (1) allow both parties to have meaningful legal representation, including by providing "financial assistance to parties unable to afford an attorney who would like to do so"; (2) require Title IX investigators to "keep and preserve a record of the investigation"; (3) establish an adjudication panel (drawn from figures outside the HLS community) in which "each of the complainant and respondent may choose from the list of qualified panelists one adjudicator; and the two adjudicators so chosen will choose a third from the same list, who shall chair the panel"; and (4) recognize that as "direct questions may provide a party with a greater ability to test the truth of claims by another party than other methods of questioning . . . the chair of the panel will ask in substance all relevant questions a party submits." HARVARD LAW SCH., HLS SEXUAL HARASSMENT RESOURCES AND PROCEDURES FOR STUDENTS 7, 10–11 (2014), https://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf.

412. *See* Doe v. St. Joseph's Univ., No. 2:18-cv-2044 (E.D. Pa. Apr. 23, 2019), *appeal docketed*, No. 19-2158 (3d Cir. May 24, 2019); Rossley v. Drake Univ., No. 4:16-cv-00623 (S.D. Iowa, Oct. 12, 2018), *appeal docketed*, No. 18-3258 (8th Cir. Oct. 23, 2018); *Univ. of Ark.-Fayetteville*, 2019 WL 1493701; Doe v. Oberlin Coll., No. 1:17-cv-01335, 2019 WL 1439115 (N.D. Ohio Mar. 31, 2019), *appeal docketed*, No. 19-3342 (6th Cir. Apr. 17, 2019); Doe v. Univ. of Denver, 1:16-cv-00152 (D. Colo. Mar 13, 2018), *appeal docketed*, No. 18-1162 (10th Cir. Apr. 20, 2018).

Rather than attempting to shoehorn unfair university procedures into Title IX, perhaps judges should imitate the more aggressive approach toward breach of contract claims seen in the *Brandeis*, *George Washington*, *Yale*, *Notre Dame*, and *Boston College* cases. It is true, the *George Washington* opinion noted, that private universities "owe[ ] no strict constitutional due process to [their] students."[413] Most schools, however, reference—even if only through boilerplate language—the importance of fair, impartial, or thorough adjudications.[414] In the context of sexual misconduct adjudications, many institutions have fallen well short of promises such as these.

Meanwhile, district courts will continue to grapple with the issue—and their opinions will help inform the broader national debate. In his *Brandeis* ruling, Judge Saylor identified the principal problem exposed by the surge of lawsuits. It seemed that too many universities had:

> substantially impaired, if not eliminated, an accused student's right to a fair and impartial process. And it is not enough simply to say that such changes are appropriate because victims of sexual assault have not always achieved justice in the past. Whether someone is a 'victim' is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning. Each case must be decided on its own merits, according to its own facts.[415]

Saylor's conclusion was blunt: "Put simply, a fair determination of the facts requires a fair process, not tilted to favor a particular outcome, and a fair and neutral fact-finder, not predisposed to reach a particular conclusion."[416]

As long as campus Title IX adjudication systems are designed mainly to protect institutions and campus bureaucrats from criticism, rather than to seek truth, the flood of litigation from accused students likely will continue.

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413. Doe v. George Washington Univ., 2018 U.S. Dist. LEXIS 136882, at *23 (D.D.C. August 14, 2018).

414. *See, e.g.*, *Sexual Misconduct and Title IX*, BRANDEIS UNIV., https://www.brandeis.edu/sexual-misconduct-title-ix (last visited June 12, 2019) ("We promise to provide a neutral, unbiased, impartial and objective decision on whether behavior(s) violates university policy.").

415. Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 573 (D. Mass. 2016).

416. *Id.* at 573.

## Case Appendix

### Table 1. Unfavorable Rulings for Colleges and Universities in Federal Lawsuits

| | |
|---|---|
| ***A. College or University Settled After Its Motion to Dismiss Was Denied*** | |
| 1 | Doe v. Columbia Univ., 831 F.3d 46 (2d Cir. 2016) |
| 2 | Doe v. Miami Univ., 882 F.3d 579 (6th Cir. 2018) |
| 3 | Doe v. N. Mich. Univ., No. 2:18-cv-196, 2019 U.S. Dist. LEXIS 88717 (W.D. Mich. May 28, 2019) |
| 4 | Doe v. Cal. Inst. of Tech., No. 2:18-cv-09178, slip op. at 7 (C.D. Cal., Apr. 30, 2019), ECF No. 35 |
| 5 | Jia v. Univ. of Miami, No. 17-cv-20018, 2019 U.S. Dist. LEXIS 23587 (S.D. Fla. Feb. 12, 2019) |
| 6 | Doe v. Marymount Univ., 297 F. Supp. 3d 573 (E.D. Va. 2018) |
| 7 | Doe v. Pa. State Univ., 336 F. Supp. 3d 441 (M.D. Pa. 2018) |
| 8 | Werner v. Albright Coll., No. 5:17-cv-05402 (E.D. Pa. May 2, 2018), ECF No. 25 |
| 9 | Schaumleffel v. Muskingum Univ., No. 2:17-cv-463, 2018 U.S. Dist. LEXIS 36350 (S.D. Ohio Mar. 6, 2018) |
| 10 | Powell v. St. Joseph's Univ., No. 17-4438, 2018 U.S. Dist. LEXIS 27145 (E.D. Pa. Feb. 16, 2018) |
| 11 | Doe v. Rider Univ., No. 3:16-cv-4882, 2018 U.S. Dist. LEXIS 7592 (D.N.J. Jan. 17, 2018) |
| 12 | Saravanan v. Drexel Univ., No. 17-3409, 2017 U.S. Dist. LEXIS 193925 (E.D. Pa. Nov. 24, 2017) |
| 13 | Carrington v. Liberty Univ., No. 6:17-cv-00068 (W.D. Va. Nov. 14, 2017), ECF No. 18 |
| 14 | Doe v. Univ. of Chi., No. 16 C 08298, 2017 U.S. Dist. LEXIS 153355 (N.D. Ill. Sept. 20, 2017) |
| 15 | Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d 799 (E.D. Pa. 2017) |
| 16 | Gulyas v. Appalachian State Univ., No. 5:16-cv-00225, 2017 U.S. Dist. LEXIS 137868 (W.D.N.C. Aug. 28, 2017) |
| 17 | Jackson v. Liberty Univ., No. 6:17-cv-00041, 2017 U.S. Dist. LEXIS 122104 (W.D. Va. Aug. 3, 2017) |
| 18 | Mancini v. Rollins Coll., No. 6:16-cv-22322, 2017 U.S. Dist. LEXIS 113160 (M.D. Fla. July 20, 2017) |
| 19 | Tsuruta v. Augustana Univ., No. 4:15-cv-04150 (D.S.D. Oct. 26, 2015), ECF No. 25 |
| 20 | Doe v. Amherst Coll., 238 F. Supp. 3d 195 (D. Mass. 2017) |
| 21 | Rolph v. Hobart & William Smith Colls., 271 F. Supp. 3d 386 (W.D.N.Y. 2017) |

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| 22 | Neal v. Colo. State Univ.-Pueblo, No. 16-cv-873, 2017 U.S. Dist. LEXIS 22196 (D. Colo. Feb. 16, 2017) |
| 23 | Doe v. Lynn Univ., Inc., 235 F. Supp. 3d 1336 (S.D. Fla. 2017) |
| 24 | Doe v. W. New England Univ., 228 F. Supp. 3d 154 (D. Mass. 2017) |
| 25 | Collick v. William Paterson Univ., No. 16-471, 2016 WL 6824374 (D.N.J. Nov. 17, 2016) |
| 26 | Doe v. Bd. of Regents of the Univ. Sys. of Ga., No. 15-cv-04079 (N.D. Ga. Apr. 19, 2016), ECF No. 40 |
| 27 | Marshall v. Ind. Univ., 170 F. Supp. 3d 1201 (S.D. Ind. 2016) |
| 28 | Doe v. Brandeis Univ., 177 F. Supp. 3d 561 (D. Mass. 2016) |
| 29 | Doe v. Brown Univ., 166 F. Supp. 3d 177 (D.R.I. 2016) |
| 30 | Prasad v. Cornell Univ., No. 5:15-cv-322, 2016 U.S. Dist. LEXIS 161297 (N.D.N.Y. Feb. 24, 2016) |
| 31 | Sterrett v. Cowan, No. 2:14-cv-11619, 2015 U.S. Dist. LEXIS 181951 (E.D. Mich. Sept. 30, 2015), *vacating* 85 F. Supp. 3d 916 (E.D. Mich. Feb. 4, 2015) |
| 32 | Doe v. Salisbury Univ., 123 F. Supp. 3d 748 (D. Md. 2015) |
| 33 | Doe v. Washington & Lee Univ., No. 6:14-cv-00052, 2015 U.S. Dist. LEXIS 102426 (W.D. Va. Aug. 5, 2015) |
| 34 | Tanyi v. Appalachian State Univ., No. 5:14-cv-170, 2015 U.S. Dist. LEXIS 95577 (W.D.N.C. July 22, 2015) |
| 35 | Doe v. Salisbury Univ., 107 F. Supp. 3d 481 (D. Md. 2015) |
| 36 | Levine v. Temple Univ., No. 2:14-cv-04729 (E.D. Pa. May 21, 2015), ECF No. 31 |
| 37 | Faiaz v. Colgate Univ., 64 F. Supp. 3d 336 (N.D.N.Y. 2014) |
| 38 | Villar v. Phila. Univ., No. 2:14-cv-02558 (E.D. Pa. Oct. 29, 2014), ECF No. 29 |
| 39 | Johnson v. W. State Colo. Univ., 71 F. Supp. 3d 1217 (D. Colo. 2014) |
| 40 | Doe v. Temple Univ., No. 2:13-cv-05156-MSG (E.D. Pa. Aug. 7, 2014), ECF No. 15 |
| 41 | Benning v. Corp. of Marlboro Coll., No. 2:14-cv-71, 2014 U.S. Dist. LEXIS 107013 (D. Vt. Aug. 5, 2014) |
| 42 | Harris v. St. Joseph's Univ., No. 13-3937, 2014 U.S. Dist. LEXIS 65452 (E.D. Pa. May 13, 2014) |
| 43 | Wells v. Xavier Univ., 7 F. Supp. 3d 746 (S.D. Ohio 2014) |
| ***B. College or University's Motion to Dismiss Denied and Matter Still Pending*** | |
| 1 | Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019) |
| 2 | Doe v. Baum, 903 F.3d 575 (6th Cir. 2018) |
| 3 | Doe v. Loyola Univ. of Chi., No. 18 C 7335, 2019 U.S. Dist. LEXIS 135925 (N.D. Ill. Aug. 13, 2019) (motion to dismiss granted in part, denied in part) |

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| 4 | Doe v. Syracuse Univ., No. 5:18-cv-377, 2019 U.S. Dist. LEXIS 77580 (N.D.N.Y. May 8, 2019) |
| 5 | Noakes v. Syracuse Univ., 369 F. Supp. 3d 397 (N.D.N.Y. 2019) |
| 6 | Norris v. Univ. of Colo., Boulder, 362 F. Supp. 3d 1001 (D. Colo. 2019) |
| 7 | Oliver v. Univ. of Tex. Sw. Med. Sch., No. 3:18-cv-1549, 2019 U.S. Dist. LEXIS 21289 (N.D. Tex. Feb. 11, 2019) |
| 8 | Doe v. Univ. of Miss., 361 F. Supp. 3d 597 (S.D. Miss. 2019) |
| 9 | Doe v. Rollins Coll., 352 F. Supp. 3d 1205 (M.D. Fla. 2019) |
| 10 | Doe v. Coastal Carolina Univ., 359 F. Supp. 3d 367 (D.S.C. 2019) |
| 11 | Lee v. Univ. of N.M., No. 1:17-cv-01230 (D.N.M. Sept. 20, 2018), ECF No. 36 |
| 12 | Doe v. Syracuse Univ., 341 F. Supp. 3d 125 (N.D.N.Y. 2018) |
| 13 | Doe v. Brown Univ., 327 F. Supp. 3d 397 (D.R.I. 2018) |
| 14 | Doe v. Univ. of Miss., No. 3:18-cv-63, 2018 U.S. Dist. LEXIS 123181 (S.D. Miss. July 24, 2018) |
| 15 | Transcript of Motion to Dismiss Hearing at 40, Doe v. Johnson & Wales Univ., No. 1:18-cv-00106 (D.R.I. May 14, 2018) |
| 16 | Doe v. Univ. of Or., No. 6:17-cv-01103, 2018 WL 1474531 (D. Or. Mar. 26, 2018) |
| 17 | Gischel v. Univ. of Cincinnati, 302 F. Supp. 3d 961 (S.D. Ohio 2018) |
| 18 | Doe v. Pa. State Univ., No. 4:17-cv-01315, 2018 WL 317934 (M.D. Pa. Jan. 8, 2018) |
| 19 | Doe v. Williams Coll., No. 3:16-cv-30184-MAP (D. Mass. Apr. 28, 2017), ECF No. 71 |
| 20 | Doe v. Ohio State Univ., 239 F. Supp. 3d 1048 (S.D. Ohio 2017) |
| ***C. Accused Student Granted Preliminary Injunction or Temporary Restraining Order*** | |
| 1 | Doe v. Univ. of Cincinnati, 872 F.3d 393 (6th Cir. 2017) |
| 2 | Doe v. Rector & Visitors of the Univ. of Va., No. 3:19-cv-00038, 2019 U.S. Dist. LEXIS 108990 (W.D. Va. June 28, 2019) |
| 3 | Doe v. Rhodes Coll., No. 2:19-cv-02336 (W.D. Tenn. June 14, 2019) (order granting in part and denying in part temporary restraining order) |
| 4 | Doe v. Univ. of S. Miss., No. 2:18-cv-00153 (S.D. Miss. Sept. 26, 2018) (order granting in part and denying in part temporary restraining order), ECF No. 35 |
| 5 | Doe v. Univ. of Mich., 325 F. Supp. 3d 821 (E.D. Mich. 2018), *vacated sub nom.* Doe v. Bd. of Regents of Univ. of Mich., No. 18-1870, 2019 WL 3501814 (6th Cir. Apr. 10, 2019) |
| 6 | Roe v. Adams-Gaston, No. 2:17-cv-00945 (S.D. Ohio Apr. 17, 2018) (order granting preliminary injunction), ECF No. 46 |
| 7 | Elmore v. Bellarmine Univ., No. 3:18-cv-00053, 2018 WL 1542140 (W.D. Ky. Mar. 29, 2018) |

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| 8 | Richmond v. Youngstown State Univ., No. 4:17-CV-1927, 2017 WL 6502833 (N.D. Ohio Sept. 14, 2017) |
| 9 | Nokes v. Miami Univ., No. 1:17-cv-482, 2017 U.S. Dist. LEXIS 136880 (S.D. Ohio Aug. 25, 2017) |
| 10 | Culiver v. United States, No. 2:17-cv-03514 (S.D.N.Y. June 15, 2017) (order), ECF No. 14 |
| 11 | Doe v. Univ. of Notre Dame, No. 3:17CV298-PPS/MGG, 2017 WL 1836939 (N.D. Ind. May 8, 2017), *vacated*, 2017 WL 7661416 (N.D. Ind. Dec. 27, 2017) |
| 12 | Doe v. Weill Cornell Med. Coll. of Cornell Univ., No. 16-cv-3531 (WHP), 2016 WL 5369613 (S.D.N.Y June 8, 2016) |
| 13 | Ritter v. Okla., No. CIV-16-043 8-HE, 2016 U.S. Dist. LEXIS 60193 (W.D. Okla. May 6, 2016) |
| 14 | Doe v. Pa. State Univ., No. 4:15-cv-02072 (M.D. Pa. Oct. 28, 2015) (order granting temporary restraining order), ECF No. 12, *vacated as moot*, No. 4:15-cv-02072 (M.D. Pa. Apr. 4, 2016), ECF No. 49 |
| 15 | Doe v. Middlebury Coll., No. 1:15-cv-192-JGM, 2015 WL 5488109 (D. Vt. Sept. 16, 2015) |
| 16 | King v. DePauw Univ., No. 2:14-cv-70-WTL-DKL, 2014 WL 4197507 (S.D. Ind. Aug. 22, 2014) |
| 17 | Doe v. George Washington Univ., No. 1:11-cv-00696-RLW (D.D.C. Apr. 8, 2011) (order granting temporary restraining order), ECF No. 8 |
| ***D. College or University's Motion for Summary Judgment Denied*** | |
| 1 | Doe v. Trs. of Bos. Coll., 892 F.3d 67 (1st Cir. 2018) |
| 2 | Doe v. Quinnipiac Univ., No. 3:17-cv-364, 2019 U.S. Dist. LEXIS 115089 (D. Conn. July 10, 2019) |
| 3 | Doe v. Grinnell College, No. 4:17-cv-00079 (S.D. Iowa July 9, 2019), ECF No. 151 |
| 4 | Montague v. Yale Univ., No. 3:16-cv-00885 (D. Conn. Mar. 29, 2019), ECF No. 177 |
| 5 | Powell v. Mont. State Univ., No. 17-cv-15, 2018 WL 6728061 (D. Mont. Dec. 21, 2018) |
| 6 | Doe v. Ohio State Univ., 311 F. Supp. 3d 881 (S.D. Ohio 2018) |
| 7 | Painter v. Adams, No. 3:15-cv-00369, 2017 WL 4678231 (W.D.N.C. Oct. 17, 2017) |
| ***E. Accused Student Prevailed at Summary Judgment or Bench Trial*** | |
| 1 | Doe v. George Washington Univ., 321 F. Supp. 3d 118 (D.D.C. 2018) |
| 2 | Doe v. Alger, 228 F. Supp. 3d 713 (W.D. Va. 2016) |
| 3 | Doe v. Brown Univ., 210 F. Supp. 3d 310 (D.R.I. 2016) |
| 4 | Doe v. Rector & Visitors of George Mason Univ., 149 F. Supp. 3d 602 (E.D. Va. 2016) |

TABLE 2. FAVORABLE RULINGS FOR ACCUSED STUDENTS BY TYPE OF CLAIM

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| ***A. Favorable Rulings for Accused Students' Federal Due Process Claims*** | |
| | **1. Preliminary Injunction or Temporary Restraining Order Granted** |
| 1 | Doe v. Univ. of Cincinnati, 872 F.3d 393 (6th Cir. 2017) |
| 2 | Doe v. Rector & Visitors of the Univ. of Va., No. 3:19-cv-00038, 2019 U.S. Dist. LEXIS 108990 (W.D. Va. June 28, 2019) |
| 3 | Doe v. Univ. of S. Miss., No. 2:18-cv-00153 (S.D. Miss. Sept. 26, 2018) (order granting in part and denying in part temporary restraining order), ECF No. 35 |
| 4 | Roe v. Adams-Gaston, No. 2:17-cv-00945 (S.D. Ohio Apr. 17, 2018) (order granting preliminary injunction), ECF No. 46 |
| 5 | Nokes v. Miami Univ., No. 1:17-cv-00482, 2017 U.S. Dist. LEXIS 136880 (S.D. Ohio Aug. 25, 2017) |
| 6 | Doe v. Pa. State Univ., No. 4:15-cv-02072 (M.D. Pa. Oct. 28, 2015) (order granting temporary restraining order), ECF No. 12, *vacated as moot*, No. 4:15-cv-02072 (M.D. Pa. Apr. 4, 2016), ECF No. 49 |
| 7 | Doe v. Univ. of Mich., 325 F. Supp. 3d 821 (E.D. Mich. 2018), *vacated sub nom.* Doe v. Bd. of Regents of Univ. of Mich., No. 18-1870, 2019 WL 3501814 (6th Cir. Apr. 10, 2019) |
| 8 | Doe v. Pa. State Univ., No. 4:17-CV-01315, 2018 WL 317934 (M.D. Pa. Jan. 8, 2018) |
| | **2. Claim Survived Motion to Dismiss** |
| 1 | Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019) |
| 2 | Doe v. Baum, 903 F.3d 575 (6th Cir. 2018) |
| 3 | Doe v. N. Mich. Univ., No. 2:18-cv-196, 2019 U.S. Dist. LEXIS 88717 (W.D. Mich. May 28, 2019) |
| 4 | Norris v. Univ. of Colo., Boulder, 362 F. Supp. 3d 1001 (D. Colo. 2019) |
| 5 | Oliver v. Univ. of Tex. Sw. Med. Sch., No. 3:18-cv-1549, 2019 U.S. Dist. LEXIS 21289 (N.D. Tex. Feb. 11, 2019) |
| 6 | Doe v. Univ. of Miss., 361 F. Supp. 3d 597 (S.D. Miss. 2019) |
| 7 | Lee v. Univ. of N.M., No. 1:17-cv-01230 (D.N.M. Sept. 20, 2018), ECF No. 36 |
| 8 | Doe v. Pa. State Univ., 336 F. Supp. 3d 441 (M.D. Pa. 2018) |
| 9 | Gischel v. Univ. of Cincinnati, 302 F. Supp. 3d 961 (S.D. Ohio 2018) |
| 10 | Doe v. Pa. State Univ., No. 4:17-cv-01315, 2018 WL 317934 (M.D. Pa. Jan. 8, 2018) |
| 11 | Gulyas v. Appalachian State Univ., No. 5:16-cv-00225, 2017 U.S. Dist. LEXIS 137868 (W.D.N.C. Aug. 28, 2017) |
| 12 | Neal v. Colo. State Univ.-Pueblo, No. 16-cv-873, 2017 U.S. Dist. LEXIS 22196 (D. Colo. Feb. 16, 2017) |

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| 13 | Collick v. William Paterson Univ., No. 16-471, 2016 WL 6824374 (D.N.J. Nov. 17, 2016) |
| 14 | Doe v. Bd. of Regents of the Univ. Sys. of Ga., No. 15-cv-04079 (N.D. Ga. Apr. 19, 2016), ECF No. 40 |
| 15 | Sterrett v. Cowan, No. 2:14-cv-1161, 2015 U.S. Dist. LEXIS 181951 (E.D. Mich. Sept. 30, 2015), *vacating* 85 F. Supp. 3d 916 (E.D. Mich. Feb. 4, 2015) |
| 16 | Tanyi v. Appalachian State Univ., No. 5:14-cv-170, 2015 U.S. Dist. LEXIS 95577 (W.D.N.C. July 22, 2015) |
| 17 | Doe v. Univ. of Miss., No. 3:18-cv-63, 2018 U.S. Dist. LEXIS 123181 (S.D. Miss. July 24, 2018) |
| | **3. Accused Student Prevailed at Summary Judgment** |
| 1 | Powell v. Mont. State Univ., No. CV 17-15, 2018 WL 6728061 (D. Mont. Dec. 21, 2018) |
| 2 | Doe v. Ohio State Univ., 311 F. Supp. 3d 881 (S.D. Ohio 2018) |
| 3 | Painter v. Adams, No. 3:15-cv-00369, 2017 WL 4678231 (W.D.N.C. Oct. 17, 2017) |
| 4 | Doe v. Alger, 228 F. Supp. 3d 713 (W.D. Va. 2016) |
| 5 | Doe v. Rector of George Mason Univ., 149 F. Supp. 3d 602 (E.D. Va. 2016) |
| ***B. Favorable Rulings for Accused Students' Breach of Contract Claims*** | |
| | **1. Temporary Restraining Order or Preliminary Injunction Granted** |
| 1 | Doe v. Weill Cornell Med. Coll. of Cornell Univ., No. 1:16-cv-03531, (S.D.N.Y. May 20, 2016) (order granting preliminary injunction), ECF No. 19 |
| 2 | Doe v. Middlebury Coll., No. 1:15-cv-192, 2015 WL 5488109 (D. Vt. Sept. 16, 2015) |
| 3 | King v. DePauw Univ., No. 2:14-cv-70, 2014 WL 4197507 (S.D. Ind. Aug. 22, 2014) |
| 4 | Doe v. George Washington Univ., No. 1:11-cv-00696-RLW (D.D.C. Apr. 8, 2011) (order granting temporary restraining order), ECF No. 8 |
| | **2. Claim Survived Motion to Dismiss** |
| 1 | Doe v. N. Mich. Univ., No. 2:18-cv-196, 2019 U.S. Dist. LEXIS 88717 (W.D. Mich. May 28, 2019) |
| 2 | Doe v. Rollins Coll., 352 F. Supp. 3d 1205 (M.D. Fla. 2019) |
| 3 | Doe v. Brown Univ., 327 F. Supp. 3d 397 (D.R.I. 2018) |
| 4 | Werner v. Albright Coll., No. 5:17-cv-05402 (E.D. Pa. May 2, 2018), ECF No. 25 |
| 5 | Schaumleffel v. Muskingum Univ., No. 2:17-cv-463, 2018 U.S. Dist. LEXIS 36350 (S.D. Ohio Mar. 6, 2018) |
| 6 | Powell v. St. Joseph's Univ., No. 17-4438, 2018 U.S. Dist. LEXIS 27145 (E.D. Pa. Feb. 16, 2018) |

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| 7 | Doe v. Rider Univ., No. 3:16-cv-4882, 2018 U.S. Dist. LEXIS 7592 (D.N.J. Jan. 17, 2018) |
| 8 | Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d 799 (E.D. Pa. 2017) |
| 9 | Mancini v. Rollins Coll., No. 6:16-cv-22322, 2017 U.S. Dist. LEXIS 113160 (M.D. Fla. July 20, 2017) |
| 10 | Tsuruta v. Augustana Univ., No. 4:15-cv-04150 (D.S.D. Oct. 26, 2015), ECF No. 25 |
| 11 | Doe v. Univ. of Notre Dame, No. 3:17-cv-298, 2017 WL 1836939 (N.D. Ind. May 8, 2017), *vacated*, 2017 WL 7661416 (N.D. Ind. Dec. 27, 2017) |
| 12 | Neal v. Colo. State Univ.-Pueblo, No. 16-cv-873, 2017 U.S. Dist. LEXIS 22196 (D. Colo. Feb. 16, 2017) |
| 13 | Doe v. Lynn Univ., Inc., 235 F. Supp. 3d 1336 (S.D. Fla. 2017) |
| 14 | Doe v. W. New England Univ., 228 F. Supp. 3d 154 (D. Mass. 2017) |
| 15 | Collick v. William Paterson Univ., No. 16-471, 2016 WL 6824374 (D.N.J. Nov. 17, 2016) |
| 16 | Doe v. Brown Univ., 210 F. Supp. 3d 310 (D.R.I. 2016) |
| 17 | Ritter v. Okla. City Univ., No. CIV-16-0438, 2016 U.S. Dist. LEXIS 95813 (W.D. Okla. July 22, 2016) |
| 18 | Doe v. Brandeis Univ., 177 F. Supp. 3d 561 (D. Mass. 2016) |
| 19 | Benning v. Corp. of Marlboro Coll., No. 2:14-cv-71, 2014 U.S. Dist. LEXIS 107013 (D. Vt. Aug. 5, 2014) |
| 20 | Doe v. Syracuse Univ., No. 5:18-CV-377, 2019 U.S. Dist. LEXIS 77580 (N.D.N.Y. May 8, 2019) |
| | **3. Accused Student Prevailed at Summary Judgment, Judgment on the Pleadings, or Bench Trial** |
| 1 | Doe v. Trs. of Bos. Coll., 892 F.3d 67 (1st Cir. 2018) |
| 2 | Doe v. Quinnipiac Univ., No. 3:17-cv-364, 2019 U.S. Dist. LEXIS 115089 (D. Conn. July 10, 2019) |
| 3 | Doe v. Grinnell Coll., No. 4:17-cv-00079 (S.D. Iowa July 9, 2019), ECF No. 151 |
| 4 | Montague v. Yale Univ., No. 3:16-cv-00885 (D. Conn. Mar. 29, 2019), ECF No. 177 |
| 5 | Doe v. George Washington Univ., 321 F. Supp. 3d 118 (D.D.C. 2018) |
| 6 | Doe v. Amherst Coll., 238 F. Supp. 3d 195 (D. Mass. 2017) |
| 7 | Doe v. Brown Univ., 166 F. Supp. 3d 177 (D.R.I. 2016) |
| ***C. Favorable Rulings for Accused Students' Title IX Claims*** | |
| | **1. Temporary Restraining Order Granted** |
| 1 | Doe v. Rhodes Coll. No. 2:19-cv-02336 (W.D. Tenn. June 14, 2019) |
| | **2. Claim Survived Motion to Dismiss** |
| 1 | Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019) |
| 2 | Doe v. Baum, 903 F.3d 575 (6th Cir. 2018) |

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| 3 | Doe v. Miami Univ., 882 F.3d 579 (6th Cir. 2018) |
| 4 | Doe v. Columbia Univ., 831 F.3d 46 (2d Cir. 2016) |
| 5 | Doe v. Syracuse Univ., No. 5:18-CV-377, 2019 U.S. Dist. LEXIS 77580 (N.D.N.Y. May 8, 2019) |
| 6 | Noakes v. Syracuse Univ., 369 F. Supp. 3d 397 (N.D.N.Y. 2019) |
| 7 | Norris v. Univ. of Colo., Boulder, 362 F. Supp. 3d 1001 (D. Colo. 2019) |
| 8 | Jia v. Univ. of Miami, No. 17-cv-20018, 2019 U.S. Dist. LEXIS 23587 (S.D. Fla. Feb. 12, 2019) |
| 9 | Oliver v. Univ. of Tex. Sw. Med. Sch., No. 3:18-CV-1549, 2019 U.S. Dist. LEXIS 21289 (N.D. Tex. Feb. 11, 2019) |
| 10 | Doe v. Rollins Coll., 352 F. Supp. 3d 1205 (M.D. Fla. 2019) |
| 11 | Doe v. Univ. of Miss., 361 F. Supp. 3d 597 (S.D. Miss. 2019) |
| 12 | Doe v. Coastal Carolina Univ., 359 F. Supp. 3d 367 (D.S.C. 2019) |
| 13 | Powell v. Mont. State Univ., No. CV 17-15, 2018 WL 6728061 (D. Mont. Dec. 21, 2018) |
| 14 | Doe v. Rider Univ., No. 3:16-cv-4882, 2018 U.S. Dist. LEXIS 7592 (D.N.J. Jan. 17, 2018) |
| 15 | Doe v. Syracuse Univ., 341 F. Supp. 3d 125 (N.D.N.Y. 2018) |
| 16 | Doe v. Brown Univ., 327 F. Supp. 3d 397 (D.R.I. 2018) |
| 17 | Doe v. Univ. of Miss., No. 3:18-CV-63, 2018 U.S. Dist. LEXIS 123181 (S.D. Miss. July 24, 2018) |
| 18 | Transcript of Motion to Dismiss Hearing at 40, Doe v. Johnson & Wales Univ., No. 1:18-cv-00106 (D.R.I. June 25, 2018), ECF No. 36 |
| 19 | Werner v. Albright Coll., No. 5:17-cv-05402 (E.D. Pa. May 2, 2018), ECF No. 25 |
| 20 | Elmore v. Bellarmine Univ., No. 3:18CV-00053, 2018 WL 1542140 (W.D. Ky. Mar. 29, 2018) |
| 21 | Doe v. Univ. of Or., No. 6:17-CV-01103, 2018 WL 1474531 (D. Or. Mar. 26, 2018) |
| 22 | Doe v. Marymount Univ., 297 F. Supp. 3d 573 (E.D. Va. 2018) |
| 23 | Schaumleffel v. Muskingum Univ., No. 2:17-cv-463, 2018 U.S. Dist. LEXIS 36350 (S.D. Ohio Mar. 6, 2018) |
| 24 | Gischel v. Univ. of Cincinnati, 302 F. Supp. 3d 961 (S.D. Ohio 2018) |
| 25 | Doe v. Pa. State Univ., No. 4:17-cv-01315, 2018 WL 317934 (M.D. Pa. Jan. 8, 2018) |
| 26 | Saravanan v. Drexel Univ., No. 17-3409, 2017 U.S. Dist. LEXIS 193925 (E.D. Pa. Nov. 24, 2017) |
| 27 | Doe v. Univ. of Chi., No. 16-cv-08298, 2017 U.S. Dist. LEXIS 153355 (N.D. Ill. Sept. 20, 2017) |
| 28 | Rolph v. Hobart & William Smith Colls., 271 F. Supp. 3d 386 (W.D.N.Y. 2017) |
| 29 | Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d 799 (E.D. Pa. 2017) |

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| 30 | Mancini v. Rollins Coll., No. 6:16-cv-22322, 2017 U.S. Dist. LEXIS 113160 (M.D. Fla. July 20, 2017) |
| 31 | Doe v. Williams Coll., No. 3:16-cv-30184 (D. Mass. Apr. 28, 2017), ECF No. 71 |
| 32 | Doe v. Ohio State Univ., 239 F. Supp. 3d 1048 (S.D. Ohio 2017) |
| 33 | Neal v. Colo. State Univ.-Pueblo, No. 16-cv-873, 2017 U.S. Dist. LEXIS 22196 (D. Colo. Feb. 16, 2017) |
| 34 | Doe v. Lynn Univ., Inc., 235 F. Supp. 3d 1336 (S.D. Fla. 2017) |
| 35 | Collick v. William Paterson Univ., No. 16-47, 2016 WL 6824374 (D.N.J. Nov. 17, 2016) |
| 36 | Doe v. Bd. of Regents of the Univ. Sys. of Ga., No. 15-cv-04079-SCJ (N.D. Ga. Apr. 19, 2016), ECF No. 40 |
| 37 | Prasad v. Cornell Univ., No. 5:15-cv-322, 2016 U.S. Dist. LEXIS 161297 (N.D.N.Y. Feb. 24, 2016) |
| 38 | Doe v. Brown Univ., 166 F. Supp. 3d 177 (D.R.I. 2016) |
| 39 | Marshall v. Ind. Univ., 170 F. Supp. 3d 1201 (S.D. Ind. 2016) |
| 40 | Doe v. Washington & Lee Univ., No. 6:14-cv-00052, 2015 U.S. Dist. LEXIS 102426 (W. Va. Aug. 5, 2015) |
| 41 | Doe v. Salisbury Univ., 123 F. Supp. 3d 748 (D. Md. 2015) |
| 42 | Doe v. Salisbury Univ., 107 F. Supp. 3d 481 (D. Md. 2015) |
| 43 | Harris v. St. Joseph's Univ., No. 13-3937, 2014 U.S. Dist. LEXIS 65452 (E.D. Pa. May 13, 2014) |
| 44 | Wells v. Xavier Univ., 7 F. Supp. 3d 746 (S.D. Ohio 2014) |
| | **3. Accused Student Prevailed at Summary Judgment or Judgment on the Pleadings** |
| 1 | Doe v. Quinnipiac Univ., No. 3:17-cv-364, 2019 U.S. Dist. LEXIS 115089 (D. Conn. July 10, 2019) |
| 2 | Doe v. Grinnell Coll., No. 4:17-cv-00079 (S.D. Iowa July 9, 2019), ECF No. 151 |
| 3 | Doe v. Amherst Coll., 238 F. Supp. 3d 195 (D. Mass. 2017) |

TABLE 3. FAVORABLE RULINGS FOR COLLEGES AND UNIVERSITIES

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| ***A. Procedural Decisions and Decisions in which the Court Produced No Written Opinion*** | |
| 1 | Coombs v. Morehead, No. 3:19-cv-00054 (M.D. Ga. Aug. 16, 2019), ECF No. 14 |
| 2 | Doe v. Salve Regina Univ., No. 1:19-cv-00232 (D.R.I. May 22, 2019) (dismissal stipulation), ECF No. 11 |
| 3 | Doe v. Yale Univ., No. 3:19-cv-00620 (D. Conn. May 3, 2019) (minute order denying temporary restraining order), ECF No. 30 |
| 4 | Roe v. Dir., Miami Univ., No. 1:19-cv-136, 2019 U.S. Dist. LEXIS 55246 (S.D. Ohio Apr. 1, 2019) |
| 5 | Doe v. Ohio State Univ., No. 2:19-cv-01054 (S.D. Ohio Mar. 26, 2019) (order denying temporary restraining order), ECF No. 17 |
| 6 | Minutes of Evidentiary Hearing, Doe v. Reed Coll., No. 3:19-cv-00130 (D. Or. Jan. 30, 2019) |
| 7 | Doe v. N.Y. Univ., No. 1:19-cv-00744 (S.D.N.Y. Jan. 28, 2019), ECF No. 10 |
| 8 | Davis v. La. State Univ., 18-614, 2019 U.S. Dist. LEXIS 5226 (M.D. La. Jan. 11, 2019) |
| 9 | Doe v. Rensselaer Polytechnic Inst., No. 1:18-CV-1374, 2019 U.S. Dist. LEXIS 5396 (N.D.N.Y. 2019) |
| 10 | Doe v. Harvard Coll., No. 1:18-cv-12462 (D. Mass. Jan. 4, 2019) (notice of voluntary dismissal), ECF No. 30 |
| 11 | Tolliver v. Prairie View A&M Univ., No. 4:18-cv-1192, 2018 U.S. Dist. LEXIS 169031 (S.D. Tex. Oct. 1, 2018) |
| 12 | Doe v. Bd. of Trs. of the Univ. of Ill., No. 2:17-cv-02180 (N.D. Ill. July 24, 2018), ECF No. 54 |
| 13 | Doe v. Univ. of Tex. at Austin, No. 1:18-cv-00085 (W.D. Tex. May 15, 2018) (order denying preliminary injunction), ECF No. 30 |
| 14 | North v. Catholic Univ. of Am., No. 1:17-cv-01373 (D.D.C. Apr. 30, 2018), ECF No. 29 |
| 15 | Doe v. Carnegie Mellon Univ., No. 2:17-cv-01574 (W.D. Pa. Dec. 6, 2017) (order denying preliminary injunction), ECF No. 13 |
| 16 | Stenzel v. Peterson, No. 17-580, 2017 U.S. Dist. LEXIS 148467 (D. Minn. Sept. 13, 2017) |
| 17 | Doe v. Univ. of Tex. at Austin, No. 1:17-cv-00732-SS (W.D. Tex. Aug. 11, 2017) (order denying preliminary injunction), ECF No. 20 |
| 18 | Doe v. Cal. State Univ. San Marcos, No. 3:17-cv-01365-WQH-JMA (S.D. Cal. July 7, 2017), ECF No. 5 |
| 19 | Jackson v. Macalester Coll., 169 F. Supp. 3d 918 (D. Minn. 2016) |
| 20 | Doe v. Ohio State Univ., 136 F. Supp. 3d 854 (S.D. Ohio 2016) |

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| 21 | Turner v. Tex. A&M Univ., No. 4:15-cv-01413 (S.D. Tex. Feb. 4, 2016) (order denying preliminary injunction), ECF No. 37 |
| 22 | Peloe v. Univ. of Cincinnati, No. 1:14-cv-404, 2015 U.S. Dist. LEXIS 19776 (S.D. Ohio Feb. 19, 2015) |
| 23 | Dempsey v. Bucknell Univ., 76 F. Supp. 3d 565 (M.D. Pa. 2015) |
| 24 | Doe v. Amherst Coll., No. 14-cv-30114, 2014 U.S. Dist. LEXIS 194577 (D. Mass. July 28, 2014) |
| 25 | Doe v. Univ. of Mont., No. 9:12-cv-00077 (D. Mont. May 10, 2012) (order denying temporary restraining order), ECF No. 11 |
| ***B. Accused Student Did Not Meaningfully Challenge College or University's Guilty Finding*** | |
| 1 | Doe v. Colgate Univ., 760 F. App'x 22 (2d Cir. 2019) |
| 2 | Doe v. Valencia Coll., 903 F.3d 1220 (11th Cir. 2018) |
| 3 | Faparusi v. Case W. Reserve Univ., 711 F. App'x 269 (6th Cir. 2017) |
| 4 | Plummer v. Univ. of Hous., 860 F.3d 767 (5th Cir. 2017) |
| 5 | Doe v. Pa. State Univ., No. 4:18-cv-02350, 2019 WL 2324506 (M.D. Pa. May 31, 2019) |
| 6 | Doe v. Case W. Reserve Univ., No. 1:17-CV-414, 2019 U.S. Dist. LEXIS 74520 (N.D. Ohio May 2, 2019) |
| 7 | Rowles v. Curators of the Univ. of Mo., No. 2:17-cv-04250 (W.D. Mo. July 16, 2018) (order), ECF No. 28 |
| 8 | Doe v. Bd. of Trs. of the Univ. of Ill., No. 2:19-cv-02054 (C.D. Ill. Apr. 1, 2019) (order denying preliminary injunction), ECF No. 12 |
| 9 | Doe v. Univ. of the Scis., No. 19-358, 2019 U.S. Dist. LEXIS 24073 (E.D. Pa. Feb. 14, 2019) |
| 10 | Ali v. Univ. of Louisville, No. 3:17-cv-00638, 2019 U.S. Dist. LEXIS 21734 (W.D. Ky. Feb. 11, 2019) |
| 11 | Doe v. E. Carolina Univ., No. 4:18-CV-137 (E.D.N.C. Feb. 5, 2019), ECF No. 58 |
| 12 | Z.J. v. Vanderbilt Univ., 355 F. Supp. 3d 646 (M.D. Tenn. 2018) |
| 13 | Caldwell v. Parker Univ., No. 3:18-cv-1617, 2018 U.S. Dist. LEXIS 200856 (N.D. Tex. Nov. 27, 2018) |
| 14 | Ayala v. Butler Univ., No. 1:16-cv-01266, 2018 U.S. Dist. LEXIS 179806 (S.D. Ind. Oct. 19, 2018) |
| 15 | Klocke v. Univ. of Tex. at Arlington, No. 4:17-cv-00285, 2018 U.S. Dist. LEXIS 96168 (N.D. Tex. June 7, 2018) |
| 16 | B.B. v. New Sch., No. 1:17-cv-08347 (S.D.N.Y. Apr. 30, 2018), ECF No. 28 |
| 17 | Doe v. Univ. of S.C., No. 3:18-161, 2018 U.S. Dist. LEXIS 38108 (D.S.C. Feb. 12, 2018) |
| 18 | Ruff v. Bd. of Regents of the Univ. of N.M., 272 F. Supp. 3d 1289 (D.N.M. 2017) |

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| 19 | Doe v. St. John's Univ., No. 17-2413, 2017 U.S. Dist. LEXIS 177373 (D. Minn. Oct. 26, 2017) |
| 20 | Streno v. Shenandoah Univ., 278 F. Supp. 3d 925 (W.D. Va. 2017) |
| 21 | Doe v. Univ. of S. Ala., No. 17-0394, 2017 U.S. Dist. LEXIS 145587 (S.D. Ala. Sept. 8, 2017) |
| 22 | Uzoechi v. Wilson, No. 16-cv-3975, 2017 U.S. Dist. LEXIS 145644 (D. Md. Sept. 8, 2017) |
| 23 | Doe v. DePauw Univ., No. 1:17-cv-02790 (S.D. Ind. Aug. 25, 2017), ECF No. 35 |
| 24 | Doe v. Wright State Univ., No. 3:16-cv-469, 2017 U.S. Dist. LEXIS 136225 (S.D. Ohio Aug. 24, 2017) |
| 25 | Venegas v. Wright State Univ., No. 3:16-cv-377, 2017 U.S. Dist. LEXIS 133378 (S.D. Ohio Aug. 21, 2017) |
| 26 | Pacheco v. St. Mary's Univ., No. 15-cv-1131, 2017 U.S. Dist. LEXIS 94510 (W.D. Tex. June 20, 2017) |
| 27 | Herrell v. Benson, 261 F. Supp. 3d 772 (E.D. Ky. 2017) |
| 28 | Brainard v. W. Or. Univ., No. 3:17-cv-0253, 2017 U.S. Dist. LEXIS 63455 (D. Or. Apr. 26, 2017) |
| 29 | Pierre v. Univ. of Dayton, No. 3:15-cv-362, 2017 U.S. Dist. LEXIS 44442 (S.D. Ohio Mar. 27, 2017) |
| 30 | Howe v. Pa. State Univ.-Harrisburg, No. 1:16-0102, 2016 U.S. Dist. LEXIS 11981 (M.D. Pa. Feb. 2, 2016) |
| 31 | Roberts v. Bd. of Regents of the Univ. Sys. of Ga., No. 1:15-cv-00958 (N.D. Ga. Jan. 27, 2016), ECF No. 23 |
| 32 | Marshall v. Ohio Univ., No. 2:15-cv-775, 2015 WL 7254213 (S.D. Ohio Nov. 17, 2015) |
| 33 | Doe v. Univ. of S. Fla. Bd. of Trs., No. 8:15-cv-682, 2015 U.S. Dist. LEXIS 69804 (M.D. Fla. May 29, 2015) |
| 34 | Johnson v. Temple Univ., No. 12-515, 2013 U.S. Dist. LEXIS 134640 (E.D. Pa. Sept. 19, 2013) |
| ***C. Court Ruled Against Student Despite Student's Plausible Claims*** | |
| 1 | Doe v. Columbia Coll. Chi., 299 F. Supp. 3d 939 (N.D. Ill. 2017), *aff'd*, 933 F.3d 849 (7th Cir. 2019) |
| 2 | Austin v. Univ. of Or., 925 F.3d 1133 (9th Cir. 2019) |
| 3 | Doe v. Univ. of Dayton, 766 F. App'x 275 (6th Cir. 2019) |
| 4 | Doe v. Va. Polytechnic Inst. & State Univ., No. 7:18-cv-170, 2019 U.S. Dist. LEXIS 137871 (W.D. Va. Aug. 15, 2019) |
| 5 | Does v. Regents of the Univ. of Minn., No. 18-1596, 2019 U.S. Dist. LEXIS 105651 (D. Minn. June 25, 2019) |
| 6 | Sheppard v. Visitors of Va. State Univ., No. 3:18-cv-723, 2019 U.S. Dist. LEXIS 70661 (E.D. Va. Apr. 25, 2019) |
| 7 | Doe v. St. Joseph's Univ., No. 2:18-cv-02044 (E.D. Pa. Apr. 23, 2019) (order), ECF No. 89 |

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| 8 | Doe v. Mich. State Univ., No. 1:19-cv-226, slip op. at 12 (W.D. Mich. Apr. 15, 2019), ECF No. 23 |
| 9 | Doe v. Univ. of Ark.-Fayetteville, No. 5:18-cv-05182, 2019 WL 1493701 (W.D. Ark. Apr. 3, 2019) |
| 10 | Doe v. Oberlin Coll., No. 1:17-cv-1335, 2019 U.S. Dist. LEXIS 55703 (N.D. Ohio Mar. 31, 2019) |
| 11 | Doe v. Univ. of St. Thomas, 368 F. Supp. 3d 1309 (D. Minn. 2019) |
| 12 | Doe v. Ind. Univ.-Bloomington, No. 1:18-cv-03713, 2019 U.S. Dist. LEXIS 12966 (S.D. Ind. Jan. 28, 2019) |
| 13 | Roe v. Univ. of Cincinnati, No. 1:18-cv-312 (S.D. Ohio Aug. 21, 2018) |
| 14 | Haynes v. Clarion Univ. of Pa., No. 2:15-cv-01389 (W.D. Pa. June 27, 2018), ECF No. 104 |
| 15 | Doe v. U.S. Merch. Marine Acad., 307 F. Supp. 3d 121 (E.D.N.Y. 2018) |
| 16 | Doe v. Loh, No. 8:16-cv-3314, 2018 U.S. Dist. LEXIS 53619 (D. Md. Mar. 29, 2018), *aff'd*, 767 F. App'x 489 (4th Cir. 2019) |
| 17 | Doe v. Univ. of Denver, No. 16-cv-00152, 2018 WL 1304530 (D. Colo. Mar. 13, 2018) |
| 18 | Doe v. Denison Univ., No. 2:16-cv-143, 2017 U.S. Dist. LEXIS 53168 (S.D. Ohio Mar. 30, 2017) |
| 19 | Knoch v. Univ. of Pittsburgh, No. 2:16-cv-00970, 2016 U.S. Dist. LEXIS 117081 (W.D. Pa. Aug. 31, 2016) |
| 20 | Doe v. Univ. of Mass.-Amherst, No. 14-30143, 2015 U.S. Dist. LEXIS 91995 (D. Mass. July 14, 2015) |
| 21 | Blank v. Knox Coll., No. 14-cv-1386, 2015 U.S. Dist. LEXIS 8205 (C.D. Ill. Jan. 26, 2015) |
| 22 | Bleiler v. Coll. of the Holy Cross, No. 11-11541, 2013 U.S. Dist. LEXIS 127775 (D. Mass. Aug. 26, 2013) |
| 23 | Caiola v. Saddlemire, No. 3:12-cv-00624, 2013 U.S. Dist. LEXIS 43208 (D. Conn. Mar. 27, 2013) |